b. 5-digit (required):

(1) For mailings containing only pieces weighing 5 ounces (0.3125 pound) or less and measuring ¾ inch thick or less: 15-piece minimum; red Label 5 or OEL.

(2) For mailings containing any pieces weighing more than 5 ounces (0.3125 pound) or measuring more than ¾ inch thick: 10-piece minimum; red Label 5 or OEL.

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M900 Advanced Preparation Options for Flats

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M950 Co-Packaging Automation Rate and Presorted Rate Pieces

* * * * *

3.0 STANDARD MAIL

* * * * *

3.2 Package Preparation

Package size, preparation sequence, and labeling:

[Revise 3.2a and 3.2b to read as follows:]

a. 5-digit scheme (optional):

(1) For mailings containing only pieces weighing 5 ounces (0.3125 pound) or less: 15-piece minimum; optional endorsement line (OEL) required.

(2) For mailings containing any pieces weighing more than 5 ounces (0.3125 pound): 10-piece minimum; OEL required.

b. 5-digit (required):

(1) For mailings containing only pieces weighing 5 ounces (0.3125 pound) or less and measuring ¾ inch thick or less: 15-piece minimum; red Label 5 or OEL.

(2) For mailings containing any pieces weighing more than 5 ounces (0.3125 pound) or measuring more than ¾ inch thick: 10-piece minimum; red Label 5 or OEL.

* * * * *

We will publish an appropriate amendment to 39 CFR 111.3 to reflect these changes.

Neva R. Watson,

Attorney, Legislative.

[FR Doc. 04–7123 Filed 3–31–04; 8:45 am]

BILLING CODE 7710–12–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 22 and 24

[WT Docket No. 01–108; FCC 04–22]

Public Mobile Services and Personal Communications Services

AGENCY: Federal Communications Commission.

ACTION: Final rule; petition for reconsideration.

SUMMARY: In this document, the Commission affirms the decision to establish a five-year sunset period for the removal of the Commission's requirement that cellular carriers provide analog service. The Commission also affirms the decision to remove the rule section governing electronic serial numbers (ESNs) in cellular telephones, but clarifies that the fraudulent and unauthorized use of ESNs remains contrary to federal law and Commission policy. Further, the Commission reconsiders and adopts a proposal to permit, in certain circumstances, cellular carriers to extend into neighboring unserved areas without prior Commission approval. The Commission also declines a request to further modify its rules regarding emissions limitations.

DATES: Effective June 1, 2004, except for a provision in the preamble this document permitting cellular carriers to extend into unserved areas of less than fifty square miles on a secondary basis, that is not effective until approved by the Office of Management and Budget (OMB) because it modifies information collection requirements. The agency will publish a document in the **Federal Register** announcing the effective date of the modified information collection.

FOR FURTHER INFORMATION CONTACT: Roger Noel or Linda Chang, Wireless Telecommunications Bureau, at (202) 418–0620.

SUPPLEMENTARY INFORMATION: This is a summary of the Federal Communications Commission's *Order on Reconsideration,* FCC 04–22, adopted February 4, 2004, and released February 12, 2004. The full text of the Order on Reconsideration is available for public inspection during regular business hours at the FCC Reference Information Center, 445 12th St., SW., Room CY–A257, Washington, DC 20554. The complete text may be purchased from the Commission's duplicating contractor: Qualex International, 445 12th Street, SW., Room CY–B402, Washington, DC, 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail at *qualexint@aol.com.*

Synopsis of Report and Order

I. Background

1. As part of its Year 2000 Biennial Review of regulations, the Commission issued a Report and Order, 67 FR 77175, December 17, 2002, in which it amended part 22 of its rules by modifying or eliminating various regulations relating to the Cellular Radiotelephone Service that became outdated due to technological change, increased competition in the Commercial Mobile Radio Services (CMRS), or supervening rules. Pursuant to section 11 of the Communications Act of 1934, as amended (Act), *see* 47 U.S.C. 161, the Commission re-examined its cellular rules in order to determine whether any of the rules are no longer necessary in the public interest as a result of the technological advances and growth in competition that have occurred in mobile telephony since the rules were first promulgated. As a result of this review, the Commission made several changes to its cellular rules, including: Modifying its rules to eliminate, after a five-year transition period, the requirement that carriers provide analog service compatible with Advanced Mobile Phone Service (AMPS) specifications; removing the manufacturing requirements found in § 22.919 governing electronic serial numbers in cellular telephones, and; modifying language in §§ 22.917 and 24.238 regarding out-of-band emission limits. The Commission also addressed a number of other part 22 issues raised by commenters, such as various proposals seeking to overhaul its cellular unserved area licensing framework.

2. In response to the *Report and Order,* petitions for reconsideration were filed by AT&T Wireless Services (AWS), the Cellular Telephone and Internet Association (CTIA), and Dobson Communications Corporation (Dobson). Further, Lucent Technologies (Lucent) submitted comments in response to a Public Notice seeking comment regarding the 2002 Biennial Regulatory Review proceeding which were incorporated into this proceeding.

II. Discussion

A. The Commission Did Not Err in Establishing a Five-Year Sunset Period for the Analog Requirement

3. *Background.* Since the establishment of the Cellular Radiotelephone Service in the early 1980s, all cellular carriers have been required to provide service in accordance with the compatibility standard for analog systems, known as

AMPS. The Commission mandated AMPS compatibility in order to accomplish two goals: (i) To enable subscribers of one cellular system to be able to use their existing terminal equipment (*i.e.* mobile handset) in a cellular market in a different part of the country (roaming); and (ii) to facilitate competition by eliminating the need for cellular consumers to acquire different handset equipment in order to switch between the two competing carriers within the consumers' home market (thereby ensuring reasonable consumer costs). Pursuant to § 22.901, a carrier was required to provide service to any subscriber within the carrier's cellular geographic service area (CGSA), including both the carrier's subscribers and roaming customers that are using technically compatible equipment.

4. In the *Report and Order,* the Commission concluded that, in light of the present competitive state of mobile telephony, the nationwide coverage achieved by cellular carriers, and the market demand for nationwide, ubiquitous coverage by carriers, the analog requirement has substantially achieved its purpose of ensuring that the public has access to low-cost, compatible equipment and to nationwide roaming. The Commission found that the objectives of the analog requirement can now largely be accomplished by market forces without the need for regulation, and therefore determined that the analog requirement should be removed. The Commission, however, found that eliminating the analog requirement immediately without a reasonable transition period would be extremely disruptive to certain consumers, particularly those with hearing disabilities as well as emergency-only consumers, who currently continue to rely on the availability of analog service and lack digital alternatives. Recognizing that telecommunications technology has become an essential part of everyday life, and that those without ready access are at a disadvantage with respect to both daily routine or emergency services, the Commission determined that it is in the public interest to establish a transition period during which time the wireless industry could develop solutions for hearing aid-compatibility issues and phones used by emergency-only callers can cycle from analog to digital.

5. AWS asserts that the Commission has not adequately met its burden to demonstrate that the analog rule remains "necessary in the public interest'' for five additional years, either for the original purposes of the rule or in order to ensure that certain consumers have access to wireless telephony. AWS argues that section 11 of the Act mandates that once the Commission has made the determination that a rule is no longer necessary as a result of meaningful economic competition, the Commission must repeal the rule. AWS maintains that it was improper for the Commission to use concerns regarding access by persons with hearing disabilities and emergency-only consumers in deciding whether to retain the rule because the Commission may only consider the original purposes for which the rule was adopted.

6. *Discussion.* In the *Report and Order,* the Commission concluded that the decision to defer the removal of the analog requirement in order to avoid causing significant hardship to certain consumers fully comports with its obligations under section 11 of the Act. The Commission continues to conclude that the effects of an immediate elimination of the analog requirement would have an inordinate impact with respect to current analog consumers, particularly persons with hearing disabilities and emergency-only users. The Commission affirms the conclusion that the five-year transition period is appropriate to ensure that persons with hearing disabilities and emergency-only consumers continue to have access to wireless devices, and it believes that the transition period is essential in ensuring a smooth migration from analog to digital technology.

1. The Commission's Decision To Implement a Five-Year Sunset of the Analog Requirement Is Consistent With the Original Purposes of the Rule

7. AWS argues that the analog requirement must be eliminated because it no longer serves its original purpose, and that under the Commission's own interpretation of section 11, the Commission may only consider the purposes for which the rule was adopted in deciding whether to retain a regulation. It is argued that, because the Commission found that the analog requirement has achieved its purpose of ensuring that the public has access to low-cost, compatible equipment and to nationwide roaming, the rule is no longer necessary and must be removed.

8. As noted, the Commission found that the original goals of ensuring reasonable consumer costs and seamless, nationwide service (*i.e.,* roaming) have been substantially achieved for most consumers. The Commission emphasized, however, that despite the multiple wireless technologies and services that are currently available, there are certain individuals, specifically emergency-only users and persons with hearing disabilities, who may not have readily available and accessible economic or technological alternatives to analog service. The Commission found that such consumers do not currently have adequate digital alternatives and would be unduly affected by the immediate elimination of the analog requirement. In so doing, the Commission recognized the reality that there is currently little or no meaningful economic competition to such consumers. The analog requirement is still necessary, at least in the near term, to ensure that emergency-only consumers and persons with hearing disabilities continue to have access to wireless telephony, and, accordingly, the decision to implement a sunset period is consistent with the original purposes of the rule.

2. The Commission Is Not Limited to the Original Purpose of a Rule in Determining Whether It Remains Necessary

9. Although the Commission's basis for establishing a five-year transition period is consistent with the original purposes of the analog requirement, the Commission notes that it would nonetheless be permissible to retain the analog requirement for other reasons if it concludes that it is in the public interest to do so. AWS is correct that the *Report and Order* stated that, in reviewing a regulation, the Commission must evaluate whether the concerns that led to the rule or the rule's original purpose may be achieved without the rule or with a modified rule. The Commission, however, did not conclude that it may only look to the original purposes of the rule to determine whether it remains necessary in the public interest. Instead, the *Report and Order* itself noted that the Commission is not limited to the original purposes of the analog requirement in determining whether the requirement remained necessary. The U.S. District Court of Appeals for the DC Circuit has found that nothing in the language of section 202(h) of the Telecommunications Act of 1996, Public Law 104–104, 110 Stat. 56, indicates that the Commission is limited to the purposes for which the rule was adopted when determining whether or not it remains necessary. Similarly, there is no language in section 11 which suggests that the Commission is limited to the original purpose behind a rule in determining whether or not it should be retained. Indeed, it is unreasonable to interpret section 11 as requiring that a rule must be repealed if it has accomplished its original goals but yet remains necessary

with respect to another purpose. There is nothing in the text of section 11 or its legislative history that suggests that this is the appropriate standard for a biennial review.

3. Sections 255 and 332 of the Act Do Not Preclude the Commission From Finding That the Analog Requirement Remains Necessary

10. Section 255 of the Communications Act provides that manufacturers and telecommunications services providers must ensure that telecommunications equipment and telecommunications services are accessible to persons with disabilities. *See* 47 U.S.C. 255(c). Specifically, section 255(c) of the Act requires that "[a] provider of telecommunications service shall ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable.'' Further, section 332 requires that the Commission ensure that providers of CMRS services are subjected to technical and operational rules comparable to those that apply to providers of substantially similar common carrier services. *See* 47 U.S.C. 332. The general goal behind section 332 is to ensure that economic forces rather than disparate regulatory constraints shape the development of the CMRS marketplace.

11. The *Report and Order* specifically discussed whether section 255 or other regulatory provisions, such as the Hearing Aid Compatibility Act of 1988 (HAC Act), which requires the Commission to establish regulations that ensure hearing-aid compatibility,[1] are sufficient to ensure accessibility to persons with hearing disabilities. The Commission found that, given the scarcity of digital devices that may be used with hearing aids, persons with hearing disabilities could be left without access to mobile telephony services in the event that the analog requirement is removed immediately, even with the existence of measures such as section 255 of the Act. The Commission specifically noted that it was establishing a transition period even though, pursuant to section 255, carriers are otherwise obligated to ensure that telecommunications service is accessible to persons with disabilities. The Commission found that, the independent requirements of section 255 notwithstanding, it was appropriate to also establish a five-year transition period in order to address the particular current problem of hearing aid-compatibility with digital handsets, and ensure access to mobile telephony service for persons with hearing disabilities.

12. Given the possible consequences to persons with hearing disabilities and emergency-only callers of the immediate removal of the analog requirement, the Commission sought to ensure that wireless services remain accessible to such consumers regardless of the mandates of section 255, *i.e.,* the Commission's action to defer the sunset of the analog requirement was sepraate distinct from the requirements of section 255. In the *Report and Order,* the Commission expressly stated that, notwithstanding a carrier's obligation under section 255, a transition period was being establish to safeguard access to mobile telephony. The purpose in implementing the transition was to ensure that persons with hearing disabilities have continuous access to wireless telecommunications services independent of actions taken by carriers to fulfill their statutory obligations. Because it is feasible that a carrier will not be in compliance with section 255, it is appropriate to establish a transition period to ensure uninterrupted access.

13. The Commission also rejects arguments that the Commission cannot require cellular carriers to bear the burden of maintaining a specific technology at its competitive disadvantage while similar CMRS providers are not subject to the same requirement. However, the Commission has previously determined that while regulatory parity is a significant policy that can yield important pro-competitive and pro-consumer benefits, parity for its own sake is not required by any provision of the Communications Act. Instead, section 332 empowers the Commission to make a distinction between different CMRS at any time if it becomes necessary to do so. Because the Commission has concluded that it is in the public interest to ensure that persons with hearing disabilities and emergency-only callers have access to mobile telephony, cellular carriers, as a consequence, must continue to provide analog service, as cellular is the only service in which every carriers has analog facilities.

4. The Decision To Establish a Five-Year Transition Period for the Removal of the Analog Requirement Was Not an Abuse of Discretion

14. AWS argues that the decision to select five years as the transition period was arbitrary given the Commission's own findings regarding the robust nature of the wireless industry and the significant competitive harms and costs associated with maintaining an analog network, as well as its failure to explain why the five-year transition is necessary in the public interest. AWS argues that at the very least the Commission must reduce the transition period to no longer than 30 months.

15. The Commission rejects AWS's argument that the Commission did not adequately demonstrate that the five-year transition period is in the public interest, and it disagrees with arguments that a five-year transition period is an inordinately long length of time. As AWS notes, the *Report and Order* stated that in light of the present state of competition in the wireless industry, the analog requirement has substantially achieved its purpose of facilitating competition and ensuring nationwide roaming. Throughout the *Report and Order*, however, the Commission was very clear in stating that, although there is a variety of wireless technologies and services available to most consumers, consumers such as persons with hearing disabilities or emergency-only users may not have readily available and accessible economic or technological alternatives to analog service. While market mechanisms will, for the most part, ensure access to digital services for most consumers, the same economic incentives do not exist that would ensure that emergency-only consumers and persons with hearing disabilities have adequate access to digital wireless service because they account for only a small percentage of mobile telephony subscribers. Because emergency-only callers and persons with hearing disabilities must currently continue to rely on analog technology for access to wireless service, the Commission found that the record in the proceeding supported a transition away from, rather than immediate elimination of, the analog rule.

16. In setting out a transition period, it was necessary for the Commission to establish a time frame that reflected its policy goals with respect to the analog requirement; that is, the transition period should be long enough to ensure that certain categories of individuals continue to have access to wireless telecommunications until digital solutions are readily available and

[1] The HAC Act requires almost all new telephones to "provides internal means for effective use with hearing aids that are designed to be compatible with telephones which meet established technical standards for hearing aid compatibility,'' but provided an exemption for certain categories of phones including those used with CMRS and private mobile radio services (or PMRS). The Commission recently issued a *Report and Order* which modified the exemption to require that digital wireless phones be capable of being used effectively with hearing aids.

accessible to them, yet be limited in duration in recognition that the analog rule is no longer necessary to ensure competition and nationwide service for most consumers. Although a number of commenters argued that the analog requirement should be maintained indefinitely until emergency-only callers can be assured of service, or until digital technologies are fully compatible with hearing aid devices, the Commission concluded that a transition period is necessary to facilitate the orderly migration of consumers with analog handsets to digital multimode handsets. To allay concerns by certain commenters who argued that the analog requirement should not be removed until access to digital devices is assured for emergency-only users, the Commission observed that, although there is a sizable number of emergency-only consumers using analog handsets, it could be assumed that the total number of such users will decline in the future, as digital networks expand and carriers migrate current analog customers to digital services. The Commission concluded that, because subscribers turn over handsets approximately every 18 to 30 months, the five-year transition period should be sufficient to ensure that recipients of donated mobile telephones have access to digital equipment.

17. Similarly, the Commission also found that a five-year period provides a reasonable time frame for the development of solutions to hearing aid-compatibility issues. The progress made in developing digital solutions in other areas caused the Commission to determine that the industry will also likely be able to develop digital solutions for wireless telephones within a five-year period.

18. AWS claims that the Commission's statement indicating that, on average, a consumer owns a handset for 1.5 to 2.5 years before acquiring a new one, supports at most a transition period of 30 months. Too much emphasis, however, is being placed on the statement that the typical recycling period for a handset is 18 to 30 months. In the *Report and Order*, the Commission sought to explain that it was unnecessary to retain the analog requirement indefinitely despite the large numbers of emergency-only callers because it is likely that digital equipment will be made available over time. The Commission surmised that, given that both digital and analog phones are being donated, that digital subscribers outnumber analog phone subscribers, and that there is a rapid turnover rate of phones, *i.e.* a turnover frequency of every 18–30 months, it is likely that a sufficient number of digital phones will be made available to emergency-only consumers by the end of the five-year transition period. The 18–30 month period relates only to the turnover rate of a phone. It was not intended to reflect the time it will take for a donated digital phone to get into the hands of any given emergency-only consumer, much less the period of time necessary to migrate the large numbers of emergency-only callers from analog service. Moreover, although the Commission agrees that there is indeed robust competition in the wireless telephony marketplace, it reiterates that persons with hearing disabilities and emergency-only consumers do not benefit in large part from such competition.

19. Moreover, the Commission recently found that ensuring greater availability of hearing aid-compatible digital phones requires at least a five-year time frame. The Commission determined in the *HAC Report and Order*, 68 FR 54173, September 16, 2003 that it is feasible for certain digital wireless phones to be made hearing aid compatible, and set out certain performance standards as well as a schedule for implementation of those requirements. *See* § 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones, *Report and Order*, 68 FR 54173, September 16, 2003. Specifically, the Commission adopted certain performance levels set forth in ANSI C63.19 as a technical standard to govern digital wireless phone compatibility with hearing aids.[2] In the *HAC Report and Order*, the Commission required that, within two years, each digital wireless handset manufacturer and each carrier providing digital wireless services must make commercially available at least two handsets for each interface in its product line which meet the ANSI C63.19 performance level (*i.e.* U3) for acoustic coupling. By the end of three years, manufacturers and carriers must offer at least two digital wireless handsets meeting the U3T performance level of providing telecoil coupling capability for each air interface offered. Further, in order to ensure consumers continued accessibility and a range of product options, the Commission determined that 50 percent of all digital wireless phone models offered by manufacturers and service providers must be compliant with requirements for acoustic coupling by February 18, 2008, the termination date of the five-year transition period. The Commission determined that providing such compatibility in half of all phone models by the end of the five-year transition is a feasible interim goal, and that further progress would be made over time to make even more digital equipment hearing aid-compatible. The Commission concluded, however, that requiring more (*i.e.* extend the requirements to all digital wireless phones in the near term) could not be done given technical and resource difficulties. It is evident then, in light of the Commission's findings in the *HAC Report and Order*, that at least a five-year transition period is required to provide persons with hearing disabilities with adequate access to hearing aid-compatible digital devices.

20. Finally, although the Commission concluded that roaming and interoperability concerns advanced by small and regional carriers as well as telematics providers were not sufficient in themselves to justify an indefinite retention of the analog requirement, the Commission nonetheless determined that the five-year transition period would be useful in mitigating any significant impacts that an immediate elimination of the analog requirement might cause. Indeed, although the concerns expressed by regional carriers and telematics providers derive from business decisions that are generally within the control of the individual provider, the Commission is not unmindful of the potential impacts of the elimination of the analog requirement on these service providers and their customers.

21. In this regard, the Commission continues to believe that the five-year period is desirable to smooth the transition from analog to digital. A five-year time frame will enable regional carriers to evaluate their current and future technology choices as well as those of their current roaming partners, and will provide carriers with adequate time to negotiate new contracts where

[2] ANSI C63.19 is the technical standard developed by Task Group C63.19 of ANSI 63 (the Accredited Standards Committee on Electromagnetic Compatibility) that is predictive of the successful use of digital wireless phones with hearing aids. Hearing aids operate in either acoustic or inductive (*i.e.* telecoil) coupling modes. With respect to acoustic coupling mode, ANSI C63.19 specifies ratings for digital wireless phones, U1 through U4, based on their RF emissions levels, with U1 being the highest emissions and U4 being the lowest emissions. The standard also provides a methodology for rating hearing aids from U1 to U4 based on their immunity to interference, with U1 being the least immune. As to telecoil coupling mode, the ANSI standard specifies the axial field and radial field intensity of the audio signal's magnetic field required for satisfactory operation of digital wireless phones with hearing aids. The standard also specifies ratings for the magnetic field quality of digital wireless phones as well as the immunity of hearing aids to undesired magnetic fields, U1T through U4T. The applicable ANSI C63.19 ratings identified for acoustic and telecoil coupling mode are U3 and U3T, respectively.

needed to ensure the availability of roaming services to their customers. As noted in the *Report and Order*, demand will likely increase for multimode/multiband handsets such that by the end of the five-year period, these handsets should be widely available and customers may choose to migrate to these new handsets depending on their roaming needs. Similarly, a five-year period will give telematics providers time to partner with various carriers to secure service on the carriers' digital networks and develop multimode devices that will provide interoperability and facilitate roaming on digital networks. Further, given the public safety uses of many telematics devices, the five-year transition will allow continued access to such applications for a reasonable period of time until telematics providers are able to switch their customers over to digital technology. Moreover, the transition period will provide additional time for other CMRS providers, particularly Personal Communications Service (PCS) carriers, to further build out their licensed service areas thereby enhancing roaming opportunities for all consumers.

B. It Is Appropriate To Reconsider Dobson Communications' Proposal To Allow Cellular Licensees To Extend, on a Secondary Basis, Into Adjacent Unserved Areas of Less Than 50 Square Miles Without Prior Commission Approval

22. *Background.* The Commission's cellular unserved area rules provide that, once the initial licensee of a market completes a five-year build-out period, the portion of the market that is not being served becomes available for re-licensing. Under the Commission's unserved area rules, carriers are only licensed for areas that they intend to serve, and applications for new cellular systems must propose a contiguous cellular geographical service area of at least 50 square miles. Applications of an entity seeking to establish a new cellular system, or an existing licensee requesting an authorization that would expand its CGSA or that would produce a *de minimis* service area boundary extension into unserved area must be placed on public notice for thirty days.

23. In the *Report and Order*, the Commission addressed proposals by various commenters seeking significant revision of the Commission's unserved area rules. Among the alternatives submitted included a proposal by Dobson which requested that the Commission permit existing licensees to cover adjacent unserved areas of less than 50 square miles on a secondary basis without approval from the Commission. Dobson asserted that the rules regarding unserved areas between a cellular licensee's CGSA and the market boundaries or CGSAs of neighboring licensees impose filing obligations and delays in the introduction of new coverage. Dobson asserted that if it seeks to make engineering modifications to its CGSA-defining cell sites (*i.e.,* sites along the periphery of its CGSA) in order to improve existing coverage inside the CGSA, it must file a major modification application if the modifications cause extensions into unserved area. Dobson argued that because of this extension, a licensee must file a major modification application, wait approximately 60–90 days for the application to be accepted for filing, and wait another 30 days once the public notice is issued before grant can be made.

24. The Commission generally rejected the proposals submitted by Dobson and other commenters, stating that the proposed modifications constituted fundamental changes to the Commission's cellular unserved licensing framework, and as such were beyond the scope of the biennial review. The Commission also noted that, under the current process, it receives approximately 40 unserved area applications each month, and typically processes the applications within 45–60 days. Given the low number of unserved area applications that are filed as well as the speed with which such applications are processed, the Commission was not persuaded that the burdens imposed by a major overhaul of the rules would be offset by any corresponding benefits.

25. In response to the *Report and Order*, Dobson requests reconsideration of the Commission's decision to reject its proposal. Dobson asserts that the reasons advanced by the Commission in rejecting the unserved area proposals appear to have been directed at those advanced by other commenters rather than at Dobson's request. Dobson asserts that the Commission's failure to adopt its specific proposal without advancing any reasons for doing so is contrary to section 11 as well as the fundamental requirements of reasoned decision making. Further, Dobson argues that, consistent with the Commission's current new rural service-oriented initiatives, Dobson's proposal advances and improves service to rural areas and should be adopted upon reconsideration.

26. *Discussion.* While the Commission continues to believe that major changes to its cellular unserved area licensing framework are beyond the scope of a biennial review proceeding, it finds that it is appropriate to reconsider certain aspects of Dobson's request. Unlike proposals advanced by other commenters which sought significant revision to existing rules, Dobson proposes only slight modification to its unserved area rules. The Commission concludes that adopting Dobson's proposal that licensees be allowed to extend into adjacent unserved areas of less than 50 square miles on a secondary basis without prior Commission approval will provide licensees with additional flexibility to respond to operational demands in a manner that remains consistent with its unserved area rules. Moreover, the Commission believes that providing licensees with this added flexibility will help to encourage carriers to expand into rural areas.

27. The Commission does not agree with Dobson's assertion that the cellular unserved area rules are no longer necessary. The basic premise of cellular service licensing is that carriers are only licensed and provided protection from incursions from other licensees for areas that they actually serve. The Commission put in place this licensing scheme to ensure that licensees could not claim as protected CGSA areas that they were not actually serving and prevent other entities from providing service instead. Because a licensee's protected CGSA is defined by actual coverage, it remains necessary for licensees to file for approval with the Commission if it seeks to add new areas to its protected service area. Further, as noted in the *Report and Order*, proposals seeking to significantly overhaul, or remove as unnecessary, the unserved area rules are actually advocating a fundamental change to the Commission's cellular service licensing model, and, as such, are beyond the scope of a biennial review proceeding.

28. While the Commission finds that major changes to its cellular licensing framework are not appropriate here, it nevertheless finds that it should reconsider and adopt Dobson's proposal. The Commission agrees with Dobson's argument that the Commission's licensing rules may be burdensome in certain cases, such as where design changes or engineering modifications aimed only at improving coverage within a licensee's existing CGSA results in an extension into adjacent unserved area. Although the Commission disagrees with Dobson's assertion that there is an inordinate delay in processing applications, it finds that the process is nevertheless burdensome if the licensee is not

actually seeking to expand its service area.

29. The Commission concludes that Dobson's proposal provides licensees with flexibility to respond to operational demands yet remains within the framework of the Commission's existing cellular unserved rules. Any extension would be on a secondary basis only and will not become part of the licensee's CGSA unless the licensee files a major modification application. Although the Commission is permitting carriers to bypass the formal major modification filing process in such circumstances, the Commission will continue to require carriers to notify the Commission as to its actual service contours so that others are on notice of their presence. Licensees may submit such filings as minor modifications through the Commission's Universal Licensing System (ULS). If another licensee is granted approval to incorporate the unserved area as part of its CGSA, the first licensee must pull back its coverage. Because any extension into unserved area will be on a secondary basis only, the proposal provides licensees with operational flexibility while also being consistent with existing unserved area rules because the licensee does not seek to claim the extension as protected CGSA. Moreover, the Commission believes that adopting this proposal may expedite expansion of cellular coverage into rural areas. By providing licensees with the flexibility to extend into unserved areas without first having to go through the major modification filing process, the Commission believes that licensees will be more likely to extend operations into rural areas.

C. The Commission Appropriately Removed § 22.919 Which Set Out Electronic Serial Number Hardware Design Requirements

30. *Background.* In the *Report and Order*, the Commission removed § 22.919 of its rules, which established ESN design requirements for cellular telephone manufacturers. An ESN is a number that uniquely identifies a cellular mobile transmitter to a cellular system. Former § 22.919 required that each cellular mobile unit have an ESN that is not "alterable, transferable, removable or otherwise able to be manipulated.'' The rule also required that equipment be designed in such a way that any attempt to remove, tamper with, or change the ESN chip or other related components would render the mobile transmitter inoperative. This rule section was originally promulgated to address the problem of cellular "cloning'' fraud that was prevalent in the mid-1990s, and which resulted in millions of dollars in losses to the cellular industry. Over the years, however, other measures were developed to combat cloning fraud, such as authentication, radio frequency fingerprinting, and call profiling. Moreover, Congress enacted the Wireless Telephone Protection Act of 1998 (WTPA) to address fraudulent and unauthorized use of wireless telecommunications services. *See* 18 U.S.C.A. 1029. After reviewing the original purpose of the rule, the advanced fraud control technologies measures developed to combat fraud since the adoption of the rule, as well as comments submitted in the proceeding, the Commission concluded that the ESN requirements were no longer necessary as a preventative measure against cellular cloning fraud. The Commission therefore removed § 22.919 of its rules.

31. In response, two entities seek reconsideration of the decision to remove the ESN rule. AWS argues that the ESN rule remains essential to fulfill its original purpose of deterring cloning fraud and reducing incentives to steal handsets. AWS asserts that not only does the Commission's removal of the ESN requirements increase the carrier's risk of fraud, it could also make wireless subscribers a target for thieves seeking expensive "next generation'' handsets for resale. Accordingly, AWS not only requests that the Commission reinstate the ESN hardening rule, it also asks the Commission to extend the requirements to cover all CMRS devices regardless of technology or frequency band. CTIA also asks the Commission to revisit the ESN issue but does not request that the Commission reverse its decision to remove the ESN requirement. Instead, CTIA requests that the Commission remove language in paragraph 39 of the *Report and Order* that stated that analog cellular cloning by legitimate subscribers would no longer be a violation of the Commission's rules. CTIA argues that the language is inconsistent with federal law and Commission policy and has serious consequences with respect to carrier operations.

32. *Discussion.* The Commission is not persuaded by arguments that it must continue to mandate ESN design requirements in order to prevent fraud. The Commission prefers, as a general policy, to allow market forces to determine technical standards wherever possible, and to avoid mandating detailed hardware design requirements for telecommunications equipment, except where doing so is necessary to achieve a specific public interest goal. Although there may be instances in which the Commission concludes that it is necessary to establish specific design requirements, the Commission continues to find that mandating ESN design specifications is no longer necessary or warranted because of other measures that the wireless industry has developed to accomplish the same goal. Moreover, the Commission notes that in removing the ESN requirements from its rules, the Commission was not precluding equipment manufacturers from continuing to produce handsets using ESN hardening. Wireless equipment manufacturers and carriers may continue to utilize hardened ESN as a fraud deterrent if they wish to do so. The Commission also declines to mandate specific design requirements for non-cellular CMRS for the same reasons. The Commission does not currently impose such anti-fraud measures in its rules affecting other CMRS services, and, the Commission is not aware that the industry has had problems with its fraud prevention efforts in the absence of Commission rules requiring that equipment manufacturers design handsets to become inoperable if tampered with.

33. While the Commission finds that the decision to eliminate the ESN design requirements was appropriate, the Commission agrees with CTIA that it is necessary to clarify language in paragraph 39 of the *Report and Order* regarding the use of cellular cloning by legitimate subscribers. The *Report and Order* provided that in the absence of § 22.919, the cloning of phones by legitimate subscribers is not a violation of the Commission's rules but is instead a contractual matter to be judged according to the terms of the applicable contract. CTIA argues that paragraph 39 should be reconsidered for a variety of reasons, for example, that it may encourage entities not affiliated with carriers to offer "cloning service'' to the carriers' subscribers, thereby leading to a panoply of operational problems: Misdirected incoming calls, the inability to make simultaneous calls on handsets with the same MIN/ESN, fraud losses from cloned devices not under the control of the subscriber as well as denial of service by the subscriber's own carrier when the carrier's anti-fraud software is triggered by the cloned handsets.

34.The Commission notes that the language in paragraph 39 was directed toward legitimate cell phone uses as agreed to by carriers and their subscribers. The intent of the paragraph was to allow carriers, in the absence of § 22.919, to examine whether there are permissible, legitimate uses of a cloned

phone by its own subscribers, and, if so, to control such use contractually. In reviewing this matter, however, the Commission agrees that the language in paragraph 39 was imprecise and may be misconstrued. The Commission is certainly cognizant of the operational problems that could occur with phones having the same ESN, and the Commission continues to believe that the altering of cellular phones to emulate ESNs without receiving the permission of the relevant cellular licensee should not be permitted. Accordingly, the Commission clarifies that the fraudulent or unauthorized use of a cloned phone, whether by a third party or a legitimate subscriber, remains prohibited by federal law and by Commission policy.

D. It Is Not Necessary To Further Modify the Commission's Rules Regarding Emission Limits for Cellular and PCS

35. *Background.* In the *Report and Order,* the Commission amended §§ 22.917 and 24.238 of its rules, which specify out-of-band radio frequency emissions limits with respect to cellular and PCS operations. The Commission sought to define the out-of-band emission limits in such a way as to provide an adequate measure of interference protection to other licensees and services in adjacent spectrum, while also allowing licensees the flexibility to establish a different limit where appropriate. The Commission specifically sought to make its rules more technology-neutral in order to encourage greater deployment of advanced technologies. In adopting these changes, the Commission pointed out that, in the Wireless Communications Service (WCS), licensees are provided certain flexibility with respect to operations at the edge of their authorized spectrum. Because the Commission seeks to ensure regulatory uniformity where possible, the Commission found it appropriate to amend §§ 22.917 and 24.238 to also provide similar flexibility to cellular and PCS licensees regarding emissions limits. Also, the specific language adopted for the modified rules is consistent with International Telecommunications Union (ITU) standards for emissions.

36. Lucent argues that the measurement procedures for emissions in §§ 22.917(b) and 24.238(b), as modified in the *Report and Order,* subjects carriers that employ Universal Mobile Telecommunications Systems (UMTS) to more stringent requirements than carriers that deploy CDMA2000. Lucent argues that because a UMTS system would be operating on a wider bandwidth than a CDMA2000 system, a UMTS carrier may not operate as close to the edge of its assigned spectrum at the same transmitting power as a CDMA2000 carrier. Lucent believes that emissions from either CDMA2000 or UMTS spread spectrum systems into the spectrum immediately outside and adjacent to the frequency block will be similar, and that the emission limitations should not discriminate between these spectrum technologies.

37. *Discussion.* The Commission finds insufficient basis to further modify §§ 22.917 and 24.238 as requested by Lucent. The changes made to §§ 22.917 and 24.238 in the *Report and Order* enable licensees to operate transmitters on frequencies closer to the edge of their authorized spectrum than full compliance with §§ 22.917 and 24.238 would normally allow by modifying how out-of-band emissions are measured. Sections 22.917 and 24.238 affect how close to the edge of its authorized spectrum that a licensee may operate as a function of the emission bandwidth in which it operates. In other words, the emissions standard is one of proportionality: the wider the bandwidth used by a licensee, the farther the licensee must operate from the edge of its assigned spectrum in order to avoid affecting operations in adjacent spectrum.

38. Although Lucent argues that the Commission's rules regarding out-of-band emissions impose greater restrictions on UMTS as compared with CDMA2000, §§ 22.917 and 24.238 in fact apply the same emissions requirement on both types of systems. The Commission finds that the modifications previously made to §§ 22.917 and 24.238 were sufficient to provide ample flexibility to licensees, while also treating all technologies consistently, and, accordingly, the Commission declines to further modify these rules.

III. Procedural Matters

A. Supplemental Regulatory Flexibility Act Certification

39. The Regulatory Flexibility Act of 1980, as amended (RFA), requires that a regulatory flexibility analysis be prepared for rulemaking proceedings, unless the agency certifies that "the rule will not have a significant economic impact on a substantial number of small entities.'' *See* 5 U.S.C. 605(b). The RFA generally defines "small entity'' as having the same meaning as the terms "small business,'' "small organization,'' and "small governmental jurisdiction.'' *See* 5 U.S.C. 601(b). In addition, the term "small business'' has the same meaning as the term "small business concern'' under the Small Business Act. *See* 5 U.S.C. 601(3). A small business concern is one which: (i) Is independently owned and operated; (ii) is not dominant in its field of operation; and (iii) satisfies any additional criteria established by the Small Business Administration. As required by the RFA, a Final Regulatory Flexibility Analysis was incorporated in the *Report and Order.* This Supplemental Final Regulatory Flexibility Analysis is limited to matters raised on reconsideration.

40. In this *Order on Reconsideration,* the Commission affirms the decision to establish a five-year sunset period for the analog requirement. The Commission also affirms the decision to remove the rule section governing electronic serial numbers in cellular telephones, but clarify that the fraudulent and unauthorized use of ESNs remains contrary to federal law and Commission policy. Further, the Commission reconsiders and adopts a proposal to permit, in certain circumstances, cellular carriers to extend on a secondary basis into neighboring unserved without prior Commission approval. The Commission also declines a request to further modify its rules regarding emission limitations.

41. The general effect of this decision on small business entities will be to allow cellular carriers to avoid processing delays only in certain situations. Otherwise, the *Order on Reconsideration* affirms or codifies decisions previously made in the *Report and Order.* Accordingly, the Commission certifies that this decision will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of the *Order on Reconsideration* including a copy of this certification, in a report to Congress pursuant to the Congressional Review Act of 1996. *See* 5 U.S.C. 801(a)(1)(A). In addition, the *Order on Reconsideration* and this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

B. Paperwork Reduction Act Analysis

42. The *Order on Reconsideration* has been analyzed with respect to the Paperwork Reduction Act of 1995, Public Law 104–13, and found to impose modified recordkeeping requirements or burdens on the public. Implementation of these modified reporting or recordkeeping requirements will be subject to approval by the Office of Management and Budget (OMB) and will go into effect upon publication in the **Federal Register** of OMB approval.

IV. Ordering Clauses

43. Pursuant to sections 1–4, 222, 227, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151-154, 222 and 227; and § 1.429 of the Commission's Rules, 47 CFR 1.429, this *Order on Reconsideration* in WT Docket No. 01–108 is adopted. The *Order on Reconsideration* will be effective June 1, 2004, except for a provision in the *Order on Reconsideration* permitting cellular carriers to extend into unserved areas of less than fifty square miles on a secondary basis that is not effective until approved by the Office of Management and Budget (OMB) because it modifies information collection requirements. The agency will publish a document in the **Federal Register** announcing the effective date of the modified information collection.

List of Subjects in Parts 22 and 24

Communications common carriers.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 04–6822 Filed 3–31–04; 8:45 am]

BILLING CODE 6712–01–U

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 04–717, MB Docket No. 02–260, RM–10502, 10833]

Radio Broadcasting Services; Freer, Hebbronville, and Orange Grove, TX

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document grants a counterproposal filed by La Nueva Cadena Radio Luz, Inc., licensee of Station KEKO(FM), Hebbronville, Texas by substituting Channel 269C2 for Channel 269A and reallotting Channel 269C2 from Hebbronville to Orange Grove, Texas, as its first local aural transmission service and modifying the Station KEKO(FM) license accordingly. Channel 269C2 can be allotted to Orange Grove, in compliance with the minimum distance separation requirement of the Commission's Rules, provided there is a site restriction 28.6 kilometers (17.8 miles) west of the community. The reference coordinates for Channel 269C2 at Orange Grove are 28–00–01 NL and 98–13–24 WL. This document also denies the Petition for Rulemaking filed by Linda Crawford, requesting the allotment of Channel 271A at Freer, Texas, as that community's third local aural transmission service.

DATES: Effective May 3, 2004.

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

FOR FURTHER INFORMATION CONTACT: Rolanda F. Smith, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Report and Order,* MB Docket No. 02–260 adopted March 17, 2004, and released March 19, 2004. The full text of this Commission decision is available for inspection and copying during normal business hours in the Commission's Reference Center 445 Twelfth Street, SW., Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Qualex International Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC, 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail *qualexint@aol.com.*

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Texas, is amended by removing Channel 269A at Hebbronville and by adding Orange Grove, Channel 269C2.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 04–7368 Filed 3–31–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 04–738; MB Docket No. 03–57; RM–10565]

Radio Broadcasting Services; Fort Collins, Westcliffe & Wheat Ridge, CO

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In response to a *Notice of Proposed Rulemaking,* 68 FR 16750, April 7, 2003, this document grants a petition for rulemaking filed by Tsunami Communications, Inc., former licensee of Station KTCL, Fort Collins, Colorado, substituting Channel 227C0 for Channel 227C at Fort Collins, CO, and reallotment of Channel 227C0 to Wheat Ridge, CO, as a first local service, with the license modified to specify operation on Channel 227C0 at Wheat Ridge. Jacor Broadcasting of Colorado, Inc. is the current licensee of Station KTCL. To accommodate Channel 227C0 at Wheat Ridge, we shall also substitute Channel 249A for vacant Channel 227A at Westcliffe, CO. The coordinates for Channel 227C0 at Wheat Ridge are 39–40–18 and 105–07–32 and the coordinates for Channel 249A at Westcliffe are 38–03–21 and 105–30–02. The counterproposal filed by Meadowlark Group, Inc. has been dismissed. With this action this proceeding is terminated.

DATES: Effective May 3, 2004.

FOR FURTHER INFORMATION CONTACT: Kathleen Scheuerle, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MB Docket No. No. 03–57, adopted March 17, 2004, and released March 19, 2004. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 445 12th Street, SW., Washington, DC. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC, 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail *qualexint@aol.com.*

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

■ Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, and 336.

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Colorado, is amended by removing Channel 227C at Fort Collins and adding Wheat Ridge, Channel 227C0 and by removing Channel 227A and adding Channel 249A at Westcliffe.