

**FEDERAL COMMUNICATIONS
COMMISSION**
47 CFR Parts 2 and 90

[PR Docket No. 89-552, GN Docket No. 93-252, PP Docket No. 93-253; FCC 97-57]

Provision for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission adopts a *Third Report and Order and Fifth Notice of Proposed Rulemaking* in this proceeding. The *Fifth Notice of Proposed Rulemaking* portion of this decision is summarized elsewhere in this issue of the **Federal Register**. The *Third Report and Order* adopts rules to govern the future operation and licensing of the 220-222 MHz band. This action is taken as part of the Commission's continuing implementation of the regulatory framework for mobile radio services enacted by Congress in the Omnibus Budget Reconciliation Act of 1993. This *Third Report and Order* also contains proposed and/or modified information collections subject to the Paperwork Reduction Act of 1995 (PRA). These will be submitted to the Office of Management and Budget (OMB) for review under the PRA. The general public and other Federal agencies are invited to comment on the proposed or modified information collections contained in this proceeding.

DATES: Effective: August 21, 1997. Written comments by the public on the proposed and/or modified information collections are due June 2, 1997.

ADDRESSES: A copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, NW., Washington, DC 20554, or via the Internet to dconway@fcc.gov.

FOR FURTHER INFORMATION CONTACT: Marty Liebman or Mary Woytek, 202-418-1310, or Frank Stilwell, 202-418-0660. For additional information concerning the information collections contained in this *Third Report and Order*, contact Dorothy Conway at 202-418-0217, or via the Internet at dconway@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a synopsis of the *Third Report and Order* portion of the *Third Report and Order and Fifth Notice of Proposed Rulemaking* in PR Docket No. 89-552, GN Docket No. 93-252, and PP Docket

No. 93-253, FCC 97-57, adopted February 19, 1997, and released March 12, 1997. The *Fifth Notice of Proposed Rulemaking* is summarized elsewhere in this edition of the **Federal Register**. The complete text of the *Third Report and Order* is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, NW., Washington, DC., and also may be purchased from the Commission's copy contractor, International Transcription Service, at (202) 857-3800, 2100 M Street, NW., Suite 140, Washington, DC. 20037.

Paperwork Reduction Act

1. This *Third Report and Order* contains either a proposed or modified information collection. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public to comment on the information collections contained in this *Third Report and Order*, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. Public and agency comments are due June 2, 1997. Comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

OMB Approval Number: New Collection.

Title: Private Land Mobile Radio Services Part 90.

Form No.: N/A.

Type of Review: New collection.

Respondents: Licensees in the 220-222 MHz band; applicants for licenses in the 220-222 MHz band; and governmental entities.

Number of Respondents: Approximately 34,200.

Estimated Time Per Response: Approximately 5 hours.

Total Annual Burden: Approximately 176,400 hours.

Needs and Uses: The information collected will be used by the Commission to verify licensee compliance with Commission rules and regulations, to ensure the integrity of the 220 MHz service, and to ensure that licensees continue to fulfill their statutory responsibilities in accordance with the Communications Act of 1934.

Synopsis of the Third Report and Order

2. This *Third Report and Order* adopts rules to govern the future operation and licensing of the 220-222 MHz band (220 MHz service). This action is taken as part of the Commission's continuing implementation of the regulatory framework for mobile radio services enacted by Congress in section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, which amended sections 3(n) and 332 of the Communications Act of 1934.¹ As part of the implementation of the Budget Act, the Commission initiated a series of rulemaking proceedings to provide guidelines for the regulation of commercial and private mobile radio services, including the 220 MHz service, consistent with the policy of regulatory symmetry as reflected in the revisions to section 332 of the Act.

3. One of the Commission's actions resulting from these proceedings, the *CMRS Third Report and Order* in GN Docket No. 93-252, 59 FR 59945 (November 21, 1994), addressed a variety of issues relating to the licensing of the 220 MHz service, but deferred a detailed examination of that service to a separate rulemaking proceeding. That proceeding was initiated by the adoption of the *Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking* in PR Docket No. 89-552, 60 FR 46564 (September 7, 1995), where the Commission proposed a new licensing plan for 220 MHz service. The *Third Report and Order* adopted today generally establishes that proposal for the Phase II² licensing of the 220-222 MHz band, with some modifications. The Commission's decisions in the *Third Report and Order* are summarized as follows:

4. The Commission will return the pending, mutually exclusive applications for the four non-commercial, Phase I nationwide licenses and adopt a new licensing procedure for the 30 channels associated with these licenses. The 30 channels will be licensed on a nationwide basis to all applicants—i.e., applicants that intend to use the channels to offer commercial

¹ Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, Title VI, sections 6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392 (1993) (Budget Act). Section 3(n) of the Communications Act has been redesignated as section 3(14). See section 3(c)(4) of the Telecommunications Act of 1996. The reference to former section 3(n) in section 332 has been changed to a reference to section 3. See section 3(d)(2) of the Telecommunications Act of 1996.

² We refer herein to licenses granted pursuant to this new framework as Phase II licenses. Licenses granted under the rules that existed prior to the adoption of this Order are referred to herein as Phase I licenses.

services as well as applicants that intend to use the channels for their private, internal use. The channels will be assigned, in the form of three 10-channel authorizations, through competitive bidding, based upon the Commission's conclusion that the principal use of the spectrum will be for the provision of for-profit, subscriber-based services. The license term will be ten (10) years, and licensees will be required to meet five- and ten-year construction benchmarks.

5. The Commission will assign Phase II, non-nationwide 220 MHz channels as follows: Fifty channels will be assigned in 175 geographic areas defined as Economic Areas by the Bureau of Economic Analysis, Department of Commerce ("EA licenses") and 75 channels in the geographic areas defined by six "Regional Economic Area Groupings" ("Regional licenses"). Codes and names for the Economic Areas are listed in Appendix D of the full text of this decision. The Regional Economic Area Groupings are described in Appendix E of the full text of this decision. The Commission will make these channels available to all eligible applicants, and resolve mutually exclusive applications for these channels through competitive bidding. EA and Regional licensees will be permitted to operate stations anywhere within their geographic borders, provided that their transmissions do not exceed a predicted field strength of 38 dBuV/m at their border, and they protect the base stations of Phase I licensees in accordance with the existing co-channel separation criteria for 220 MHz stations. The Commission adopts a 10-year license term for EA and Regional licensees, and will require EA and Regional licensees to meet five- and ten-year construction benchmarks.

6. The Commission adopts the following Phase II band plan for non-nationwide channels:

NON-NATIONWIDE 220 MHz CHANNEL ALLOCATION PLAN

	Channels
EA Block	
A: Channel Groups ³ 2, 13	10
B: Channel Groups 3, 16	10
C: Channel Groups 5, 18	10
D: Channel Groups 8, 19	10
E: Channels 171-180	10
Total	50
Regional Block	
F: Channel Groups 1, 6, 11	15
G: Channel Groups 4, 9, 14	15
H: Channel Groups 7, 12, 17	15
I: Channel Groups 10, 15, 20	15

NON-NATIONWIDE 220 MHz CHANNEL ALLOCATION PLAN—Continued

	Channels
J: Channels 186-200	15
Total	75

³The Channel Groups indicated in the allocation plan are the 5-channel, non-contiguous assignments identified as "Group Nos. 1, 2, 3," etc., in §90.721 of the Commission's rules, 47 CFR 90.721.

7. The Commission will continue to assign, on a single-station basis, 10 channels to applicants eligible in the Public Safety Radio Service (PSRS) and five channels to applicants eligible in the Emergency Medical Radio Service (EMRS) to meet internal communications needs. The Commission will assign five of the 10 PSRS channel pairs on a shared basis to all public safety eligibles. This will enable public safety licensees within a particular geographic area to share these channels and coordinate the location and operation of base stations on these channels, which will enable them to communicate more effectively with each other during emergencies. The Commission will assign channels in the PSRS and EMRS pools on a first-come, first-served basis and resolve mutually exclusive applications by random selection procedures.

8. The Commission will allow Phase I and Phase II, nationwide and non-nationwide 220 MHz licensees to operate paging systems without the requirement that such use be on an ancillary basis to land mobile operations. Phase I and Phase II, nationwide and non-nationwide 220 MHz licensees, will also be allowed to aggregate any and all of their authorized, contiguous channels to operate on channels wider than 5 kHz, so long as they comply with a prescribed spectrum efficiency standard.

9. The Commission also modifies existing 220 MHz rules with regard to certain technical and operational matters. Specifically, Phase I and Phase II, nationwide and non-nationwide non-CMRS 220 MHz licensees will be permitted to operate fixed stations without the requirement that such use be on an ancillary basis to land mobile operations; and licensees using the 220-222 MHz band for geophysical telemetry operations will be permitted to operate fixed stations on a temporary basis, without the requirement that such use be ancillary to land mobile operations, and on a secondary basis to Phase I and Phase II licensees authorized to operate

on 220 MHz channels on a primary basis.

10. The Commission adopts procedures and definitions for initial applications, amended applications, applications to modify authorizations, and renewal of authorizations. First, the Commission defines initial applications for 220 MHz licenses as applications for the nationwide, EA, and Regional licenses to be assigned in Phase II. Second, the Commission adopts the same procedures for amending applications and modifying authorizations for Phase II 220 MHz licenses that are established for other Part 90 Commercial Mobile Radio Services (CMRS). Third, the Commission adopts the same procedures for obtaining grants of Special Temporary Authority for Phase II 220 MHz licenses that are established for other Part 90 CMRS services. Fourth, the Commission adopts for all 220 MHz licensees the renewal standards adopted in the *CMRS Third Report and Order* for Part 90 CMRS services.

Auction Rules

Competitive Bidding Design

11. A total of 908 licenses (3 nationwide, 30 Regional, and 875 Economic Area ("EA") licenses) will be awarded in the Phase II 220 MHz service. The Commission will use a simultaneous multiple round auction to award these licenses. These licenses will be significantly interdependent, because of the desirability of aggregation across spectrum blocks and geographic areas. Simultaneous multiple round bidding will generate more information about license values during the course of the auction and provide bidders with more flexibility to pursue back-up strategies than if the licenses were auctioned separately or through sealed bidding.

License Grouping

12. Grouping interdependent licenses and putting them up for bid at the same time facilitates awarding licenses to bidders who value them most highly by providing bidders with information about the prices of complementary and substitutable licenses during the course of an auction. As a result, the Commission plans to hold a single simultaneous multiple round auction for all nationwide, Regional, and EA 220 MHz licenses. The Commission reserves the discretion, however, to auction each of these license groupings (i.e., nationwide, Regional, EA) separately or in different combinations (e.g., nationwide and Regional) if there are administrative reasons for doing so.

Bid Increments and Tie Bids

13. The general guidelines for bid increments will be announced by Public Notice prior to the auction. In the case of a tie bid, the high bidder will be determined by the order in which the bids were received by the Commission.

Stopping Rules

14. The Commission adopts a simultaneous stopping rule for the 220 MHz service auction, and elects not to employ a hybrid rule or a market-by-market closing rule. Under a simultaneous stopping rule, bidding will remain open on all licenses in an auction until bidding stops on every license. The Commission concludes that the substitutability between and among licenses in different geographic areas and the importance of preserving bidders' ability to pursue back-up strategies support the use of a simultaneous stopping rule. The Phase II 220 MHz service auction will close after one round passes in which no new valid bids or proactive activity rule waivers (as discussed below) are submitted. The Commission retains the discretion, however, to keep the auction open even if no new acceptable bids and no proactive waivers are submitted in a single round. In the event that this discretion is exercised, the effect will be the same as if a bidder has submitted a proactive waiver. The Commission also retains the discretion to announce market-by-market closing.

15. The Commission further retains the discretion to declare, at any point, that the auction will end after some specified number of additional rounds. If this option is exercised, bids will be accepted only on licenses where the high bid has increased in the last three rounds. This will deter bidders from continuing to bid on a few low value licenses solely to delay the closing of the auction. It also will enable the Commission to end the auction when it determines that the benefits of terminating the auction and issuing licenses exceed the likely benefits of continuing to allow bidding.

Activity Rules

16. The Commission will employ the Milgrom-Wilson activity rule in conjunction with the simultaneous stopping rule in a manner similar to that employed in prior FCC auctions. In each round of Stage I, a bidder that wishes to maintain its current eligibility must be active on licenses encompassing at least sixty percent of the activity units for which it currently is eligible. In each round of Stage II, a bidder that wishes to maintain its current eligibility in the

next round is required to be active on at least eighty percent of the activity units for which it is eligible in the current round. In each round of Stage III, a bidder that wishes to maintain its current eligibility must be active on licenses encompassing at least ninety-eight percent of the activity units for which it is eligible in the current round.

17. The Commission believes that initially establishing required activity at these levels will achieve a proper balance between allowing for bidder flexibility and completing the auction within a reasonable time. Requiring a 100 percent level of activity in Stage III, as originally proposed, might inhibit bidder flexibility and be unduly restrictive. In addition, activity levels of sixty, eighty and ninety-eight percent are far easier to administer, both for bidders and for the Commission, than the fractional one-third, two-thirds and 100 percent activity levels initially proposed. In addition to easing administrative burdens, the increased activity requirement will require bidders to focus their bidding and will contribute to increasing the pace of the auction.

18. As in prior auctions, the transition from one stage to the next in the Phase II 220 MHz auction will be determined based on a variety of measures of bidder activity, including, but not limited to, the auction activity level (*i.e.*, the sum of bidding units of those licenses whose high bid increased in the current round, as a percentage of the total bidding units of all licenses in the auction), the percentage of licenses (measured in terms of bidding units) on which there are new bids, the number of new bids, and the percentage increase in revenue. In no case can the auction revert to an earlier stage. The Wireless Telecommunications Bureau will announce when the auction will move from one stage to the next. To avoid the consequences of clerical errors and to compensate for unusual circumstances that might delay a bidder's bid preparation or submission on a particular day, bidders will be provided with five activity rule waivers that may be used in any round during the course of the auction. Bidders will have the option to proactively enter an activity rule waiver during the bid submission period. A proactive waiver, as distinguished from an automatic waiver, is one requested by the bidder. If a bidder submits a proactive waiver in a round in which no other bidding activity occurs, the auction will remain open.

Duration of Bidding Rounds

19. The Wireless Telecommunications Bureau will announce the duration of and intervals between bidding rounds, either by Public Notice prior to the auction or by announcement during the auction.

Pre-Auction Application Procedures

20. Bidders will be able to submit bids from remote locations using special bidding software or by telephone. The Commission has adopted a fee schedule for obtaining access to the Commission's database and remote bidding software packages. The remote access bidding software package is available for \$175.00. The charge for on-line remote access via a 900 number is \$2.30 per minute. Bidders also may bid via telephone for no charge. There is no charge for the first Bidder Information Package, and a \$16.00 fee for each additional package that is subsequently requested by the same party. Bidders will be permitted to bid electronically only if they have filed a short-form application electronically. Bidders who file their short-form applications manually may bid only telephonically. When submitting bids telephonically, bidders may utilize the Internet to learn the round-by-round results of the auction. Bidders also may, at negligible cost, use a computerized bulletin board service, accessible by telephone lines, from which auction results can be downloaded to a personal computer. The Commission intends to hold a seminar for prospective bidders to acquaint them with these bidding procedures.

Short-Form Applications

21. Applicants for 220 MHz service licenses will be required to file a short-form application, FCC Form 175 and 175-S, prior to the auction. If only one application that is acceptable for filing is received for a particular license, and thus there is no mutual exclusivity, a Public Notice will be issued cancelling the auction for that license and establishing a date for the filing of a long-form application. Filing deadlines will be announced by Public Notice.

Short-Form Application Amendments and Modifications

22. Upon reviewing the short-form applications, the Commission will issue a Public Notice listing all defective applications. Applicants with minor defects in their applications will be given an opportunity to cure them and resubmit a corrected version.

Upfront Payments

23. The Commission proposed to require 220 MHz auction participants to tender in advance to the Commission an upfront payment of \$2,500 or \$0.02 per MHz-pop, whichever is greater, for the largest combination of MHz-pops (bidding units) on which they anticipate bidding in any round. In the *Competitive Bidding Second Report and Order*, 59 FR 22980, (May 4, 1994), the Commission indicated that upfront payments should equal approximately five percent of the expected amounts of winning bids. In general, the license values in previous auctions have exceeded expectations. Based upon defaults occurring in the broadband PCS, IVDS and MDS auctions, and to guard against future defaults, the Commission believes that there is a need to obtain a higher payment upfront than the one proposed. Authority is delegated to the Wireless Telecommunications Bureau to determine an appropriate upfront payment for each license being auctioned, taking into account such factors as the population in each geographic license area and the value of similar spectrum. In no event will the upfront payment for any license be less than \$2,500, and the Wireless Telecommunications Bureau will retain the flexibility to modify this minimum if it finds that a higher amount would better deter speculative filings. Prior to the 220 MHz auction, the Wireless Telecommunications Bureau will publish a Public Notice listing the upfront payment amounts required for the licenses to be auctioned. The number of bidding units determines the amount of upfront payment for the license. Although a bidder may file applications for every license being auctioned, the total upfront payment submitted by each applicant will determine the combinations on which the applicant will actually be permitted to be active in any single round of bidding. Upfront payments will be due by a date specified by Public Notice, but generally no later than 14 days before the scheduled auction.

Down Payments and Full Payments

24. All winning bidders, including small businesses and very small businesses will be required to supplement their upfront payments with a down payment sufficient to bring their total deposits up to 20 percent of their winning bid(s). If the upfront payment already tendered by a winning bidder, after deducting any bid withdrawal and default payments due, amounts to 20 percent or more of its

winning bids, no additional deposit will be required. If the upfront payment amount on deposit is greater than 20 percent of the winning bid amount after deducting any bid withdrawal and default payments due, the additional monies will be refunded.

25. Winning bidders, except small businesses and very small businesses, must submit the required down payment by cashier's check or wire transfer to the Commission's lock-box bank within ten business days following release of a Public Notice announcing the close of bidding. All auction winners, except those eligible for an installment payment plan, will be required to make full payment of the balance of their winning bids within ten business days following release of a Public Notice mailed to the successful applicant that the Commission is prepared to award the license. The Commission generally will grant uncontested licenses within ten business days after receiving full payment.

Bid Withdrawal, Default, and Disqualification

26. The Commission will apply the bid withdrawal rules set forth in Part 1 of its rules in the 220 MHz auction. Any bidder that withdraws a high bid before the Commission declares bidding closed will be required to reimburse the Commission in the amount of the difference between its high bid and the amount of the "winning bid" the next time the license is offered, if this subsequent "winning bid" is lower than the withdrawn bid.

27. If a license is re-offered by auction, the "winning bid" refers to the high bid in the auction in which the license is re-offered. If a license is re-offered in the same auction, the winning bid refers to the high bid amount made subsequent to the withdrawal in that auction. If a license which is the subject of withdrawal or default is offered to the highest losing bidders in the initial auction, as opposed to being re-auctioned, the "winning bid" refers to the bid of the highest bidder who accepts the offer.

28. After bidding closes, the Commission will assess a defaulting auction winner an additional payment of three percent of the subsequent winning bid or three percent of the amount of the defaulting bid, whichever is less. This additional payment is designed to encourage bidders who wish to withdraw their bids to do so before bidding ceases. In the unlikely event that there is more than one bid withdrawal on the same license, each withdrawing bidder will be held

responsible for the difference between its withdrawn bid and the amount of the winning bid the next time the license is offered for auction.

29. If a bidder has withdrawn a bid or defaulted, but the amount of the default payment cannot yet be determined, the bidder will be required to make a deposit of up to 20 percent of the amount bid on the license. When it becomes possible to calculate and assess the default payment, any excess deposit will be refunded. Upfront payments will be applied to such deposits, and to bid withdrawal and default assessments due, before being applied toward the bidder's down payment on licenses the bidder has won and seeks to acquire.

30. The Commission recently addressed the issue of how its bid withdrawal provisions apply to bids that are mistakenly placed and withdrawn in a decision involving the 900 MHz Specialized Mobile Radio (SMR) and broadband Personal Communication Service (PCS) C block auctions. See Atlanta Trunking Associates, Inc. and MAP Wireless L.L.C. Request to Waive Bid Withdrawal Payment Provisions, FCC 96-203, Order (released May 3, 1996) (summarized in 61 FR 25807 (May 23, 1996)), *recon. pending*. If a default or disqualification involves gross misconduct, misrepresentation or bad faith by an applicant, the Commission may declare the applicant and its principals ineligible to bid in future auctions, and may take any other action that it deems necessary, including institution of proceedings to revoke any existing licenses held by the applicant.

Long-Form Applications

31. The Commission will apply its Part 1 long-form procedures to the 220 MHz auction. A long-form application filed on FCC Form 600 must be filed by a date specified by Public Notice, generally within ten business days after the close of bidding. After the winning bidder's down payment and long-form application are received, the Commission will review the application to determine if it is acceptable for filing. Upon acceptance for filing, the Commission will issue a Public Notice announcing this fact, triggering the filing window for petitions to deny. If all petitions to deny are dismissed or denied, the license(s) will be granted to the auction winner.

Petitions To Deny and Limitations on Settlements

32. In the *Third Notice*, the Commission proposed to adopt petition to deny procedures based on former § 22.30 of its rules, which provided for

procedures regarding opposition to applications. In addition, the Commission proposed to adopt rules similar to former § 22.943 of its rules, which provided for procedures regarding the withdrawal of applications, to prevent the filing of speculative applications and pleadings designed to extract money from sincere 220 MHz license applicants. The Commission adopted these proposals. The restrictions in § 90.162, 47 CFR 90.162 (which replaced § 22.943 for purposes of CMRS), were established to prevent the filing of speculative applications and pleadings (or threats of the same) designed to extract money from license applicants. Thus, the Commission will limit the consideration that an individual or entity is permitted to receive for agreeing to withdraw an application or a petition to deny to the legitimate and prudent expenses of the applicant or petitioner.

Anti-Collusion Rules

33. The Commission will require 220 MHz licensees to comply with the reporting requirements and rules prohibiting collusion embodied in §§ 1.2105 and 1.2107 of the Commission's rules, 47 CFR 1.2105 and 1.2107. Even where the applicant discloses parties with whom it has reached an agreement on the short-form application, thereby permitting discussions with those parties, the applicant nevertheless is subject to existing antitrust laws. Moreover, where specific instances of collusion in the competitive bidding process are alleged during the petition to deny process, the Commission may conduct an investigation or refer such complaints to the United States Department of Justice for investigation. Bidders who are found to have violated the antitrust laws, in addition to any penalties they incur under the antitrust laws, or who are found to have violated the Commission's rules in connection with their participation in the auction process, may be subject to a variety of sanctions, including forfeiture of their down payment or their full bid amount, revocation of their license(s), and possible prohibition from participating in future auctions.

Transfer Disclosure Requirements

34. The Commission will apply § 1.2111(a) of its rules, 47 CFR 1.2111(a), to all Phase II 220 MHz licenses obtained through the competitive bidding process. The Commission has also adopted specific rules that will apply solely to small business licensees, as discussed in subsequent sections. The Commission

will give particular scrutiny to auction winners who have not yet begun commercial service and who seek approval for a transfer of control or assignment of their licenses within three years after the initial license grant, so that it may determine if any unforeseen problems relating to unjust enrichment have occurred.

Treatment of Designated Entities

Minority- and Women-Owned Businesses

35. In the Phase II 220 MHz service, as in other auctionable services, the Commission is committed to meeting the objectives of 47 U.S.C. 309(j) of promoting economic opportunity and competition, of avoiding excessive concentrations of licenses, and of ensuring access to new and innovative technologies by disseminating licenses among a wide variety of applicants, including businesses owned by members of minority groups and women. Commenters did not cite any evidence of specific discrimination for purposes of creating a record sufficient to support special provisions for minorities under the strict scrutiny standard of judicial review, which applies to federal race-based provisions. *Adarand Constructors, Inc. v. Peña*, 115 S.Ct. 2097 (1995). The Commission is also concerned that the record would not support gender-based provisions under intermediate scrutiny, the standard of judicial review applicable to such provisions. *United States v. Virginia*, 116 S.Ct. 2263 (1996). Balancing the Commission's statutory obligation to provide opportunities for women- and minority-owned businesses to participate in spectrum-based services against the statutory duties to facilitate the rapid delivery of new services to the American consumer and promote efficient use of the spectrum, the Commission concludes that it should not delay the Phase II 220 MHz service auction for the amount of time it would take to adduce sufficient evidence to support race- and gender-based provisions. Moreover, the Commission believes that most minority- and women-owned businesses will be able to take advantage of the specific provisions that the Commission is adopting for small businesses, as discussed *infra*.

36. The Commission also notes that it has initiated a separate inquiry to gather information regarding barriers to entry faced by minority- and women-owned firms as well as small businesses. *Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, Notice of Inquiry*, GN

Docket No. 96-113, 61 FR 33066 (June 26, 1996). The Commission will continue to track the rate of participation in its auctions by minority- and women-owned firms. It will evaluate this information, together with other data gathered, with the goal of developing a record to support race- and gender-based provisions that will satisfy judicial scrutiny. If a sufficient record can be adduced, the Commission will consider race- and gender-based provisions for future auctions. Finally, the Commission will continue to look for other ways to reduce barriers to entry for women- and minority-owned businesses, such as extending partitioning and disaggregation of licenses to entities that do not currently qualify, an adjustment to its rules that may be helpful to small businesses generally.

Small Businesses

37. Congress specifically cited the needs of small businesses in enacting Section 309(j), directing the Commission to promote economic opportunities for small businesses. The Commission believes that small businesses applying for 220 MHz licenses should be entitled to some type of bidding credit and should be allowed to pay their bids in installments. In order to ensure the meaningful participation of small business entities in the 220 MHz auction the Commission adopts a two-tiered definition of small business with thresholds applicable across all three categories of license. This approach will give qualifying small businesses flexibility to bid for a Regional license or, on the other hand, elect to bid for several EAs, without having to choose which type of license to bid for prior to the start of the auction. For purposes of bidding on the nationwide, Regional, and EA licenses, therefore, the Commission will define (1) a very small business as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the three preceding years; and (2) a small business as an entity that, together with affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the three preceding years. Bidding credits will be determined, as discussed *infra*, based upon this two-tiered approach.

38. The Commission believes the cost of building out a 220 MHz system most closely resembles the cost of a 900 MHz SMR system, and that it is therefore appropriate to establish definitions of "small business" and "very small business" for the 220 MHz service that

are consistent with the definitions adopted for the 900 MHz SMR service. The Commission's experience in conducting the 900 MHz SMR auction indicates that its definitions of eligible small businesses in that service were appropriate, and that it would substantially dilute the value of the small business preferences to increase the size of small businesses eligible for special bidding provisions in the 220 MHz service.

39. For purposes of the Phase II 220 MHz small business definition, the Commission will consider the gross revenues of the small business applicant, its controlling principals, and its affiliates. The Commission will not impose specific equity requirements on the controlling principals of entities that meet the small business definition. The Commission will still require, however, that in order for an applicant to qualify as a small business or very small business, qualifying small business principals must maintain control of the applicant, including both *de facto* and *de jure* control. For this purpose, the Commission will borrow from certain Small Business Administration rules that are used to determine when a firm should be deemed an affiliate of a small business. Typically, *de jure* control is evidenced by ownership of 50.1 percent of an entity's voting stock. *De facto* control is determined on a case-by-case basis. An entity must demonstrate at least the following indicia of control to establish that it retains *de facto* control of the applicant: (1) The entity constitutes or appoints more than 50 percent of the board of directors or partnership management committee; (2) the entity has authority to appoint, promote, demote and fire senior executives that control the day-to-day activities of the licensees; and (3) the entity plays an integral role in all major management decisions. The Commission cautions that, while it is not imposing specific equity requirements on small business principals, the absence of significant equity could raise questions about whether the applicant qualifies as a *bona fide* small business or very small business.

40. Exceptions will apply for small business consortia and publicly traded corporations with widely dispersed voting power. Specifically, eligible small businesses or very small businesses will be permitted to form consortia and not aggregate their gross revenues. Additionally, a small corporation that has dispersed voting stock ownership and no controlling affiliates will not be required to aggregate with its own revenues the

revenues of each shareholder for purposes of small business or very small business status. Thus, an applicant may qualify, even in the absence of identifiable control being held by particular investors.

41. Applicants and licensees claiming eligibility as a small business, a very small business, a consortium of small businesses, or a consortium of very small businesses, are subject to audits by the Commission. Selection for audit may be random, on information, or on the basis of other factors. Consent to such audit is part of the certification included in the short-form application (FCC Form 175). Such consent includes consent to the audit of the applicant's or licensee's books, documents, and other material, including accounting procedures and practices, regardless of form or type, sufficient to confirm that such applicant's or licensee's representations are and remain accurate. Such consent also includes inspection at all reasonable times of the facilities, or parts thereof, engaged in providing and transacting business or keeping records regarding licensed Phase II 220 MHz service, and will also include consent to the interview of principals, employees, customers, and suppliers of the applicant or licensee.

Bidding Credits

42. The Commission adopts bidding credits consistent with its two-tiered definition of small business that will apply to all three license groups. Very small businesses that, together with affiliates and controlling principals, have average gross revenues that are not more than \$3 million for the three preceding years, will receive a 25 percent bidding credit, available for all three categories of Phase II 220 MHz licenses. Likewise, small businesses that, together with affiliates and controlling principals, have average gross revenues that are not more than \$15 million for the three preceding years, will receive a bidding credit of ten percent, available for all three categories of Phase II 220 MHz licenses. While the 25 percent bidding credit is less than the 40 percent bidding credit proposed for one of the nationwide licenses and the Regional geographic area licenses, the Commission concludes that this bidding credit is appropriate since the Commission is now going to offer bidding credits generally for all channel blocks. The Commission also had favorable results in previous auctions with bidding credits at this level or lower.

Installment Payments, Upfront Payments, and Down Payments

43. The Commission will make installment payment plans available to small businesses that are winners in the 220 MHz auction(s). Licensees who qualify as small businesses or very small businesses in the 220 MHz auction(s) will be entitled to pay their winning bid amount in quarterly installments over the term of the license with interest charges to be fixed at the time of licensing at a rate equal to the rate for ten-year U.S. Treasury obligations plus 2.5 percent. The rate for ten-year U.S. Treasury obligations will be determined by taking the coupon rate of interest on the ten-year U.S. Treasury notes most recently auctioned by the Treasury Department before licenses are conditionally granted. These licensees will be able to make interest-only payments for the first two years of the license term. Timely payment of all installments will be a condition of the license grant, and failure to make such timely payments will be grounds for revocation of the license.

44. The Commission will not adopt a second installment payment plan with a longer interest-only period for very small businesses with average gross revenues of not more than \$3 million. The Commission believes that the two-year interest-only period in the single plan it adopts will provide all small businesses with the appropriate level of financing to overcome difficulties in attracting capital.

45. The Commission also concludes that there should be a late payment fee in connection with the installment payment plan for Phase II 220 MHz licensees. The Commission stated in the *Third Notice* that timely payment of all installments would be a condition of the award of a license. Therefore, when licensees are more than fifteen days late in their scheduled installment payments, the Commission will charge a late payment fee equal to five percent of the amount of the past due payment. For example, if a \$50,000 payment is due on June 1, then on June 16, \$2,500 is due in addition to the payment. Without such a fee licensees may not have adequate financial incentives to make installment payments on time and may attempt to maximize their cash flow at the government's expense by paying late. The five percent payment is an approximation of late payment fees applied in typical commercial lending transactions. Payments will be applied in the following order: late charges, interest charges, and principal payments.

46. Substantial upfront payments are necessary for both large and small businesses to deter speculation and ensure participation by sincere bidders only. The Commission therefore declines to adopt a reduced upfront payment provision for small businesses or very small businesses.

47. The Commission likewise concludes that small businesses should be required to pay a down payment of 20 percent of their winning bid(s). Such a requirement is consistent with ensuring that winning bidders have the financial capability of building out their systems, will provide the Commission with stronger assurance against defaults than a ten percent down payment, and should cover the required payments in the unlikely event of default. Thus, small businesses will be required to bring their deposit up to ten percent of their winning bid within ten business days of the close of the auction. Prior to licensing, they will be required to pay an additional ten percent. Specific procedures for payment will be provided in a Public Notice.

Partitioning

48. The Commission will permit any holder of an EA, Regional, or nationwide Phase II 220 MHz license to partition portions of its authorization and enter into contracts with eligible parties, and will allow such parties to file long-form applications for the usable channels within the partitioned area. The Commission concludes that allowing holders of EA, Regional and nationwide Phase II 220 MHz licenses to partition their geographic service areas will facilitate the provision of services in small markets and rural areas. Partitioning will also furnish providers of Phase II 220 MHz service with operational flexibility that will serve to promote the most efficient use of the spectrum and encourage participation by a wide variety of service providers.

49. The Commission will not, at this time, authorize spectrum disaggregation for the Phase II 220 MHz service.

Instead, the Commission will seek comment on the feasibility of spectrum disaggregation for the 220 MHz service in a notice of proposed rulemaking adopted concurrently with this *Third Report and Order*.

50. Providers of 220 MHz service will be permitted to acquire partitioned licenses in either of two ways: (1) By forming bidding consortia to participate in auctions, and then partitioning the licenses won among consortium members; and (2) by acquiring partitioned licenses from other licensees through private negotiation and agreement either before or after the

auction. Each member of a consortium will be required to file a long-form application, following the auction, for its respective mutually agreed-upon geographic area. In the event the Commission receives applications requesting FCC consent to partitioning transfers prior to the adoption of rules governing such issues as whether to permit partitioning based on any license area defined by the parties—upon which the Commission seeks comment in a notice of proposed rulemaking—action on such applications will be deferred.

Transfer Restrictions and Unjust Enrichment Provisions

51. To ensure that large businesses do not become the unintended beneficiaries of measures meant for smaller firms, the Commission adopts unjust enrichment provisions similar to those adopted for narrowband PCS and the 900 MHz SMR service. Licensees seeking to transfer their licenses to entities which do not qualify as small businesses (or very small businesses seeking to transfer their licenses to small businesses or large companies), as a condition of approval of the transfer, must remit to the government a payment equal to a portion of the total value of the benefit conferred by the government. Thus, for example, a small business that received a bidding credit seeking to transfer or assign a license to an entity that does not qualify as a small business will be required to reimburse the government for the amount of the bidding credit, plus interest at the rate imposed for installment financing at the time the license was awarded, before the transfer will be permitted. Similarly, a very small business that received a bidding credit seeking to transfer or assign a license to a small business that qualified for a lesser bidding credit will be required to reimburse the government for the difference between the amount of its bidding credit and the lesser credit, plus interest at the rate imposed for installment financing at the time the license was awarded, before the transfer will be permitted. The amount of this payment will be reduced over time as follows: (1) A transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit (or, in the case of very small businesses transferring to small businesses, 100 percent of the difference between the bidding credit received by the former and the bidding credit for which the latter is eligible); (2) in year three of the license term the payment will be 75 percent; (3) in year four the payment will be 50 percent, and (4) in year five

the payment will be 25 percent, after which there will be no required payment. These assessments will have to be paid to the U.S. Treasury as a condition of approval of the assignment or transfer.

52. In addition, if a licensee that qualifies for installment payments seeks to assign or transfer control of its license during its term to an entity that does not meet the small business or very small business definition, the Commission will require payment of the remaining principal and any interest accrued through the date of assignment as a condition of the license assignment or transfer. Also, if an investor subsequently purchases an interest in the business and, as a result, the gross revenues of the business exceed the applicable financial caps, this unjust enrichment provision will apply. The Commission will apply these payment requirements for the entire license term to ensure that small businesses will look first to other small businesses when deciding to transfer their licenses. However, the Commission will not impose a holding period or other transfer restrictions on these licensees.

Spectrum Set Asides

53. Because there will be both a large number and a large variety of licenses available in the Phase II 220 MHz auction, the Commission will not adopt an entrepreneurs' block for the service. Small businesses will have a significant opportunity to compete for Phase II 220 MHz licenses, particularly given the special provisions that have been adopted for small businesses.

Procedural Matters; Ordering Clauses

Final Regulatory Flexibility Analysis

54. As required by the Regulatory Flexibility Act of 1980, Pub. L. 96–354, 94 Stat. 1164, as amended by the Contract with America Advancement Act of 1996, Pub. L. 104–121, 110 Stat. 847, 5 U.S.C. 601 *et seq.*, the Commission has prepared a Final Regulatory Flexibility Analysis of the expected impact of the rule changes adopted in this proceeding on small entities. The Secretary shall send a copy of this *Third Report and Order and Fifth Notice of Proposed Rulemaking*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act.⁴

⁴Pub. L. 96–354, 94 Stat. 1164, 5 U.S.C. section 601 *et seq.* (1980).

Final Regulatory Flexibility Analysis

55. As required by section 603 of the Regulatory Flexibility Act, 5 U.S.C. 603 (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Third Notice of Proposed Rulemaking* in this proceeding (*Third Notice*).⁵ The Commission sought written public comments on the proposals in the *Third Notice*, including on the IRFA. The Commission's Final Regulatory Flexibility Analysis (FRFA) in this *220 MHz Third Report and Order* conforms to the RFA, as amended by the Contract With America Advancement Act of 1996, Pub. L. 104-121, 110 Stat. 847 (1996) (CWAAA).⁶

I. Need for and Objective of the Rules

56. The rules adopted in this decision will establish a flexible regulatory scheme that will allow for efficient licensing and use of the 220 MHz service, eliminate unnecessary regulatory burdens on existing and future 220 MHz licensees, provide a wide variety of radio services to the public, enhance the competitive potential of 220 MHz services in the mobile marketplace, and continue to provide a home for the development of spectrally efficient technologies. By establishing competitive bidding procedures pursuant to section 309(j) of the Communications Act, this decision will promote economic opportunity and ensure that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses. The adoption of competitive bidding rules will also permit the recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource.

II. Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis

57. No issues were raised specifically in response to the IRFA. However, we have considered the significant economic impact on a substantial number of small entities through consideration of comments that pertained to issues of concern to small businesses. For example, two equipment manufacturers, SEA and Securicor, argued against allowing Phase I and

Phase II licensees to aggregate their contiguous channels to create wider bandwidth channels.⁷ (See para. 98 of the full text of this decision). These commenters, who have developed radio equipment in the 220 MHz band using spectrally efficient technologies, argue that allowing aggregation of channels would severely jeopardize their ability to continue to develop and market their technology. The Commission decided in favor of allowing licensees to aggregate their channels, agreeing with those commenters who support allowing such aggregation because this type of flexibility will allow 220 MHz licensees to offer a wider variety of communications services and more effectively compete in the wireless marketplace. While allowing channel aggregation, the Commission agreed with SEA and Securicor that it should also require licensees and equipment manufacturers to meet a spectrum efficiency standard. In adopting a spectrum efficiency standard, the Commission sought to ensure that the 220 MHz band would continue to be a home for the development of spectrally efficient technologies.

58. The Commission proposed two classifications of non-nationwide 220 MHz licensing—*i.e.*, Economic Area (EA) licenses and Regional licenses. Pagenet endorsed this proposal, noting that such assignments would be a "complement to nationwide" licensing, and would allow "participation by small, medium and large carriers in which local to nationwide service will be provided by a number of different licensees in each marketplace." (See para. 79 of the full text of this decision). The Commission adopted this proposal. (See para. 80 of the full text of this decision).

59. American Mobile Telecommunications Association (AMTA) and Comtech asked that no limit be placed on the number of channels a licensee may obtain within an EA or Region through our auction procedures. Comtech also asked that EA and Regional licensees not be required to construct a minimum number of channels at all of their base stations. The Commission adopted both of these proposals.

⁷The Commission received comments from five equipment manufacturers: Fairfield Industries (Fairfield), SEA Inc. (SEA), Securicor Radiocomms, Ltd. (Securicor), Ericsson Corporation, and E. F. Johnson Company. Of these commenters, Fairfield, SEA, and Securicor may be small businesses under the definition used in this analysis. Securicor is a corporation based in England. A sixth equipment manufacturer, Motorola, while not submitting formal comments, filed *ex parte* presentations in this proceeding.

60. The Commission also adopted a proposal by Fairfield to allow for fixed operations on a secondary basis. In so doing, the Commission acknowledged the concerns of other commenters that such operations might cause interference to primary users of the band. We thus required secondary licensees to notify nearby primary users of their secondary facilities, limited secondary licensees' operating parameters beyond those initially proposed, and restricted secondary licensees from operating on public safety, Emergency Medical Radio Service (EMRS), or Federal Government 220-222 MHz channels.

61. A number of commenters asked that we provide greater protection to Phase I base stations than initially proposed. We decided to adopt our proposed co-channel protection criteria because we concluded that, *inter alia*, this decision would provide protection to Phase I base stations consistent with other recent Commission decisions establishing protection criteria in other mobile services. Commenters were also opposed to our proposal for limiting field strength at EA and Regional borders. We adopted our proposal in order to afford Phase II licensees the maximum degree of flexibility in designing their systems and to enable them to provide a quality signal at the borders of their service areas.

62. Association of Public-Safety Communications Officials—International (APCO) asked that we refrain from assigning the 125 non-nationwide channels not reserved for Public Safety or EMRS eligibles by competitive bidding in order to give public safety entities a realistic opportunity to obtain authorization for more than ten 220 MHz channels. We decided that such channels should be assigned through competitive bidding because we could not conclusively determine the demand by public safety entities for 220 MHz channels, and because we intend to fully explore the spectrum needs of the public safety community in a future rulemaking proceeding.

63. A number of commenters urged the Commission to maintain a non-commercial set-aside for the 220 MHz service, arguing that there is a continuing demand for such a set-aside and that it is necessary for licensees' internal communications. Other commenters disagreed. We found that it would not be in the public interest to establish a non-commercial set-aside based in part on our continuing commitment to efficient use of the spectrum. As discussed in para. 42 of the full text of this *Third Report and*

⁵ *Third Notice*, 11 FCC Rcd at 287.

⁶ Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), codified at 5 U.S.C. 601 *et seq.*

Order, we agree with those commenters who believe that it is unnecessary to set aside spectrum for exclusively internal communications, given the apparent demand for nationwide spectrum for the provision of service to the public and the fact that we are not precluding a nationwide licensee from using all or part of its spectrum for internal communications.

64. Commenters disagreed regarding how the Commission should treat pending applications for nationwide 220 MHz licenses. Many commenters urged the Commission to exercise its discretion to award the licenses through lotteries. Other commenters argued that the pending applications should be returned and the licenses should be awarded through auctions. We found that it would be in the public interest to return the pending applications for the 220 MHz service without prejudice and award the licenses through competitive bidding. We concluded that, because the nature of the 220 MHz service is undergoing a substantial change, it would be unfair to preclude new applicants from having the opportunity to apply for these licenses. We also noted that awarding licenses through auctions benefits the public by ensuring that licenses go to those who value them the most and to those who have an incentive to build their systems quickly, thereby speeding the provision of service to the public.

III. Description and Estimate of the Small Entities Involved

65. The Commission anticipates receiving approximately 2,220 total applications for the Phase II 220 MHz service—*i.e.*, 2,000 Public Safety applications (including 1,000 EMRS applications), 90 applications for Economic Area channels, 20 applications for Regional channels, 100 applications for secondary service, and 10 applications for nationwide channels. These applicants, many of whom may be small businesses, as well as approximately 3,800 Phase I 220 MHz licensees, many of whom may be small entities, and at least six equipment manufacturers, three of which may be small businesses, will be subject to the rules adopted in the *220 MHz Third Report and Order*.

66. The Commission has not developed a definition of small entities applicable to 220 MHz Phase I licensees, or equipment manufacturers for purposes of this Final Regulatory Flexibility Analysis, and since the Regulatory Flexibility Act amendments were not in effect until the record in this proceeding was closed, the Commission was unable to request information

regarding the number of small businesses that are associated with the 220 MHz service. However, we have adopted criteria for defining small businesses and very small businesses for purposes of determining eligibility for auction bidding credits and installment payments.⁸ We will therefore use this definition for estimating the number of potential Phase II entities applying for auctionable spectrum that are small businesses. To estimate the number of Phase I licensees and the number of 220 MHz equipment manufacturers that are small businesses, and the number of Phase II entities applying for non-auctionable spectrum (*i.e.*, public safety and EMRS channels) we shall turn to the relevant definitions as provided by the Small Business Administration (SBA).

Phase I Licensees

There are approximately 3,800 non-nationwide Phase I licensees and 4 nationwide licensees currently authorized to operate in the 220 MHz band. To estimate the number of such entities that are small businesses, we apply the definition of a small entity under SBA rules applicable to radiotelephone companies. This definition provides that a small entity is a radiotelephone company employing fewer than 1,500 persons.⁹ However, the size data provided by the SBA do not allow us to make a meaningful estimate of the number of 220 MHz providers that are small entities because they combine all radiotelephone companies with 500 or more employees.¹⁰ We therefore use the 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, which is the most recent information available. Data from the Bureau of the Census' 1992 study indicate that only 12 out of a total 1,178 radiotelephone firms which operated during 1992 had 1,000 or more employees—and these may or may not be small entities, depending on whether they employed more or less than 1,500 employees.¹¹ But 1,166 radiotelephone firms had fewer than 1,000 employees

⁸ Approval from the Small Business Administration for this definition is pending.

⁹ 13 CFR 121.201, Standard Industrial Classification (SIC) Code 4812.

¹⁰ U.S. Small Business Administration 1992 Economic Census Employment Report, Bureau of the Census, U.S. Department of Commerce, Table 3, SIC Code 4812 (radiotelephone communications industry data adopted by the SBA Office of Advocacy).

¹¹ U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC92-S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms; 1992, SIC Code 4812 (issued May 1995).

and therefore, under the SBA definition, are small entities. However, we do not know how many of these 1,166 firms are likely to be involved in the 220 MHz service.

Phase II Entities Applying for Auctionable Spectrum

The *220 MHz Third Report and Order* adopts a two-tiered definition of small business for the purpose of competitive bidding. The Commission defines a "very small business" as an entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years of not more than \$3 million; and a "small business" as an entity that, together with affiliates and controlling principals, has average gross revenues for the three preceding years of not more than \$15 million. For purposes of determining small business status, the Commission will attribute the gross revenues of all controlling principals in the small business applicant as well as the gross revenues of affiliates of the applicant. The Commission is not imposing specific equity requirements on the controlling principals that meet this small business definition. In order for an applicant to qualify as a small business, qualifying small business principals must maintain both *de facto* and *de jure* control of the applicant.

67. As noted above, the SBREFA was not in effect at the time the *Third Notice* was issued, so comment was not sought on the number of prospective Phase II applicants in the 220 MHz service which might qualify as small businesses. Therefore, the Commission cannot accurately predict the number of applicants in the 220 MHz service who will fit the description of a small business. However, using the definitions of small business and very small business we adopted for the purpose of determining eligibility for bidding credits and installment payments, the Commission can attempt to estimate the number of applicants for 220 MHz licenses that are small businesses by looking at the number of applicants in similar services that qualified as small businesses. For example, the 900 MHz SMR service utilized a definition of very small business based on gross revenues of not more than \$3 million and a definition of small business based on gross revenues of not more than \$15 million. A total of 128 applications were received in the 900 MHz SMR auction, and, of these applications, 71 qualified as very small businesses and an additional 30 qualified as small businesses.

68. Approximately 900 licenses will be made available for authorization in

the 220 MHz auction. In the 900 MHz SMR auction, 1050 licenses were made available. Given that 128 qualified applications were received in the 900 MHz auction, we anticipate receiving slightly fewer, or 120 applications in the 220 MHz auction. Given that 71 applicants qualified as very small businesses and 30 applicants qualified as small businesses in the 900 MHz SMR auction, we estimate that proportionately fewer, or 65 applicants, will qualify as very small businesses, and 27 applicants will qualify as small businesses in the 220 MHz auction.

Phase II Entities Applying for Non-Auctionable Spectrum

We estimate that approximately 1,000 applications will be filed for authorization on the 220 MHz public safety channels, and we estimate that approximately 1,000 applications will be filed for authorization on the 220 MHz EMRS channels. To estimate the number of such applicants that are small entities, we apply the definition of a small entity under the SBA rules applicable to small governmental entities. The SBREFA requires that we estimate the number of governmental entities with populations of less than 50,000 for which our rules will apply.¹² According to the Census Bureau, 96 percent of the nation's counties, cities, and towns have populations of fewer than 50,000.¹³ The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. We thus estimate that 96 percent of all governmental entities are small; and further estimate that, because the estimated 1,000 applications for the public safety channels will be from governmental entities, that 960 of these applications may be from small governmental entities. Some EMRS applicants will be governmental entities, while others will be non-governmental (e.g., hospitals, ambulance services). Because we assume that *all* such non-governmental entities applying for EMRS licenses will be small entities, we estimate that a slightly higher percentage of applicants for EMRS licenses, or 98 percent of EMRS applicants, will be small entities. We therefore estimate that approximately 980 applications for the EMRS channels will be from small entities.

¹² See 5 U.S.C. 601(5) (including cities, counties, towns, townships, villages, school districts, or special districts).

¹³ See 1992 Census of Governments, U.S. Bureau of the Census, U.S. Department of Commerce.

Radio Equipment Manufacturers

We anticipate that at least six radio equipment manufacturers will be affected by our decisions in this proceeding. According to the SBA's regulations, a radio and television broadcasting and communications equipment manufacturer must have 750 or fewer employees in order to qualify as a small business concern.¹⁴ Census Bureau data indicate that there are 858 U.S. firms that manufacture radio and television broadcasting and communications equipment, and that 778 of these firms have fewer than 750 employees and would therefore be classified as small entities.¹⁵ We do not have information that indicates how many of the six radio equipment manufacturers associated with this proceeding are among these 778 firms. However, because three of these manufacturers (Motorola, Ericsson and E.F. Johnson) are major, nationwide radio equipment manufacturers, we conclude that these manufacturers would *not* qualify as small businesses.

IV. Summary of the Projected Reporting, Recordkeeping, and Other Compliance Requirements

69. The *220 MHz Third Report and Order* adopts a number of rules that will entail reporting, recordkeeping, and/or third party consultation. However, the Commission believes that these requirements are the minimum needed to ensure the integrity of the 220 MHz service. The Commission considers the effects of these requirements first on Phase II applicants and licensees and then on Phase I licensees.

Phase II Applicants

Applicants for the Phase II 220 MHz auction will be required to submit a completed FCC Form 175. Auction winners, as well as applicants for the 220 MHz public safety and EMRS channels, will be required to file a completed FCC Form 600. In addition, applicants for the 220 MHz EMRS channels, like all other EMRS applicants, must furnish a statement from the governmental body having jurisdiction over the state emergency plan indicating that the applicant is included in the emergency plan, or is otherwise supporting the application.

Phase II Licensees

Phase II licensees authorized on Channels 161–200 and Channels 1–40 will be required to coordinate among

¹⁴ 13 CFR 121.201, (SIC) Code 3663.

¹⁵ U.S. Dept. of Commerce, *1992 Census of Transportation, Communications and Utilities* (issued May 1995), SIC category 3663.

themselves to locate their base stations to avoid interference. Regional licensees operating on Channels 196–200 may operate stations at powers exceeding 2 watts ERP or at antenna heights greater than 20 feet provided that they obtain the written concurrence of all Phase I and Phase II licensees operating base stations on Channels 1–40 within 6 km of the base stations of the Regional licensees.

70. Phase II licensees operating secondary, fixed stations will be required to notify any co-channel primary licensees authorized in the area of their operation of the location of their secondary facilities. Phase II licensees implementing nationwide land mobile or paging systems will be required to meet construction "benchmarks" and must submit maps and other supporting documentation to demonstrate compliance with these benchmarks five and ten years after grant of the initial license. Also, nationwide licensees implementing fixed systems, in lieu of meeting the construction benchmarks described above, may make a showing of "substantial service" within five and ten years of the initial license grant. To comply with these requirements, such licensees must also submit maps and other supporting documents five and ten years after grant of the initial license. Regional licensees and EA licensees implementing land mobile, paging, or fixed systems must also comply with 5- and 10-year construction or substantial service requirements and must also provide maps and other supporting documents to demonstrate compliance with such requirements. Preparation of maps and supporting documentation may involve engineering expertise. Failure by nationwide, EA, or Regional licensees to meet either the five- or ten-year construction requirement will result in automatic cancellation of the licensees' nationwide authorization. Phase II licensees will not be permitted to construct their stations less than 120 km from a constructed and operating Phase I, co-channel station unless they submit a technical analysis demonstrating that the predicted 28 dBuV/m interfering contour of their base station does not overlap the predicted 38 dBuV/m service contour of the Phase I licensee's station. This technical analysis will involve engineering expertise. Phase II licensees may also locate their stations less than 120 km from the station of an existing Phase I co-channel licensee or with less 10 dB protection to such co-channel's station's 38 dBuV/m contour if the Phase II licensee obtains the written consent of the affected Phase I

licensee. Finally, Phase II licensees operating in adjacent EAs or Regions may exceed the specified field strength limit at their border if all affected, co-channel EA and Regional licensees agree to the higher field strength.

71. Section 309(j)(4)(E) of the Communications Act directs the Commission to "require such transfer disclosures and anti-trafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits."¹⁶ The Commission adopted safeguards designed to ensure that the requirements of this section are satisfied, including a transfer disclosure requirement for licenses obtained through the competitive bidding process for the 220 MHz service. An applicant seeking approval for a transfer of control or assignment of a license within three years of receiving a new license through a competitive bidding procedure must, together with its application for transfer of control or assignment, file with the Commission a statement indicating that its license was obtained through competitive bidding. Such applicant must also file with the Commission the associated contracts for sale, option agreements, management agreements, or other documents disclosing the total consideration that the applicant would receive in return for the transfer or assignment of its license.

72. With respect to small businesses, we have adopted unjust enrichment provisions to deter speculation and participation in the licensing process by those who do not intend to offer service to the public, or who intend to use the competitive bidding process to obtain a license at a lower cost than they would otherwise have to pay and to later sell it at a profit, and to ensure that large businesses do not become the unintended beneficiaries of measures meant to help small firms. Small business licensees seeking to transfer their licenses to entities which do not qualify as small businesses (or very small businesses seeking to transfer their licenses to small businesses or large companies), as a condition of approval of the transfer, must remit to the government a payment equal to a portion of the total value of the benefit conferred by the government.

73. Finally, applicants and licensees claiming eligibility for competitive bidding as a small business, a very small business, or a consortium of small businesses (or very small businesses) are subject to audits by the Commission. Selection for audit may be random, on

information, or on the basis of other factors. Consent to such audit is part of the certification included in the short-form application (FCC Form 175).

Phase I Licensees

Phase I nationwide licensees intending to operate primary, fixed or paging operations instead of or in addition to their land mobile operations must revise their 10-year schedule for construction of their land mobile system to describe the fixed or paging system they intend to deploy. They must also certify that the financial showings and all other certifications they had previously provided in demonstrating their ability to construct and operate their nationwide land mobile system remain applicable to their planned, primary fixed or paging system, or they must revise their financial showings and provide all other relevant certifications to demonstrate their ability to construct and operate a nationwide, primary fixed or paging system. These certifications and showings may involve engineering and financial expertise. The Commission anticipates that two Phase I licensees will seek to deploy primary fixed or paging operations.

74. Phase I nationwide licensees intending to operate primary fixed systems will be required to comply with existing construction, recordkeeping, and reporting requirements, but, rather than constructing base stations (for base and mobile operations) and placing them in operation to meet their 4-, 6- and 10-year construction benchmarks, must demonstrate how their fixed stations are providing "substantial service" to the public. This demonstration of substantial service will be provided in the same form as documentation currently required for nationwide Phase I licensees providing evidence of the construction of their primary land mobile systems.

All 220 MHz Licensees

All 220 MHz licensees seeking renewal of their authorizations will be required, *inter alia*, to demonstrate that they have provided substantial service during their past license term, and submit a showing explaining why they should receive a renewal expectancy.

V. Significant Alternatives and Steps Taken by Agency to Minimize the Significant Economic Impact on a Substantial Number of Small Entities Consistent With Stated Objectives

75. The Commission's chief objectives in adopting the *220 MHz Third Report and Order* are to establish a regulatory plan for the 220 MHz service that will allow for the efficient licensing and use

of the service, to eliminate unnecessary regulatory burdens, to enhance the competitive potential of the 220 MHz service in the mobile services marketplace, to provide a wide variety of radio services to the public, and to continue to provide a home for the development of spectrally efficient technologies. A number of the Commission's original proposals were modified in order to minimize the significant economic impact on small entities consistent with these objectives, based on issues and suggestions raised in the public comment.

76. For example, the Commission made significant changes to the proposed Phase II channel band plan based on an analysis of the comments. Most of the commenters favored the assignment of larger numbers of channels to individual EA and Regional licensees than the proposed 5-channel blocks. The Commission concurred with the commenters' argument that proposed 5-channel blocks would unjustly inhibit licensees' revenue-producing ability and therefore decided to authorize 10- and 15-channel EA and Regional assignments, respectively. We concluded that adoption of a licensing scheme that provides for 10-channel and 15-channel assignments should enable Phase II licensees, many of which are likely to be small businesses, to establish more viable radio services. Commenters were also generally opposed to the Commission's use of contiguous channel assignments in our proposed Phase II band plan after having previously adopted predominantly non-contiguous assignments in Phase I. The Commission found merit in the argument of those who emphasized the difficulties that are likely to be encountered by both Phase I licensees and Phase II licensees, many of which are likely to be small businesses, if we adopted completely inconsistent Phase II and Phase I band plans. We therefore adopted a Phase II band plan that mirrored the existing Phase I plan. We concluded that adopting a Phase II band plan patterned after the Phase I plan will benefit both Phase I and Phase II licensees because Phase I licensees will be able to more easily expand on their existing authorized channels, and Phase II licensees will be able to more easily provide protection to co-channel Phase I licensees. In addition, at the suggestion of a commenter, we decided not to require EA, Regional or nationwide licensees to construct a minimum number of channels at all of their base stations.

77. In order to provide licensees with maximum flexibility to employ a variety

¹⁶ 47 U.S.C. 309(j)(4)(E).

of technologies, the Commission decided to allow them to aggregate their contiguous channels. However, in so doing the Commission agreed with the views of commenters SEA and Securicor and adopted a spectrum efficiency standard. In adopting a spectrum efficiency standard, we rejected other commenters' arguments that a standard is not necessary because licensees acquiring spectrum assigned on contiguous channels through competitive bidding will have an incentive to use that spectrum as efficiently as possible, and that adoption of a particular spectrum efficiency standard could limit the types of services that licensees would be able to provide. The Commission concluded that a standard was needed to ensure that the 220 MHz band would continue to be a home for the development of spectrum efficient technologies.

78. The Commission also attempted, wherever possible, to offer licensees the most flexibility with a minimum regulatory burden. For example, the Commission elected to allow Phase I and Phase II licensees the flexibility to conduct paging operations on a primary basis. The commenters were divided on this issue. Commenters opposed to allowing paging on a primary basis maintained that to do so would transform the 220 MHz band into merely an additional band for the provision of paging services, and that this would be unfair to existing paging licensees in other bands. These commenters argued that there are a sufficient number of paging bands already in existence and that the 220 MHz band should continue to be used to advance the development of narrowband technology. The Commission, however, decided to allow paging on a primary basis in the 220 MHz band in order to provide additional spectrum for a rapidly growing communications service and to enable 220 MHz licensees to compete more effectively in the wireless marketplace.

79. The Commission also decided to allow 220 MHz licensees to conduct fixed operations on a primary basis to provide them with the flexibility to offer a wider array of communications services to the public. Similarly, the Commission decided that 220 MHz licensees conducting geophysical telemetry operations should be permitted to obtain secondary authorizations to operate their fixed facilities on a non-interference basis to licensees authorized to operate on a primary basis. In making this decision, the Commission acknowledged concerns raised by commenters about

possible interference to primary operations, but concluded that the risk of interference from secondary, geophysical telemetry operations was minimal, and that such operations should therefore be allowed.

80. In prescribing rules for the 220 MHz service auction, we initially proposed to begin by auctioning the nationwide licenses and the Regional licenses in one simultaneous multiple round auction. We proposed to then auction the economic area (EA) licenses in a subsequent auction. The SMR Advisory Group supported this approach. After further consideration, however, we concluded that all three categories of licenses are highly interdependent. Grouping such licenses and putting them up for bid at the same time facilitates awarding licenses to bidders who value them the most highly by providing bidders, including small businesses, with information about the prices of complementary and substitutable licenses during the course of an auction. We therefore announced our plan to hold a single, simultaneous multiple round auction for all classes of licenses. We did, however, reserve the discretion to auction each of these license groupings (nationwide, Regional, EA) separately or in different combinations (e.g., nationwide and Regional together) if there are administrative reasons for doing so.

81. In establishing bidding procedures, the Commission proposed the use of the Milgrom-Wilson activity rule. We proposed a minimum activity level requiring bidders to be active on at least one-third of the MHz-pops for which they are eligible in Stage I, two-thirds of the MHz-pops for which they are eligible in Stage II, and 100 percent of the MHz-pops for which they are eligible in Stage III. The SMR Advisory Group and AMTA supported use of the Milgrom-Wilson activity rule. However, NTIA stated that requiring a 100 percent level of activity in Stage III may inhibit bidder flexibility and be unduly restrictive. We agree with NTIA and decided not to require a 100 percent level of activity in Stage III. Moreover, in order to enhance bidder flexibility at the end of the auction and to make the figures easier to administer, we eliminated the use of fractions. Thus, we adopted eligibility levels of 60 percent, 80 percent, and 98 percent, for Stages I, II, and III, respectively. This change will benefit all bidders, including small businesses.

82. In establishing auction rules for the 220 MHz service, the Commission adopted a number of provisions to support the participation of small businesses. For example, the

Commission established bidding credits and an installment payment plan, designed to increase the opportunities for small businesses to become 220 MHz service providers. In addition, the Commission established rules for the partitioning of geographic area licenses, which will increase opportunities for small businesses to participate in the 220 MHz service. Through partitioning, small businesses may acquire licenses for portions of geographic areas, a less expensive alternative to acquiring a license for an entire area.

83. The Commission initially proposed to define small business, for purposes of eligibility for such provisions as bidding credits and installment payments as follows: For companies wishing to bid on nationwide and Regional licenses, we proposed to define small businesses as those entities with \$15 million or less in average annual gross revenues for the preceding three years. For EA licenses, we proposed to define small businesses as those entities with \$6 million or less in average annual gross revenues for the preceding three years. AMTA and the SMR Advisory Group agreed with this definition. We concluded, however, that while the nationwide and Regional Phase II 220 MHz licenses would have higher build-out and operational costs than would the EA licenses, it is likely that bidders will attempt to aggregate licenses across regions or EAs to establish their markets. Thus, for example, bidders may elect to aggregate EA licenses to create a Regional market, rather than bid for the Regional license itself. In order to ensure the meaningful participation of small business entities in the auction, we adopted a two-tiered definition of small business with gross revenues limits applicable across all three categories of license. This approach will give qualifying small businesses flexibility to bid for a Regional license or, on the other hand, elect to bid for several EAs, without having to choose which type of license to bid for prior to the start of the auction. For purposes of bidding for the nationwide, Regional and EA licenses, therefore, we defined (1) a very small business as an entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years of no more than \$3 million and (2) a small business as an entity that, together with affiliates and controlling principals, has average gross revenues for the preceding three years of no more than \$15 million. Defining a "very small business" at the \$3 million threshold, rather than at the \$6 million threshold, is consistent with the

definitions successfully used in the 900 MHz SMR service, where build-out costs are similar to those in the 220 MHz service. Bidding credits are based upon this two-tiered approach.

84. We disagreed with the suggestion of Metricom that we should increase the gross revenues threshold of our small business definition to \$25 million, because, based upon our experience in the 900 MHz SMR auction, such an increase would be far too inclusive. In the 900 MHz SMR auction, we established small business definitions of \$15 million and \$3 million. Of the 128 applicants that qualified to participate in the auction, 101 qualified for the small business or very small business bidding credits. Because we believe the cost of building out a 220 MHz system most closely resembles the cost of a 900 MHz SMR system, and because it would substantially dilute the value of the small business preferences for virtually all applicants to qualify for them, we declined to adopt the Metricom proposal.

85. For purposes of determining small business status, we will attribute the gross revenues of the applicant, all controlling principals of the applicant, and their affiliates. This is a much simpler approach than we utilized in broadband PCS, because it does not require a control group. We will still require, however, that in order for an applicant to qualify as a small business, qualifying small business principals must maintain "control" of the applicant, including both *de facto* and *de jure* control. Thus, small businesses will have less difficulty determining their eligibility. We declined to adopt Comtech's suggestion that, for determining whether an entity qualifies as a small business, revenues and assets of investors holding more than 25 percent of an applicant's voting stock and revenues and assets of all affiliates should be attributable to the applicant. Our approach is a more accurate indicator of the control of an applicant.

86. With respect to bidding credits, in order to ensure that small businesses have a realistic opportunity to acquire Phase II 220 MHz nationwide and Regional licenses, we proposed a 40 percent bidding credit for all qualified designated entities. For Phase II 220 MHz nationwide licenses, we proposed, *inter alia*, to offer this bidding credit on only one of the available channel blocks. For Phase II 220 MHz Regional licenses, we proposed to offer the bidding credit on all available channel blocks. Because we believed that the Phase II 220 MHz EA licenses are similar in their number and in the level of incumbency to the licenses offered in

the 900 MHz SMR service, we proposed offering the same 10 percent bidding credit to qualified small businesses bidding on Phase II 220 MHz EA licenses as we did in the 900 MHz SMR auction. SMR Advisory Group supported these proposals. AMTA, U.S. MobilComm, Roamer, and Incom also supported these proposals, although they supported bidding credits solely for regional and EA licenses. Comtech agreed with a 40 percent bidding credit for Regional licenses, but suggested this credit should be extended to all nationwide licenses as well.

87. We concluded, however, that small businesses are in the best position to decide which blocks of licenses to bid on. As we have stated, based upon our experience in prior auctions, it is very likely that bidders will attempt to aggregate Regional and EA licenses in the development of their bidding strategies, particularly if these licenses are auctioned together. Thus, in order to enhance bidder flexibility, we elected to establish bidding credits consistent with our two-tiered definition of small business that will apply to all three license groups. For very small businesses that, together with affiliates and controlling principals, have average gross revenues for the three preceding years of not more than \$3 million, we will give a 25 percent bidding credit, applicable for all three categories of licenses. Likewise, we will give small businesses that, together with affiliates and controlling principals, have average gross revenues for the three preceding years of not more than \$15 million, a bidding credit of 10 percent, available for all three categories of licenses. While the 25 percent bidding credit is less than originally proposed for the nationwide and Regional licenses, we believe it is appropriate since we are now going to offer bidding credits generally for all channel blocks. Moreover, we had favorable results—*i.e.*, a significant number of small business applicants were winning bidders—in previous auctions with bidding credits at this level or lower.

88. We initially proposed the use of installment payments and reduced down payments for all small businesses bidding for any of the Phase II 220 MHz nationwide, Regional and EA licenses. The SMR Advisory Group supported these positions. We also tentatively concluded that reduced upfront payments for small businesses would be unnecessary.

89. We adopted an installment payment plan for small businesses and very small businesses participating in the 220 MHz auction. We declined to provide very small businesses with a

longer interest-only period than the two-year period provided for small businesses. We determined that a two-year interest-only period in the single plan we adopted provides all small businesses with the appropriate level of financing to overcome difficulties in attracting capital. Given that we are making additional financial assistance available to very small businesses in the form of a 25 percent bidding credit, we concluded that a longer interest-only period is not needed. We also concluded that small businesses should not be permitted to pay a reduced down payment. As we stated in the case of the broadband PCS D, E and F Block auction, we believe that a substantial down payment is necessary to ensure that winning bidders have the financial capability of building out their systems, and will provide us with stronger assurance against defaults than a reduced down payment. Increasing the amount of the bidder's funds at risk in the event of default discourages insincere bidding and therefore increases the likelihood that licenses are awarded to parties who are best able to serve the public. We also believe that a 20 percent down payment should cover the required payments in the unlikely event of default.

90. Finally, we elected not to adopt a spectrum set-aside for designated entities, including small businesses. Because there will be both a large number and a large variety of licenses available in the Phase II 220 MHz auction, we decided not to adopt an entrepreneur's block for this service. Small businesses, we concluded, will have a significant opportunity to compete for Phase II 220 MHz licenses, particularly given the special provisions adopted for small businesses.

91. In making its various decisions in this proceeding, the Commission considered all available alternatives. It believes that the rules it has adopted in this decision represent the best balance of providing licensees, many of whom are small businesses, with the most flexibility and the smallest regulatory burden, and enables them to offer a variety of radio services to the public and compete effectively in the mobile communications marketplace.

VI. Report to Congress

92. The Commission shall send a copy of this Final Regulatory Flexibility Analysis (FRFA) along with this *220 MHz Third Report and Order*, in a report to Congress pursuant to 5 U.S.C. 801(a)(1)(A). A copy of this FRFA will also be published in the **Federal Register**.

Ordering Clauses

93. Authority for issuance of this Third Report and Order is contained in sections 4(i), 303(r), 309(j), and 332 of the Communications Act of 1934, 47 U.S.C. 154(i), 303(r), 309(j), 332.

94. Accordingly, *it is ordered* that part 90 of the Commission's rules, 47 CFR part 90, *is amended* as set forth below, effective August 21, 1997.

95. *It is further ordered* that the Petitions for Reconsideration filed by Columbia Cellular Corporation, PLMRS Narrowband Corp. and 360 Mobile Data Joint Venture on August 6, 1993, *are dismissed* as moot.

96. *It is further ordered* that, pursuant to 47 U.S.C. 155(c), the Chief, Wireless Telecommunications Bureau, *is granted delegated authority* to implement and modify auction procedures in the Phase II 220 MHz service, including the general design and timing of an auction; the number and grouping of authorizations to be offered in any particular auction; the manner of submitting bids; the amount of minimum opening bids and bid

increments; activity and stopping rules; and application and payment requirements, including the amount of upfront payments; and to announce such procedures by Public Notice.

97. *It is further ordered* that all pending nationwide and non-nationwide 220 MHz applications, together with the appropriate filing fees, will be returned to applicants, without prejudice.

98. *It is further ordered* that a Public Notice will be issued announcing the acceptance of applications for authorizations on Channels 161-170 and Channels 181-185 after August 21, 1997.

99. *It is further ordered* that applications for temporary, secondary authorizations for geophysical telemetry operations will be accepted beginning August 21, 1997.

List of Subjects

47 CFR Part 2

Radio.

47 CFR Part 90

Radio.

Federal Communications Commission.

William F. Caton,
Acting Secretary.

Rule Changes

Parts 2 and 90 of Title 47 of the Code of Federal Regulations are amended as follows:

PART 2—FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

1. The authority citation for part 2 continues to read as follows:

Authority: Secs. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. 154, 302, 303, and 307, unless otherwise noted.

2. Section 2.106, the Table of Frequency Allocations, is amended as follows:

- a. Revise entries for 220-222 MHz;
- b. Remove international footnote 625; and
- c. Add United States footnote US335.

§ 2.106 Table of Frequency Allocations.

* * * * *

International table			United States table		FCC use designators	
Region 1—allocation MHz	Region 2—allocation MHz	Region 3—allocation MHz	Government	Non-Government	Rule part(s)	Special-use frequencies
(1)	(2)	(3)	Allocation MHz	Allocation MHz		
(4)	(5)	(6)	(7)	(8)	(9)	(10)
*	*	*	*	*	*	*
220-222 BRO-AD-CAST-ING	220-222 AMA-TEUR FIXED MO-BILE Radio-location 627	220-222 FIXED MO-BILE BROADCAST-ING	220-222 FIXED LAND MOBILE Radiolocation 627	220-222 FIXED LAND MOBILE	PRIVATE LAND MO-BILE (90)	
621 623 628 629 *	*	626	G2 US335	627 US335		*
		*	*	*	*	*

United States (US) Footnotes

* * * * *

US335 The primary Government and non-Government allocations for the various segments of the 220-222 MHz band are divided as follows: (1) the 220.0-220.55/221.0-221.55, 220.6-220.8/221.6-221.8, 220.85-220.90/221.85-221.90 and 220.925-221.0/221.925-222.0 MHz bands (Channels 1-110, 121-160, 171-180 and 186-200, respectively) are available for exclusive non-Government use; (2) the 220.55-220.60/221.55-221.60 MHz bands (Channels 111-120) are available for exclusive Government use; and (3) the 220.80-220.85/221.80-

221.85 and 220.900-220.925/221.900-221.925 MHz bands (Channels 161-170 and 181-185, respectively) are available for shared Government and non-Government use. The exclusive non-Government band segments are also available for temporary fixed geophysical telemetry operations on a secondary basis to the fixed and mobile services.

* * * * *

PART 90—PRIVATE LAND MOBILE RADIO SERVICES

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

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

2. Section 90.7 is amended by revising the definitions for "EA-based or EA license" and "Economic Areas (EAs)," and by adding definitions for "Geophysical Telemetry," "Regional Economic Area Groupings (REAGs),"

“Regional License,” and “220 MHz Service” in alphabetical order to read as follows:

§ 90.7 Definitions.

* * * * *

EA-based or EA license. A license authorizing the right to use a specified block of SMR and 220–222 MHz spectrum within one of 175 Economic Areas (EAs) as defined by the Department of Commerce Bureau of Economic Analysis. The EA Listings and the EA Map are available for public inspection at the Wireless Telecommunications Bureau’s public reference room, Room 5608, 2025 M St. NW, Washington, DC 20554 and Office of Operations—Gettysburg, 1270 Fairfield Road, Gettysburg, PA 17325.

Economic Areas (EAs). A total of 175 licensing regions based on the United States Department of Commerce Bureau of Economic Analysis Economic Areas defined as of February 1995, with the following exceptions:

(1) Guam and Northern Mariana Islands are licensed as a single EA-like area (identified as EA 173 in the 220 MHz Service);

(2) Puerto Rico and the U.S. Virgin Islands are licensed as a single EA-like area (identified as EA 174 in the 220 MHz Service); and

(3) American Samoa is licensed as a single EA-like area (identified as EA 175 in the 220 MHz Service).

* * * * *

Geophysical Telemetry. Telemetry involving the simultaneous transmission of seismic data from numerous locations to a central receiver and digital recording unit.

* * * * *

Regional Economic Area Groupings (REAGs). The six geographic areas for Regional licensing in the 220–222 MHz band, based on the United States Department of Commerce Bureau of Economic Analysis Economic Areas (see 60 FR 13114 (March 10, 1995)) defined as of February 1995, and specified as follows:

REAG 1 (Northeast): REAG 1 consists of the following EAs: EA 001 (Bangor, ME) through EA 011 (Harrisburg-Lebanon-Carlisle, PA); and EA 054 (Erie, PA).

REAG 2 (Mid-Atlantic): REAG 2 consists of the following EAs: EA 012 (Philadelphia-Wilmington-Atlantic City, PA–NJ–DE–MD) through EA 026 (Charleston-North Charleston, SC); EA 041 (Greenville-Spartanburg-Anderson, SC–NC); EA 042 (Asheville, NC); EA 044 (Knoxville, TN) through EA 053 (Pittsburgh, PA–WV); and EA 070 (Louisville, KY–IN).

REAG 3 (Southeast): REAG 3 consists of the following EAs: EA 027 (Augusta-Aiken, GA–SC) through EA 040 (Atlanta, GA–AL–NC); EA 043 (Chattanooga, TN–GA); EA 069 (Evansville–Henderson, IN–KY–IL); EA 071 (Nashville, TN–KY) through EA 086 (Lake Charles, LA); EA 088 (Shreveport-Bossier City, LA–AR) through EA 090 (Little Rock-North Little Rock, AR); EA 095 (Jonesboro, AR–MO); EA 096 (St. Louis, MO–IL); and EA 174 (Puerto Rico and the U.S. Virgin Islands).

REAG 4 (Great Lakes): REAG 4 consists of the following EAs: EA 055 (Cleveland-Akron, OH–PA) through EA 068 (Champaign-Urbana, IL); EA 097 (Springfield, IL–MO); and EA 100 (Des Moines, IA–IL–MO) through EA 109 (Duluth-Superior, MN–WI).

REAG 5 (Central/Mountain): REAG 5 consists of the following EAs: EA 087 (Beaumont-Port Arthur, TX); EA 091 (Forth Smith, AR–OK) through EA 094 (Springfield, MO); EA 098 (Columbia, MO); EA 099 (Kansas City, MO–KS); EA 110 (Grand Forks, ND–MN) through EA 146 (Missoula, MT); EA 148 (Idaho Falls, ID–WY); EA 149 (Twin Falls, ID); EA 152 (Salt Lake City-Ogden, UT–ID); and EA 154 (Flagstaff, AZ–UT) through EA 159 (Tucson, AZ).

REAG 6 (Pacific): REAG 6 consists of the following EAs: EA 147 (Spokane, WA–ID); EA 150 (Boise City, ID–OR); EA 151 (Reno, NV–CA); EA 153 (Las Vegas, NV–AZ–UT); EA 160 (Los Angeles-Riverside-Orange County, CA–AZ) through EA 173 (Guam and the Northern Mariana Islands); and EA 175 (American Samoa).

Regional License. A license authorizing the right to use a specified block of 220–222 MHz spectrum within one of six Regional Economic Area Groupings (REAGs).

* * * * *

220 MHz Service. The radio service for the licensing of frequencies in the 220–222 MHz band.

* * * * *

3. Section 90.41(a) is revised to read as follows:

§ 90.41 Disaster relief organizations.

(a) *Eligibility.* Organizations established for disaster relief purposes having an emergency radio communications plan are eligible to hold authorizations to operate radio stations for the transmission of communications relating to the safety of life or property, the establishment and maintenance of temporary relief facilities, and the alleviation of emergency situations during periods of actual or impending emergency, or disaster, and until substantially normal

conditions are restored. In addition, the stations may be used for training exercises, incidental to the emergency communications plan, and for operational communications of the disaster relief organization or its chapter affiliates.

* * * * *

4. Section 90.137 is amended by revising paragraph (a)(3) to read as follows:

§ 90.137 Applications for operation at temporary locations.

(a) * * *

(3) Applications for operation at temporary locations exceeding 180 days must be accompanied by evidence of frequency coordination, except that applications for operation at temporary locations exceeding 180 days by applicants using 220–222 MHz spectrum for geophysical telemetry operations need not be accompanied by evidence of frequency coordination.

* * * * *

5. Section 90.203 is amended by adding paragraph (k) to read as follows:

§ 90.203 Type acceptance required.

* * * * *

(k)(1) For transmitters operating on frequencies in the 220–222 MHz band, type acceptance will only be granted for equipment with channel bandwidths up to 5 kHz, except that type acceptance will be granted for equipment operating on 220–222 MHz band Channels 1 through 160 (220.0025 through 220.7975/221.0025 through 221.7975), 171 through 180 (220.8525 through 220.8975/221.8525 through 221.8975), and 186 through 200 (220.9275 through 220.9975/221.9275 through 221.9975) with channel bandwidths greater than 5 kHz if the equipment meets the following spectrum efficiency standard: Applications for Part 90 type acceptance of transmitters designed to operate on frequencies in the 220–222 MHz band must include a statement that the equipment meets a spectrum efficiency standard of at least one voice channel per 5 kHz of channel bandwidth (for voice communications), and a data rate of at least 4,800 bits per second per 5 kHz of channel bandwidth (for data communications). Type acceptance for transmitters operating on 220–222 MHz band Channels 1 through 160 (220.0025 through 220.7975/221.0025 through 221.7975), 171 through 180 (220.8525 through 220.8975/221.8525 through 221.8975), and 186 through 200 (220.9275 through 220.9975/221.9275 through 221.9975) with channel bandwidths greater than 5 kHz will be granted without the requirement that a statement be included that the

equipment meets the spectrum efficiency standard if the requests for type acceptance of such transmitters are filed after December 31, 2001.

(2) Type acceptance may be granted on a case-by-case basis by the Commission's Equipment Authorization Division for equipment operating on 220–222 MHz band Channels 1 through 160 (220.0025 through 220.7975/221.0025 through 221.7975), 171 through 180 (220.8525 through 220.8975/221.8525 through 221.8975), and 186 through 200 (220.9275 through 220.9975/221.9275 through 221.9975) with channel bandwidths greater than 5 kHz and *not* satisfying the spectrum efficiency standard identified in paragraph (k)(1) of this section, if requests for Part 90 type acceptance of such transmitters are accompanied by a technical analysis that satisfactorily demonstrates that the transmitters will provide more spectral efficiency than that which would be provided by use of the spectrum efficiency standard.

6. Section 90.701 is revised to read as follows:

§ 90.701 Scope.

(a) Frequencies in the 220–222 MHz band are available for land mobile and fixed use for both Government and non-Government operations. This subpart sets out the regulations governing the licensing and operation of non-Government systems operating in the 220–222 MHz band. It includes eligibility requirements, application procedures, and operational and technical standards for stations licensed in these bands. The rules in this subpart are to be read in conjunction with the applicable requirements contained elsewhere in this part; however, in case of conflicts, the provisions of this subpart shall govern with respect to licensing and operation in this frequency band.

(b)(1) Licensees granted initial authorizations for operations in the 220–222 MHz band from among applications filed on or before May 24, 1991 are referred to in this subpart as "Phase I" licensees;

(2) Applicants that filed initial applications for operations in the 220–222 MHz band on or before May 24, 1991 are referred to in this subpart as "Phase I" applicants; and

(3) All assignments, operations, stations, and systems of licensees granted authorizations from among applications filed for operations in the 220–222 MHz band on or before May 24, 1991 are referred to in this subpart as "Phase I" assignments, operations, stations, and systems, respectively.

(c)(1) Licensees granted initial authorizations for operations in the 220–222 MHz band from among applications filed after May 24, 1991 are referred to in this subpart as "Phase II" licensees;

(2) Applicants that filed initial applications for operations in the 220–222 MHz band after May 24, 1991 are referred to in this subpart as "Phase II" applicants; and

(3) All assignments, operations, stations, and systems of licensees granted authorizations from among applications filed for operations in the 220–222 MHz band after May 24, 1991 are referred to in this subpart as "Phase II" assignments, operations, stations, and systems, respectively.

(d) The rules in this subpart apply to both Phase I and Phase II licensees, applicants, assignments, operations, stations, and systems, unless otherwise specified.

7. Section 90.705 is revised to read as follows:

§ 90.705 Forms to be used.

Phase II applications for EA, Regional, or Nationwide radio facilities under this subpart must be prepared in accordance with §§ 90.1009 and 90.1013. Phase II applications for radio facilities operating on public safety/mutual aid channels (Channels 161 through 170) or Emergency Medical Radio Service channels (Channels 181 through 185) under this subpart must be prepared on FCC Form 600 and submitted or filed in accordance with § 90.127.

8. Paragraphs (a) and (c) of § 90.709 are revised and paragraph (e) is added to read as follows:

§ 90.709 Special limitations on amendment of applications and on assignment or transfer of authorizations licensed under this subpart.

(a) Except as indicated in paragraph (b) of this section, the Commission will not consent to the following:

(1) Any request to amend an application so as to substitute a new entity as the applicant;

(2) Any application to assign or transfer a license for a Phase I, non-nationwide system prior to the completion of construction of facilities; or

(3) Any application to transfer or assign a license for a Phase I nationwide system before the licensee has constructed at least 40 percent of the proposed system pursuant to the provisions of § 90.725(a) or § 90.725(h), as applicable.

(e) The assignee or transferee of a Phase I nationwide system is subject to

the construction benchmarks and reporting requirements of § 90.725. The assignee or transferee of a Phase I nationwide system is not subject to the entry criteria described in § 90.713.

* * * * *

(e) The assignee or transferee of a Phase II system is subject to the provisions of § 90.1017 and § 1.2111(a) of this chapter.

9. Section 90.711 is revised to read as follows:

§ 90.711 Processing of Phase II applications.

(a) Phase II applications for authorizations on Channels 166 through 170 and Channels 181 through 185 will be processed on a first-come, first-served basis. When multiple applications are filed on the same day for these frequencies in the same geographic area, and insufficient frequencies are available to grant all applications (*i.e.*, if all applications were granted, violation of the station separation provisions of § 90.723(i) would result), these applications will be considered mutually exclusive and will be subject to random selection procedures pursuant to § 1.972 of this chapter.

(1) All applications will first be considered to determine whether they are substantially complete and acceptable for filing. If so, they will be assigned a file number and put in pending status. If not, they will be dismissed.

(2) Except as otherwise provided in this section, all applications in pending status will be processed in the order in which they are received, determined by the date on which the application was received by the Commission in its Gettysburg, Pennsylvania office (or the address set forth at § 1.1102 of this chapter for applications requiring the fees established by part 1, subpart G of this chapter).

(3) Each application that is accepted for filing will then be reviewed to determine whether it can be granted. Frequencies will be assigned by the Commission pursuant to the provisions of § 90.723.

(4) An application which is dismissed will lose its place in the processing line.

(5) If an application is returned for correction and resubmitted and received by the Commission within 60 days from the date on which it was returned to the applicant, it will retain its place in the processing line. If it is not received within 60 days, it will lose its place in the processing line.

(b) All applications for Channels 161 through 165 that comply with the applicable rules of this part shall be

granted. Licensees operating on such channels shall cooperate in the selection and use of frequencies and resolve any instances of interference in accordance with the provisions of § 90.173.

(c) Phase II applications for authorization on all non-Government channels other than Channels 161 through 170 and 181 through 185 shall be processed in accordance with the provisions of subpart W of this part.

10. Section 90.713 is revised to read as follows:

§ 90.713 Entry criteria.

(a) As set forth in § 90.717, four 5-channel blocks are available for nationwide, commercial use to non-Government, Phase I applicants. Applicants for these nationwide channel blocks must comply with paragraphs (b), (c), and (d) of this section.

(b)(1) An applicant must include certification that, within ten years of receiving a license, it will construct a minimum of one base station in at least 70 different geographic areas designated in the application; that base stations will be located in a minimum of 28 of the 100 urban areas listed in § 90.741; and that each base station will have all five assigned nationwide channels constructed and placed in operation (regularly interacting with mobile and/or portable units).

(2) An applicant must include certification that it will meet the construction requirements set forth in § 90.725.

(3) An applicant must include a ten-year schedule detailing plans for construction of the proposed system.

(4) An applicant must include an itemized estimate of the cost of constructing 40 percent of the system and operating the system during the first four years of the license term.

(5) An applicant must include proof that the applicant has sufficient financial resources to construct 40 percent of the system and operate the proposed land mobile system for the first four years of the license term; *i.e.*, that the applicant has net current assets sufficient to cover estimated costs or a firm financial commitment sufficient to cover estimated costs.

(c) An applicant relying on personal or internal resources for the showing required in paragraph (b) of this section must submit independently audited financial statements certified within one year of the date of the application showing net current assets sufficient to meet estimated construction and operating costs. An applicant must also submit an unaudited balance sheet, current within 60 days of the date of

submission, that clearly shows the continued availability of sufficient net current assets to construct and operate the proposed system, and a certification by the applicant or an officer of the applicant organization attesting to the validity of the balance sheet.

(d) An applicant submitting evidence of a firm financial commitment for the showing required in paragraph (b) of this section must obtain the commitment from a bona fide commercially acceptable source, *e.g.*, a state or federally chartered bank or savings and loan institution, other recognized financial institution, the financial arm of a capital equipment supplier, or an investment banking house. If the lender is not a state or federally chartered bank or savings and loan institution, other recognized financial institution, the financial arm of a capital equipment supplier, or an investment banking house, the lender must also demonstrate that it has funds available to cover the total commitments it has made. The lender's commitment shall contain a statement that the lender:

(1) Has examined the financial condition of the applicant including an audited financial statement, and has determined that the applicant is creditworthy;

(2) Has examined the financial viability of the proposed system for which the applicant intends to use the commitment; and

(3) Is willing, if the applicant is seeking a Phase I, commercial nationwide license, to provide a sum to the applicant sufficient to cover the realistic and prudent estimated costs of construction of 40 percent of the system and operation of the system for the first four years of the license term.

(e) A Phase II applicant for authorization in a geographic area for Channels 166 through 170 in the public safety/mutual aid category may not have any interest in another pending application in the same geographic area for Channels 166 through 170 in the public safety/mutual aid category, and a Phase II applicant for authorization in a geographic area for channels in the Emergency Medical Radio Service (EMRS) category may not have any interest in another pending application in the same geographic area for channels in the EMRS category.

11. Section 90.717 is revised to read as follows:

§ 90.717 Channels available for nationwide systems in the 220–222 MHz band.

(a) Channels 51–60, 81–90, and 141–150 are 10-channel blocks available to

non-Government applicants only for nationwide Phase II systems.

(b) Channels 21–25, 26–30, 151–155, and 156–160 are 5-channel blocks available to non-Government applicants only for nationwide, commercial Phase I systems.

(c) Channels 111–115 and 116–120 are 5-channel blocks available for Government nationwide use only.

12. Section 90.719 is revised to read as follows:

§ 90.719 Individual channels available for assignment in the 220–222 MHz band.

(a) Channels 171 through 200 are available to both Government and non-Government Phase I applicants, and may be assigned singly or in contiguous channel groups.

(b) Channels 171 through 180 are available for any use by Phase I applicants consistent with this subpart.

(c) Channels 181 through 185 are set aside for Phase II Emergency Medical Radio Service (EMRS) use under subpart B of this part.

(d) Channels 161 through 170 and 181 through 185 are the only 220–222 MHz channels available to Phase II non-nationwide, Government users.

13. Section 90.720 is revised to read as follows:

§ 90.720 Channels available for public safety/mutual aid.

(a) Part 90 licensees whose licenses reflect a two-letter radio service code beginning with the letter "P" (except for licensees whose licenses reflect a two-letter radio service code beginning with the letters "PS" and are not eligible under §§ 90.35, 90.37, 90.41, and 90.45) are authorized by this rule to use mobile and/or portable units on Channels 161–170 throughout the United States, its territories, and possessions to transmit:

(1) Communications relating to the immediate safety of life;

(2) Communications to facilitate interoperability among public safety entities and Special Emergency Radio Service (SERS) entities eligible under §§ 90.35, 90.37, 90.41 and 90.45; or

(3) Communications on behalf of and by members of organizations established for disaster relief purposes having an emergency radio communications plan (*i.e.*, licensees eligible under § 90.41) for the transmission of communications relating to the safety of life or property, the establishment and maintenance of temporary relief facilities, and the alleviation of emergency conditions during periods of actual or impending emergency, or disaster, until substantially normal conditions are restored; for limited training exercises incidental to an emergency radio

communications plan, and for necessary operational communications of the disaster relief organization or its chapter affiliates.

(b) Any Government entity and any non-Government entity eligible to obtain a license under subpart B of this part or eligible to obtain a license under §§ 90.35, 90.37, 90.41 and 90.45 is also eligible to obtain a license for base/mobile operations on Channels 161 through 170. Base/mobile or base/portable communications on these channels that do not relate to the immediate safety of life or to communications interoperability among public safety entities and the above-specified SERS entities, may only be conducted on a secondary non-interference basis to such communications.

14. Section 90.721 is revised to read as follows:

§ 90.721 Other channels available for non-nationwide systems in the 220–222 MHz band.

(a) The channel groups listed in the following Table are available to both Government and non-Government Phase I applicants for trunked operations or operations of equivalent or greater efficiency for non-commercial or commercial operations.

TABLE 1.—PHASE I TRUNKED CHANNEL GROUPS

Group No.	Channel Nos.
1	1–31–61–91–121
2	2–32–62–92–122
3	3–33–63–93–123
4	4–34–64–94–124
5	5–35–65–95–125
6	6–36–66–96–126
7	7–37–67–97–127
8	8–38–68–98–128
9	9–39–69–99–129
10	10–40–70–100–130
11	11–41–71–101–131
12	12–42–72–102–132
13	13–43–73–103–133
14	14–44–74–104–134
15	15–45–75–105–135
16	16–46–76–106–136
17	17–47–77–107–137
18	18–48–78–108–138
19	19–49–79–109–139
20	20–50–80–110–140

(b) The channels listed in the following Table are available to non-Government applicants for Phase II assignments in Economic Areas (EAs) and Regional Economic Area Groupings (REAGs) (see §§ 90.761 and 90.763).

TABLE 2.—PHASE II EA AND REGIONAL CHANNEL ASSIGNMENTS

Assignment	Assignment area	Group Nos. (from table 1)	Channel Nos.
A	EA	2 and 13.	171–180
B	EA	3 and 16.	
C	EA	5 and 18.	
D	EA	8 and 19.	
E	EA	
F	REAG	1, 6, and 11.	186–200
G	REAG	4, 9, and 14.	
H	REAG	7, 12, and 17.	
I	REAG	10, 15, and 20.	
J	REAG	

15. Section 90.723 is revised to read as follows:

§ 90.723 Selection and assignment of frequencies.

(a) Phase II applications for frequencies in the 220–222 MHz band shall specify whether their intended use is for 10-channel nationwide systems, 10-channel EA systems, 15-channel Regional systems, public safety/mutual aid use, or EMRS use. Phase II applicants for frequencies for public safety/mutual aid use or EMRS use shall specify the number of frequencies requested. All frequencies in this band will be assigned by the Commission.

(b) Phase II channels will be assigned pursuant to §§ 90.717, 90.719, 90.720, 90.721, 90.761 and 90.763.

(c) Phase II applicants for public safety/mutual aid and EMRS channels will be assigned only the number of channels justified to meet their requirements.

(d) Phase I base or fixed station receivers utilizing 221–222 MHz frequencies assigned from Sub-band A as designated in § 90.715(b) will be geographically separated from those Phase I base or fixed station transmitters utilizing 220–221 MHz frequencies removed 200 kHz or less and assigned from Sub-band B as follows:

GEOGRAPHIC SEPARATION OF SUB-BAND A; BASE OR FIXED STATION RECEIVERS AND SUB-BAND B; BASE OR FIXED STATION TRANSMITTERS EFFECTIVE

Separation distance (kilometers)	Radiated power (watts) ¹
0.0–0.3	(²)
0.3–0.5	5
0.5–0.6	10
0.6–0.8	20
0.8–2.0	25
2.0–4.0	50
4.0–5.0	100
5.0–6.0	200

GEOGRAPHIC SEPARATION OF SUB-BAND A; BASE OR FIXED STATION RECEIVERS AND SUB-BAND B; BASE OR FIXED STATION TRANSMITTERS EFFECTIVE—Continued

Separation distance (kilometers)	Radiated power (watts) ¹
Over 6.0	500

¹ Transmitter peak envelope power shall be used to determine effective radiated power.

² Stations separated by 0.3 km or less shall not be authorized. This table does not apply to the low-power channels 196–200. See § 90.729(c).

(e) Phase II licensees authorized on 220–221 MHz frequencies assigned from Sub-band B will be required to geographically separate their base station or fixed station transmitters from the base station or fixed station receivers of Phase I licensees authorized on 221–222 MHz frequencies 200 kHz removed or less in Sub-band A in accordance with the Table in paragraph (d) of this section.

(f) Phase II licensees with base or fixed stations transmitting on 220–221 MHz frequencies assigned from Sub-band B and Phase II licensees with base or fixed station stations receiving on Sub-band A 221–222 MHz frequencies, if such transmitting and receiving frequencies are 200 kHz or less removed from one another, will be required to coordinate the location of their base stations or fixed stations to avoid interference and to cooperate to resolve any instances of interference in accordance with the provisions of § 90.173(b).

(g) A mobile station is authorized to transmit on any frequency assigned to its associated base station. Mobile units not associated with base stations (see § 90.720(a)) must operate on “mobile” channels.

(h) A licensee’s fixed station is authorized to transmit on any of the licensee’s assigned base station frequencies or mobile station frequencies.

(i) Except for nationwide assignments, the separation of co-channel Phase I base stations, or fixed stations transmitting on base station frequencies, shall be 120 kilometers. Except for Phase I licensees seeking license modification in accordance with the provisions of §§ 90.751 and 90.753, shorter separations between such stations will be considered by the Commission on a case-by-case basis upon submission of a technical analysis indicating that at least 10 dB protection will be provided to an existing Phase I station’s predicted 38 dBu signal level

contour. The existing Phase I station's predicted 38 dBu signal level contour shall be calculated using the F(50,50) field strength chart for Channels 7-13 in § 73.699 (Fig. 10) of this chapter, with a 9 dB correction factor for antenna height differential. The 10 dB protection to the existing Phase I station's predicted 38 dBu signal level contour shall be calculated using the F(50,10) field strength chart for Channels 7-13 in § 73.699 (Fig. 10a) of this chapter, with a 9 dB correction factor for antenna height differential.

16. Section 90.725 is amended by revising the section heading and paragraphs (f) and (h) to read as follows:

§ 90.725 Construction requirements for Phase I licensees.

* * * * *

(f) Licensees authorized Phase I non-nationwide systems, or authorized on Channels 161 through 170 or Channels 181 through 185, must construct their systems (*i.e.*, have all specified base stations constructed with all channels) and place their systems in operation, or commence service in accordance with the provisions of § 90.167, within twelve months of the initial license grant date. Authorizations for systems not constructed and placed in operation, or having commenced service, within twelve months from the date of initial license grant cancel automatically.

* * * * *

(h) The requirements and conditions of paragraphs (a) through (e) and paragraph (g) of this section apply to nationwide licensees that construct and operate stations for fixed or paging operations on a primary basis instead of, or in addition to, stations for land mobile operations on a primary basis except that, in satisfying the base station construction and placed in operation requirements of paragraph (a) of this section and the system progress report requirements of paragraphs (d) and (e) of this section, licensees operating stations for fixed operation on a primary basis instead of, or in addition to, stations for land mobile or paging operations on a primary basis in a given geographic area may demonstrate how such fixed stations are providing substantial service to the public in those geographic areas.

17. The section heading of § 90.727 is revised to read as follows:

§ 90.727 Extended implementation schedules for Phase I licensees.

* * * * *

18. Section 90.729 is revised to read as follows:

§ 90.729 Limitations on power and antenna height.

(a) The permissible effective radiated power (ERP) with respect to antenna heights for land mobile, paging, or fixed stations transmitting on frequencies in the 220-221 MHz band shall be determined from the following Table. These are maximum values and applicants are required to justify power levels requested.

ERP VS. ANTENNA HEIGHT TABLE 2

Antenna height above average terrain (HAAT), meters	Effective radiated power, watts ¹
Up to 150	500
150 to 225	250
225 to 300	125
300 to 450	60
450 to 600	30
600 to 750	20
750 to 900	15
900 to 1050	10
Above 1050	5

¹ Transmitter PEP shall be used to determine ERP.

² These power levels apply to stations used for land mobile, paging, and fixed operations.

(b) The maximum permissible ERP for mobile units is 50 watts. Portable units are considered as mobile units. Licensees operating fixed stations or paging base stations transmitting on frequencies in the 221-222 MHz band may not operate such fixed stations or paging base stations at power levels greater than 50 watts ERP, and may not transmit from antennas that are higher than 7 meters above ground, except that transmissions from antennas that are higher than 7 meters above ground will be permitted if the effective radiated power of such transmissions is reduced below 50 watts ERP by 20 log₁₀(h/7) dB, where h is the height of the antenna above ground, in meters.

(c) Base station and fixed station transmissions on base station transmit Channels 196-200 are limited to 2 watts ERP and a maximum antenna height of 6.1 meters (20 ft) above ground. Licensees authorized on these channels may operate at power levels above 2 watts ERP or with a maximum antenna height greater than 6.1 meters (20 ft) above ground if:

(1) They obtain the concurrence of all Phase I and Phase II licensees with base stations or fixed stations receiving on base station receive Channels 1-40 and located within 6 km of their base station or fixed station; and

(2) Their base station or fixed station is not located in the United States/ Mexico or United States/Canada border areas.

§ 90.731 [Removed]

19. Section 90.731 is removed.
 20. Section 90.733 is amended by removing paragraph (d), revising paragraphs (a)(1), and (c) and adding new paragraphs (d), (e), (f), (g), (h), and (i) to read as follows:

§ 90.733 Permissible operations.

(a) * * *

(1)(i) For government and non-government land mobile operations, *i.e.*, for base/mobile and mobile relay transmissions, on a primary basis; or

(ii) For the following operations instead of or in addition to a licensee's land mobile operations: One-way or two-way paging operations on a primary basis by all non-Government Phase II licensees, fixed operations on a primary basis by all non-Government Phase II licensees and all Government licensees, one-way or two-way paging or fixed operations on a primary basis by all non-Government Phase I licensees, except that before a non-Government Phase I licensee may operate one-way or two-way paging or fixed systems on a primary basis instead of or in addition to its land mobile operations, it must meet the following requirements:

(A) A nationwide Phase I licensee must:

(1) Meet its two-year benchmark for the construction of its land mobile system base stations as prescribed in § 90.725(a); and

(2) Provide a new 10-year schedule, as required in § 90.713(b)(3), for the construction of the fixed and/or paging system it intends to construct instead of, or in addition to, its nationwide land mobile system; and

(3) Certify that the financial showings and all other certifications provided in demonstrating its ability to construct and operate its nationwide land mobile system, as required in §§ 90.713 (b), (c) and (d), remain applicable to the nationwide system it intends to construct consisting of fixed and/or paging operations on a primary basis instead of, or in addition to, its land mobile operations; or

(4) In lieu of providing the requirements of paragraph (a)(1)(ii)(A)(3) of this section, provide the financial showings and all other certifications required in §§ 90.713 (b), (c) and (d) to demonstrate its ability to construct and operate a nationwide system consisting of fixed and/or paging operations on a primary basis instead of, or in addition to, its land mobile operations.

(B) A non-nationwide Phase I licensee must first meet the requirement to construct its land mobile base station and place it in operation, or commence

service (in accordance with § 90.167) as prescribed in § 90.725(f) or § 90.727, as applicable.

* * * * *

(c) For operations requiring less than a 4 kHz bandwidth, more than a single emission may be utilized within the authorized bandwidth. In such cases, the frequency stability requirements of § 90.213 do not apply, but the out-of-band emission limits of § 90.210(f) must be met.

(d) Licensees, except for licensees authorized on Channels 161 through 170 and 181 through 185, may combine any number of their authorized, contiguous channels to form channels wider than 5 kHz. In so doing, licensees must comply with the following spectrum efficiency standard, which will remain in effect through December 31, 2001:

(1) For voice communications, licensees must employ equipment that provides at least one voice channel per 5 kHz of channel bandwidth; and

(2) For data communications, licensees must employ equipment that operates at a data rate of at least 4,800 bits per second per 5 kHz of channel bandwidth.

(3) Licensees authorized on channels other than Channels 161 through 170 and 181 through 185 may combine any number of their authorized, contiguous channels to form channels wider than 5 kHz *without* complying with the spectrum efficiency standard identified in paragraphs (d)(1) and (d)(2) of this section if they operate with equipment that has been granted type acceptance in accordance with the provisions of § 90.203(k)(2).

(e) In combining authorized contiguous channels to form channels wider than 5 kHz, the emission limits in § 90.210(f) must be met only at the outermost edges of the contiguous channels. Transmitters shall be tested to confirm compliance with this requirement with the transmission located as close to the band edges as permitted by the design of the transmitter. The frequency stability requirements in § 90.213 shall apply only to the outermost of the contiguous channels authorized to the licensee. However, the frequency stability employed for transmissions operating inside the outermost contiguous channels must be such that the emission limits in § 90.210(f) are met over the temperature and voltage variations prescribed in § 2.995 of this chapter.

(f) A Phase I non-nationwide licensee operating a paging base station, or a fixed station transmitting on frequencies in the 220–221 MHz band, may only

operate such stations at the coordinates of the licensee's authorized land mobile base station.

(g) The transmissions of a Phase I non-nationwide licensee's paging base station, or fixed station transmitting on frequencies in the 220–221 MHz band, must meet the requirements of §§ 90.723 (d) and (i), and 90.729, and such a station must operate at the effective radiated power and antenna height-above-average-terrain prescribed in the licensee's land mobile base station authorization.

(h) Licensees using 220–222 MHz spectrum for geophysical telemetry operations are authorized to operate fixed stations on a secondary, non-interference basis to licensees operating in the 220–222 MHz band on a primary basis under the conditions that such licensees:

(1) Provide notification of their operations to co-channel non-nationwide Phase I licensees with an authorized base station, or fixed station transmitting on frequencies in the 220–221 MHz band, located within 45 km of the secondary licensee's station, to co-channel, Phase II EA or Regional licensee authorized to operate in the EA or REAG in which the secondary licensee's station is located, and to co-channel Phase I or Phase II nationwide licensees;

(2) Operate only at temporary locations in accordance with the provisions of Section 90.137;

(3) Not transmit at a power level greater than one watt ERP;

(4) Not transmit from an antenna higher than 2 meters (6.6 feet) above ground; and

(5) Not operate on Channels 111 through 120, 161 through 170, or 181 through 185.

(i) All licensees constructing and operating base stations or fixed stations on frequencies in the 220–222 MHz band must:

(1) Comply with any rules and international agreements that restrict use of their authorized frequencies, including the provisions of § 90.715 relating to U.S./Mexican border areas;

(2) Comply with the provisions of § 17.6 of this chapter with regard to antenna structures; and

(3) Comply with the provisions of §§ 1.1301 through 1.1319 of this chapter with regard to actions that may or will have a significant impact on the quality of the human environment.

21. Paragraph (d) of § 90.735 is revised to read as follows:

§ 90.735 Station identification.

* * * * *

(d) Digital transmissions may also be identified by digital transmission of the

station call sign. A licensee that identifies its station in this manner must provide the Commission, upon its request, information (such as digital codes and algorithms) sufficient to decipher the data transmission to ascertain the call sign transmitted.

22. The section heading of § 90.737 is revised to read as follows:

§ 90.737 Supplemental reports required of Phase I licensees.

* * * * *

23. Section 90.739 is revised to read as follows:

§ 90.739 Number of systems authorized in a geographical area.

(a) No licensee will be authorized more than one Phase I system in the 220–222 MHz band in a single category (*i.e.*, one nationwide system, one 5-channel trunked system, one data-only local system of 1 to 5 channels, one unrestricted non-trunked local system of 1 to 5 channels, or one public safety/mutual aid local system of 1 to 5 channels) within 64 kilometers (40 miles) of an existing system authorized to that licensee in the same category, unless the licensee can demonstrate that the additional system is justified on the basis of its communications requirements.

(b) There is no limit on the number of Phase II nationwide, EA or Regional licenses that may be authorized to a single licensee.

24. The section heading and introductory text of § 90.741 are revised to read as follows:

§ 90.741 Urban areas for Phase I nationwide systems.

Licensees of Phase I nationwide systems must construct base stations, or fixed stations transmitting on frequencies in the 220–221 MHz band, in a minimum of 28 of the urban areas listed in the following Table within ten years of initial license grant. A base station, or fixed station, is considered to be within one of the listed urban areas if it is within 60 kilometers (37.3 miles) of the specified coordinates.

* * * * *

25. A new § 90.743 is added to read as follows:

§ 90.743 Renewal expectancy.

(a) All licensees seeking renewal of their authorizations at the end of their license term must file a renewal application in accordance with the provisions of § 90.149. Licensees must demonstrate, in their application, that:

(1) They have provided "substantial" service during their past license term. "Substantial" service is defined in this rule as service that is sound, favorable,

and substantially above a level of mediocre service that just might minimally warrant renewal; and

(2) They have substantially complied with applicable FCC rules, policies, and the Communications Act of 1934, as amended.

(b) In order to establish its right to a renewal expectancy, a renewal applicant must submit a showing explaining why it should receive a renewal expectancy. At a minimum, this showing must include:

(1) A description of its current service in terms of geographic coverage and population served;

(2) For an EA, Regional, or nationwide licensee, an explanation of its record of expansion, including a timetable of the construction of new stations to meet changes in demand for service;

(3) A description of its investments in its system;

(4) Copies of all FCC orders finding the licensee to have violated the Communications Act or any FCC rule or policy; and

(5) A list of any pending proceedings that relate to any matter described in this paragraph.

(c) Phase I non-nationwide licensees have license terms of 5 years, and therefore must meet these requirements 5 years from the date of initial authorization in order to receive a renewal expectancy. Phase I nationwide licensees and all Phase II licensees have license terms of 10 years, and therefore must meet these requirements 10 years from the date of initial authorization in order to receive a renewal expectancy.

26. Section 90.751 is revised to read as follows:

§ 90.751 Minor modifications of Phase I, non-nationwide licenses.

Phase I non-nationwide licensees will be given an opportunity to seek modification of their license to relocate their initially authorized base station, *i.e.*, locate their base station at a site other than its initially authorized location. The conditions under which modifications will be granted and the procedures for applying for license modifications are described in §§ 90.753, 90.755, and 90.757. For CMRS licensees, these modifications will be treated as minor modifications in accordance with § 90.164.

27. A new centered heading is added following § 90.757 to read as follows:

Policies Governing the Licensing and Use of Phase II EA, Regional and Nationwide Systems

28. A new § 90.761 is added to read as follows:

§ 90.761 EA and Regional licenses.

(a) EA licenses for spectrum blocks listed in Table 2 of § 90.721(b) are available in 175 Economic Areas (EAs) as defined in § 90.7.

(b) Regional licenses for spectrum blocks listed in Table 2 of § 90.721(b) are available in six Regional Economic Area Groupings (REAGs) as defined in § 90.7.

29. A new § 90.763 is added to read as follows:

§ 90.763 EA, Regional and Nationwide system operations.

(a) A nationwide licensee authorized pursuant to § 90.717(a) may construct and operate any number of land mobile or paging base stations, or fixed stations, anywhere in the Nation, and transmit on any of its authorized channels, provided that the licensee complies with the requirements of § 90.733(i).

(b) An EA or Regional licensee authorized pursuant to § 90.761 may construct and operate any number of land mobile or paging base stations, or fixed stations, anywhere within its authorized EA or REAG, and transmit on any of its authorized channels, provided that:

(1) The licensee affords protection to all authorized co-channel Phase I non-nationwide base stations as follows:

(i) The EA or Regional licensee must locate its land mobile or paging base stations, or fixed stations transmitting on base station transmit frequencies, at least 120 km from the land mobile or paging base stations, or fixed stations transmitting on base station transmit frequencies, of co-channel Phase I licensees, except that separations of less than 120 km shall be considered on a case-by-case basis upon submission by the EA or Regional licensee of:

(A) A technical analysis demonstrating at least 10 dB protection to the predicted 38 dBu service contour of the co-channel Phase I licensee, *i.e.*, demonstrating that the predicted 28 dBu interfering contour of the EA or Regional licensee's base station or fixed station does not overlap the predicted 38 dBu service contour of the co-channel Phase I licensee's base station or fixed station; or

(B) A written letter from the co-channel Phase I licensee consenting to a separation of less than 120 km, or to less than 10 dB protection to the predicted 38 dBu service contour of the licensee's base station or fixed station.

(ii) The Phase I licensee's predicted 38 dBu service contour referred to in paragraph (a)(1)(i) of this section is calculated using the F(50,50) field strength chart for Channels 7–13 in § 73.699 (Fig. 10) of this chapter, with

a 9 dB correction factor for antenna height differential, and is based on the licensee's authorized effective radiated power and antenna height-above-average-terrain. The EA or Regional licensee's predicted 28 dBu interfering contour referred to in paragraph (a)(1)(i) of this section is calculated using the F(50,10) field strength chart for Channels 7–13 in § 73.699 (Fig. 10a) of this chapter, with a 9 dB correction factor for antenna height differential.

(2) The licensee complies with the requirements of § 90.733(i).

(3) The licensee limits the field strength of its base stations, or fixed stations operating on base station transmit frequencies, in accordance with the provisions of § 90.771.

(4) The licensee notifies the Commission within 30 days of the completion of the addition, removal, relocation or modification of any of its facilities within its authorized area of operation. Such notification must be made by submitting an FCC Form 600, and must include the appropriate filing fee, if any.

(c) In the event that the authorization for a co-channel Phase I base station, or fixed station transmitting on base station transmit frequencies, within an EA or Regional licensee's border is terminated or revoked, the EA or Regional licensee's channel obligations to such stations will cease upon deletion of the facility from the Commission's official licensing records, and the EA or Regional licensee then will be able to construct and operate without regard to the previous authorization.

30. A new § 90.765 is added to read as follows:

§ 90.765 Licenses term for Phase II licenses.

Nationwide licenses authorized pursuant to § 90.717(a), EA and Regional licenses authorized pursuant to § 90.761, and non-nationwide licenses authorized pursuant to §§ 90.720 and 90.719(c) will be issued for a term not to exceed ten years.

31. A new § 90.767 is added to read as follows:

§ 90.767 Construction and implementation of EA and Regional licenses.

(a) An EA or Regional licensee must construct a sufficient number of base stations (*i.e.*, base stations for land mobile and/or paging operations) to provide coverage to:

(1) At least one-third of the population of its EA or REAG within five years of the issuance of its initial license; and

(2) At least two-thirds of the population of its EA or REAG within ten

years of the issuance of its initial license.

(b) EA and Regional licensees offering fixed services as part of their system, and EA and Regional licensees that have one or more incumbent, co-channel Phase I licensees authorized within their EA or REAG may meet the construction requirements of paragraph (a) of this section by demonstrating an appropriate level of substantial service at their five- and ten-year benchmarks.

(c) Licensees must submit maps or other supporting documents to demonstrate compliance with the construction requirements of paragraphs (a) and (b) of this section.

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

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

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

32. A new § 90.769 is added to read as follows:

§ 90.769 Construction and implementation of Nationwide licenses.

(a) A nationwide licensee must construct a sufficient number of base stations (*i.e.*, base stations for land mobile and/or paging operations) to provide coverage to:

(1) A composite area of at least 750,000 square kilometers or 37.5 percent of the United States population within five years of the issuance of its initial license; and

(2) A composite area of at least 1,500,000 square kilometers or 75 percent of the United States population within ten years of the issuance of its initial license.

(b) Nationwide licensees offering fixed services as part of their system may meet the construction requirements of paragraph (a) of this section by demonstrating an appropriate level of substantial service at their five- and ten-year benchmarks.

(c) Licensees must submit maps or other supporting documents to demonstrate compliance with the

construction requirements of paragraphs (a) and (b) of this section.

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

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

33. A new § 90.771 is added to read as follows:

§ 90.771 Field strength limits.

(a) The transmissions from base stations, or fixed stations transmitting on base station transmit frequencies, of EA and Regional licensees may not exceed a predicted 38 dBu field strength at their EA or REAG border. The predicted 38 dBu field strength is calculated using the F(50,50) field strength chart for Channels 7–13 in § 73.699 (Fig. 10) of this chapter, with a 9 dB correction factor for antenna height differential.

(b) Licensees will be permitted to exceed the predicted 38 dBu field strength required in paragraph (a) of this section if all affected, co-channel EA and Regional licensees agree to the higher field strength.

(c) EA and Regional licensees must coordinate to minimize interference at or near their EA and REAG borders, and must cooperate to resolve any instances of interference in accordance with the provisions of § 90.173(b).

34. A new subpart W consisting of §§ 90.1001 through 90.1025 is added to part 90 to read as follows:

Subpart W—Competitive Bidding Procedures for the 220 MHz Service

Sec.

- 90.1001 220 MHz service subject to competitive bidding.
- 90.1003 Competitive bidding design for the 220 MHz service.
- 90.1005 Competitive bidding mechanisms.
- 90.1007 Withdrawal, default and disqualification payments.
- 90.1009 Bidding application (FCC Form 175 and 175-S Short-form).
- 90.1011 Submission of upfront payments and down payments.
- 90.1013 Long-form application (FCC Form 600).
- 90.1015 License grant, denial, default, and disqualification.
- 90.1017 Bidding credits, down payments, and installment payments for small businesses and very small businesses.
- 90.1019 Eligibility for partitioned licenses.
- 90.1021 Definitions concerning competitive bidding process.

90.1023 Certifications, disclosures, records maintenance and audits.

90.1025 Petitions to deny and limitations on settlements.

Subpart W—Competitive Bidding Procedures for the 220 MHz Service

§ 90.1001 220 MHz service subject to competitive bidding.

Mutually exclusive initial applications for 220 MHz geographic area licenses are subject to competitive bidding procedures. The procedures set forth in part 1, subpart Q, of this chapter will apply unless otherwise provided in this part.

§ 90.1003 Competitive bidding design for the 220 MHz service.

A simultaneous multiple round auction will be used to choose from among mutually exclusive initial applications for 220 MHz geographic area licenses, unless the Commission specifies otherwise by Public Notice prior to the competitive bidding procedure.

§ 90.1005 Competitive bidding mechanisms.

(a) *Sequencing.* The Commission will establish and may vary the sequence in which 220 MHz geographic area licenses are auctioned.

(b) *Grouping.* The Commission will determine which licenses will be auctioned simultaneously or in combination.

(c) *Minimum bid increments.* The Commission may, by public announcement before or during an auction, require minimum bid increments in dollar or percentage terms.

(d) *Stopping rules.* The Commission may establish stopping rules before or during an auction in order to terminate the auction within a reasonable time.

(e) *Activity rules.* The Commission may establish activity rules which require a minimum amount of bidding activity. In the event that the Commission establishes an activity rule in connection with a simultaneous multiple round auction, each bidder may request waivers of such rule during the auction. The Commission may, by public announcement either before or during the auction, specify or vary the number of waivers available to each bidder.

§ 90.1007 Withdrawal, default and disqualification payments.

The Commission will impose payments on bidders who withdraw high bids during the course of an auction, who default on payments due after an auction terminates, or who are

disqualified. When the Commission conducts a simultaneous multiple round auction, payments will be calculated as set forth in §§ 1.2104(g) and 1.2109 of this chapter. When the amount of such a payment cannot be determined, a deposit of up to 20 percent of the amount bid on the license will be required.

§ 90.1009 Bidding application (FCC Form 175 and 175-S Short-form).

Each applicant to participate in competitive bidding for 220 MHz geographic area licenses must submit an application (FCC Forms 175 and 175-S) pursuant to the provisions of § 1.2105 of this chapter.

§ 90.1011 Submission of upfront payments and down payments.

(a) The Commission will require applicants to submit an upfront payment prior to the start of a 220 MHz service auction. The amount of the upfront payment for each geographic area license auctioned and the procedures for submitting it will be set forth by the Wireless Telecommunications Bureau in a Public Notice in accordance with § 1.2106 of this chapter.

(b) Each winning bidder in a 220 MHz service auction, except those that qualify as small businesses or very small businesses pursuant to § 90.1021(b)(1) or § 90.1021(b)(2), must submit a down payment to the Commission in an amount sufficient to bring its total deposits up to 20 percent of its winning bid within ten (10) business days following the release of a Public Notice announcing the close of bidding. Small businesses and very small businesses must submit a down payment to the Commission in accordance with § 90.1017(c).

§ 90.1013 Long-form application (FCC Form 600).

Each successful bidder for a 220 MHz geographic area license must submit a long-form application (FCC Form 600) within ten (10) business days after being notified by Public Notice that it is the winning bidder. Applications for 220 MHz geographic area licenses on FCC Form 600 must be submitted in accordance with § 1.2107 of this chapter, all applicable procedures set forth in the rules in this part, and any applicable Public Notices that the Commission may issue in connection with an auction. After an auction, the Commission will not accept long-form applications for 220 MHz geographic area licenses from anyone other than the auction winners and parties seeking partitioned licenses pursuant to

agreements with auction winners under § 90.1019.

§ 90.1015 License grant, denial, default, and disqualification.

(a) Each winning bidder, except those eligible for installment payments, will be required to pay the full balance of its winning bid within ten (10) business days following Public Notice that the Commission is prepared to award the license.

(b) A bidder that withdraws its bid subsequent to the close of bidding, defaults on a payment due, or is disqualified, is subject to the payments specified in § 1.2104(g), § 1.2109 of this chapter and § 90.1007, as applicable.

§ 90.1017 Bidding credits, down payments, and installment payments for small businesses and very small businesses.

(a) *Bidding credits.* A winning bidder that qualifies as a small business or a consortium of small businesses as defined in § 90.1021(b)(1) or § 90.1021(b)(4) may use a bidding credit of 10 percent to lower the cost of its winning bid. A winning bidder that qualifies as a very small business or a consortium of very small businesses as defined in § 90.1021(b)(2) or § 90.1021(b)(4) may use a bidding credit of 25 percent to lower the cost of its winning bid.

(b) *Unjust enrichment—bidding credits.* (1) If a small business or very small business (as defined in §§ 90.1021(b)(1) and 90.1021(b)(2), respectively) that utilizes a bidding credit under this section seeks to transfer control or assign an authorization to an entity that is not a small business or a very small business, or seeks to make any other change in ownership that would result in the licensee losing eligibility as a small business or very small business, the small business or very small business must seek Commission approval and reimburse the U.S. government for the amount of the bidding credit, plus interest at the rate imposed for installment financing at the time the license was awarded, as a condition of approval of the assignment, transfer, or other ownership change.

(2) If a very small business (as defined in § 90.1021(b)(2)) that utilizes a bidding credit under this section seeks to transfer control or assign an authorization to a small business meeting the eligibility standards for a lower bidding credit, or seeks to make any other change in ownership that would result in the licensee qualifying for a lower bidding credit under this section, the licensee must seek Commission approval and reimburse the

U.S. government for the difference between the amount of the bidding credit obtained by the licensee and the bidding credit for which the assignee, transferee, or licensee is eligible under this section, plus interest at the rate imposed for installment financing at the time the license was awarded, as a condition of the approval of such assignment, transfer, or other ownership change.

(3) The amount of payments made pursuant to paragraphs (b)(1) and (b)(2) of this section will be reduced over time as follows: A transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit (or the difference between the bidding credit obtained by the original licensee and the bidding credit for which the post-transfer licensee is eligible); in year 3 of the license term the payment will be 75 percent; in year 4 the payment will be 50 percent; and in year 5 the payment will be 25 percent, after which there will be no assessment.

(c) *Down payments.* Winning bidders in a 220 MHz service auction that qualify as small businesses under § 90.1021(b)(1) or very small businesses under § 90.1021(b)(2) must submit a down payment to the Commission in an amount sufficient to bring their total deposits up to 20 percent of their winning bids. Small businesses and very small businesses must bring their deposit up to 10 percent of their winning bids within ten (10) business days following a Public Notice announcing the close of bidding. Prior to licensing, by a date and time to be specified by Public Notice, they must pay an additional 10 percent.

(d) *Installment payments.* (1) Each licensee that qualifies as a small business under § 90.1021(b)(1) or as a very small business under § 90.1021(b)(2) may pay the remaining 80 percent of the net auction price for the license in installment payments over the term of the geographic area license. Interest charges shall be fixed at the time of licensing at a rate equal to the rate for ten-year U.S. Treasury obligations plus 2.5 percent. An eligible licensee may make interest-only payments for two years. Payments of interest and principal shall be amortized over the remaining eight years of the license term.

(2) Late installment payment. Any licensee that submits a scheduled installment payment more than fifteen days late will be charged a late payment fee equal to five percent of the amount of the past due payment.

(3) Payments will be applied in the following order: Late charges, interest charges, principal payments.

(e) *Unjust enrichment—installment payments.* (1) If a licensee that utilizes installment financing under this section seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for installment financing, the licensee must seek Commission approval and make full payment of the remaining unpaid principal and unpaid interest accrued through the date of assignment or transfer as a condition of Commission approval.

(2) If a licensee that utilizes installment financing under this section seeks to make any change in ownership structure that would result in the licensee losing eligibility for installment payments, the licensee shall first seek Commission approval before making such a change in ownership structure and must make full payment of the remaining unpaid principal and unpaid interest accrued through the date of such change in ownership structure as a condition of Commission approval.

§ 90.1019 Eligibility for partitioned licenses.

If partitioned licenses are being applied for in conjunction with a license(s) to be awarded through competitive bidding procedures—

(a) The applicable procedures for filing short-form applications and for submitting upfront payments and down payments contained in this chapter shall be followed by the applicant, who must disclose as part of its short-form application all parties to agreement(s) with or among other entities to partition the license pursuant to this section, if won at auction (see 47 CFR 1.2105(a)(2)(viii));

(b) Each party to an agreement to partition the license must file a long-form application (FCC Form 600) for its respective, mutually agreed-upon geographic license area together with the application for the remainder of the geographic license area filed by the auction winner.

(c) If the partitioned license is being applied for as a partial assignment of the geographic area license following grant of the initial license, request for authorization for partial assignment of a license shall be made pursuant to § 90.153.

§ 90.1021 Definitions concerning competitive bidding process.

(a) *Scope.* The definitions in this section apply to §§ 90.1001 through 90.1025, unless otherwise specified in those sections.

(b) *Small business; very small business; consortium of small businesses or very small businesses.* (1)

A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.

(2) A very small business is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years.

(3) For purposes of determining whether an entity meets either of the definitions set forth in paragraph (b)(1) or (b)(2) of this section, the gross revenues of the entity, its affiliates, and controlling principals shall be considered on a cumulative basis and aggregated.

(4) A consortium of small businesses (or a consortium of very small businesses) is a conglomerate organization formed as a joint venture between or among mutually independent business firms, each of which individually satisfies the definition in paragraph (b)(1) of this section or each of which individually satisfies the definition in paragraph (b)(2) of this section. Where an applicant (or licensee) is a consortium of small businesses (or very small businesses), the gross revenues of each small business (or very small business) shall not be aggregated.

(c) *Gross revenues.* Gross revenues shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (e.g., cost of goods sold). Gross revenues are evidenced by audited financial statements for the relevant number of calendar or fiscal years preceding the filing of the applicant's short-form application (FCC Form 175). If an entity was not in existence for all or part of the relevant period, gross revenues shall be evidenced by the audited financial statements of the entity's predecessor-in-interest or, if there is no identifiable predecessor-in-interest, unaudited financial statements certified by the applicant as accurate. When an applicant does not otherwise use audited financial statements, its gross revenues may be certified by its chief financial officer or its equivalent.

(d) *Affiliate.*—(1) *Basis for affiliation.* An individual or entity is an affiliate of an applicant if such individual or entity:

(i) Directly or indirectly controls or has the power to control the applicant, or

(ii) Is directly or indirectly controlled by the applicant, or

(iii) Is directly or indirectly controlled by a third party or parties who also control or have the power to control the applicant, or

(iv) Has an "identity of interest" with the applicant.

(2) *Nature of control in determining affiliation.* (i) Every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative and it is immaterial whether it is exercised so long as the power to control exists.

Example for paragraph (d)(2)(i). An applicant owning 50 percent of the voting stock of another concern would have negative power to control such concern since such party can block any action of the other stockholders. Also, the bylaws of a corporation may permit a stockholder with less than 50 percent of the voting stock to block any actions taken by the other stockholders in the other entity. Affiliation exists when the applicant has the power to control a concern while at the same time another person, or persons, are in control of the concern at the will of the party or parties with the power of control.

(ii) Control can arise through stock ownership; occupancy of director, officer, or key employee positions; contractual or other business relations; or combinations of these and other factors. A key employee is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

(iii) Control can arise through management positions if the voting stock is so widely distributed that no effective control can be established.

Example for paragraph (d)(2)(iii). In a corporation where the officers and directors own various size blocks of stock totaling 40 percent of the corporation's voting stock, but no officer or director has a block sufficient to give him/her control or the power to control and the remaining 60 percent is widely distributed with no individual stockholder having a stock interest greater than 10 percent, management has the power to control. If persons with such management control of the other entity are controlling principals of the applicant, the other entity will be deemed an affiliate of the applicant.

(3) *Identity of interest between and among persons.* Affiliation can arise between or among two or more persons with an identity of interest, such as members of the same family or persons with common investments. In determining if the applicant controls or is controlled by a concern, persons with an identity of interest will be treated as though they were one person.

(i) *Spousal affiliation.* Both spouses are deemed to own or control or have the power to control interests owned or

controlled by either of them, unless they are subject to a legal separation recognized by a court of competent jurisdiction in the United States.

(ii) *Kinship affiliation.* Immediate family members will be presumed to own or control or have the power to control interests owned or controlled by other immediate family members. In this context "immediate family member" means father, mother, husband, wife, son, daughter, brother, sister, father- or mother-in-law, son- or daughter-in-law, brother- or sister-in-law, step-father or -mother, step-brother or -sister, step-son or -daughter, half-brother or -sister. This presumption may be rebutted by showing that:

(A) The family members are estranged,

(B) The family ties are remote, or

(C) The family members are not closely involved with each other in business matters.

Example for paragraph (d)(3)(ii). A owns a controlling interest in Corporation X. A's sister-in-law, B, has a controlling interest in a 220 MHz service geographic area license application. Because A and B have a presumptive kinship affiliation, A's interest in Corporation X is attributable to B, and thus to the applicant, unless B rebuts the presumption with the necessary showing.

(4) *Affiliation through stock ownership.* (i) An applicant is presumed to control or have the power to control a concern if he/she owns or controls or has the power to control 50 percent or more of its voting stock.

(ii) An applicant is presumed to control or have the power to control a concern even though he/she owns, controls, or has the power to control less than 50 percent of the concern's voting stock, if the block of stock he/she owns, controls, or has the power to control is large as compared with any other outstanding block of stock.

(iii) If two or more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, the presumption arises that each one of these persons individually controls or has the power to control the concern; however, such presumption may be rebutted by a showing that such control or power to control, in fact, does not exist.

(5) *Affiliation arising under stock options, convertible debentures, and agreements to merge.* Stock options, convertible debentures, and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to

control the concern. Therefore, in making a size determination, such options, debentures, and agreements will generally be treated as though the rights held thereunder had been exercised. However, neither an affiliate nor an applicant can use such options and debentures to appear to terminate its control over another concern before it actually does so.

Example 1 for paragraph (d)(5). If company B holds an option to purchase a controlling interest in company A, who holds a controlling interest in a 220 MHz service geographic area license application, the situation is treated as though company B had exercised its rights and had become owner of a controlling interest in company A. The gross revenues of company B must be taken into account in determining the size of the applicant.

Example 2 for paragraph (d)(5). If a large company, BigCo, holds 70% (70 of 100 outstanding shares) of the voting stock of company A, who holds a controlling interest in a 220 MHz service geographic area license application, and gives a third party, SmallCo, an option to purchase 50 of the 70 shares owned by BigCo, BigCo will be deemed to be an affiliate of company A, and thus the applicant, until SmallCo actually exercises its options to purchase such shares. In order to prevent BigCo from circumventing the intent of the rule, which requires such options to be considered on a fully diluted basis, the option is not considered to have present effect in this case.

Example 3 for paragraph (d)(5). If company A has entered into an agreement to merge with company B in the future, the situation is treated as though the merger has taken place.

(6) *Affiliation under voting trusts.* (i) Stock interests held in trust shall be deemed controlled by any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will.

(ii) If a trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the stock interests held in trust will be deemed controlled by the grantor or beneficiary, as appropriate.

(iii) If the primary purpose of a voting trust, or similar agreement, is to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control a concern in order that such concern or another concern may meet the Commission's size standards, such voting trust shall not be considered valid for this purpose regardless of whether it is or is not recognized within the appropriate jurisdiction.

(7) *Affiliation through common management.* Affiliation generally arises

where officers, directors, or key employees serve as the majority or otherwise as the controlling element of the board of directors and/or the management of another entity.

(8) *Affiliation through common facilities.* Affiliation generally arises where one concern shares office space and/or employees and/or other facilities with another concern, particularly where such concerns are in the same or related industry or field of operations, or where such concerns were formerly affiliated, and through these sharing arrangements one concern has control, or potential control, of the other concern.

(9) *Affiliation through contractual relationships.* Affiliation generally arises where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control, or potential control, of the other concern.

(10) *Affiliation under joint venture arrangements.* (i) A joint venture for size determination purposes is an association of concerns and/or individuals, with interests in any degree or proportion, formed by contract, express or implied, to engage in and carry out a single, specific business venture for joint profit for which purpose they combine their efforts, property, money, skill and knowledge, but not on a continuing or permanent basis for conducting business generally. The determination whether an entity is a joint venture is based upon the facts of the business operation, regardless of how the business operation may be designated by the parties involved. An agreement to share profits/losses proportionate to each party's contribution to the business operation is a significant factor in determining whether the business operation is a joint venture.

(ii) The parties to a joint venture are considered to be affiliated with each other.

§ 90.1023 Certifications, disclosures, records maintenance and audits.

(a) *Short-Form Applications: Certifications and Disclosure.* In addition to certifications and disclosures required in part 1, subpart Q, of this chapter, each applicant for a 220 MHz service geographic area license which qualifies as a small business, very small business, consortium of small businesses, or consortium of very small businesses, shall append the following information as an exhibit to its FCC Form 175:

(1) The identity of the applicant's affiliates and controlling principals, and, if a consortium of small businesses

(or consortium of very small businesses), the members of the joint venture; and

(2) The applicant's gross revenues, computed in accordance with § 90.1021.

(b) *Long-Form Applications: Certifications and Disclosure.* In addition to the requirements in § 90.1013, each applicant submitting a long-form application for a 220 MHz service geographic area license and qualifying as a small business or very small business shall, in an exhibit to its long-form application:

(1) Disclose separately and in the aggregate the gross revenues, computed in accordance with § 90.1021, for each of the following: The applicant, the applicant's affiliates, the applicant's controlling principals, and, if a consortium of small businesses (or consortium of very small businesses), the members of the joint venture;

(2) List and summarize all agreements or other instruments (with appropriate references to specific provisions in the text of such agreements and instruments) that support the applicant's eligibility as a small business or very small business under §§ 90.1017 through 90.1023, including the establishment of *de facto* and *de jure* control; such agreements and instruments include, but are not limited to, articles of incorporation and bylaws, shareholder agreements, voting or other trust agreements, franchise agreements, and any other relevant agreements including letters of intent, oral or written; and

(3) List and summarize any investor protection agreements, including rights of first refusal, supermajority clauses, options, veto rights, and rights to hire and fire employees and to appoint members to boards of directors or management committees.

(c) *Records maintenance.* All winning bidders qualifying as small businesses or very small businesses shall maintain at their principal place of business an updated file of ownership, revenue, and asset information, including any documents necessary to establish eligibility as a small business or very small business and/or consortium of small businesses (or consortium of very small businesses) under § 90.1021. Licensees (and their successors-in-interest) shall maintain such files for the term of the license. Applicants that do not obtain the license(s) for which they applied shall maintain such files until the grant of such license(s) is final, or one year from the date of the filing of their short-form application (FCC Form 175), whichever is earlier.

(d) *Audits.* (1) Applicants and licensees claiming eligibility as a small business or very small business or consortium of small businesses (or consortium of very small businesses) under §§ 90.1017 through 90.1023 shall be subject to audits by the Commission. Selection for audit may be random, on information, or on the basis of other factors.

(2) Consent to such audits is part of the certification included in the short-form application (FCC Form 175). Such

consent shall include consent to the audit of the applicant's or licensee's books, documents and other material (including accounting procedures and practices) regardless of form or type, sufficient to confirm that such applicant's or licensee's representations are, and remain, accurate. Such consent shall include inspection at all reasonable times of the facilities, or parts thereof, engaged in providing and transacting business, or keeping records regarding licensed 220 MHz service, and shall also include consent to the interview of principals, employees, customers and suppliers of the applicant or licensee.

(e) *Definitions.* The terms affiliate, small business, very small business, consortium of small businesses (or consortium of very small businesses), and gross revenues used in this section are defined in § 90.1021.

§ 90.1025 Petitions to deny and limitations on settlements.

(a) Procedures regarding petitions to deny long-form applications in the 220 MHz service will be governed by §§ 1.2108(b) through 1.2108(d) of this chapter and § 90.163.

(b) The consideration that an individual or an entity will be permitted to receive for agreeing to withdraw an application or a petition to deny will be limited by the provisions set forth in § 90.162 and § 1.2105(c) of this chapter.

[FR Doc. 97-8014 Filed 4-2-97; 8:45 am]

BILLING CODE 6712-01-P