

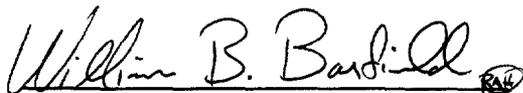
modified, consistent with §§ 22.163 and 22.167, to provide licensees additional flexibility in emergency situations. *See Appendix C.*

CONCLUSION

BellSouth supports the Commission's undertaking to revise and update the Part 22 rules. This proceeding provides the Commission with an opportunity to eliminate many needless regulatory burdens and clarify the requirements that are imposed on licensees. The revisions set forth herein and in the Appendices will further assist the Commission in this effort.

Respectfully submitted,

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APPENDIX 1

APPENDIX 1

Application Forms and Instructions

BellSouth supports the Commission's intent to revise FCC Forms 401, 489, and 490. While the proposed forms streamline the information required, BellSouth suggests that additional revisions be made to further simplify the application process. These suggestions, which are detailed below, also incorporate BellSouth's comments on the proposed rules.

A. FCC Form 401

1. Instructions

Corrections should be made to the FCC Form 401 instructions to cross-reference revised rule numbers instead of existing rule numbers. Instruction items 15-19 should be corrected to reference the correct item numbers on FCC Form 401.

2. Schedule A, Item 12 — Type of application

Consistent with the NPRM, the proposed FCC Form 401 will be used for all requests that require Commission action — whether or not the request would be considered major or minor. Item 12, as proposed, delineates which filings are considered major and which are considered minor, based on the letter code for the type of filing. BellSouth suggests, however, that the Commission eliminate the major/minor categories as listed on the FCC Form 401. Elimination of this distinction would allow Applicants to classify certain filings, which would otherwise be major, as minor provided such a classification was consistent with Part 22.

For example, Item 12, code C (requests for developmental authorizations) could be characterized as minor if it complied with proposed Section 22.123(b). Such a characterization would be consistent with current rules as embodied in Item 7(g) of the current FCC Form 489. For additional comments on developmental authorizations, see BellSouth's discussion of Section 22.123(b) in Appendix 2.

In the event efficient application coding makes it essential that the letter selected in Item 12 be associated with a single major or minor classification, BellSouth offers two alternatives that would be compatible with the coding scheme. The first alternative would be to create additional letter codes for the additional application type/classification combinations, such as S, for requests for developmental authorization classified as minor. The second alternative would be to provide an additional item that would allow the applicant to request classification as minor for an application type otherwise listed as major. In either of these cases, the staff processing the application after initial coding could reclassify the application as major if it was not properly classified as minor and cause a public notice to be issued.

3. Schedule A, Item 17 — Title of signer

This item should be conformed to the practice followed in FCC Forms 489 and 490, which provide for the use of letter codes to designate the capacity of the signing party, rather than a typed title. BellSouth suggests that the block indicating the capacity of the signer for all three forms be amended to read as follows:

##.
Signed in the capacity of: _____
<u>I</u> ndividual applicant <u>M</u> ember of partnership
<u>O</u> fficer of corporation or association
<u>A</u> uthorized employee of corporation

This would make specific provision for signing by an authorized employee of a corporation, as is permitted by Section 1.743(a) of the Rules; the coded blocks on the NPRM's proposed FCC Forms 489 and 490 do not provide for signing by an authorized employee. The Commission should also consider adding an explanation to the Instructions for each form to indicate that when the members of an applicant partnership are in turn corporations or partnerships, "Member of partnership" should be indicated and the signer should be an individual authorized to act on behalf of a member of the partnership.

4. Schedule B

BellSouth applauds the Commission's compression of the FCC Form 401, Schedule B. The proposed Schedule B eliminates information which was previously required but seldom used. BellSouth suggests, however, that some minor revisions may be necessary to avoid confusion. The Commission should make clear that the header immediately preceding Items 18, 27, 34, 36, and 37 is for Commission use only. While an applicant may be able to provide the call sign and type of action requested, it should not provide a file number as, in most cases, the Form 401 will be assigned a new file number. Similarly, an applicant should not provide the date filed. The date filed is better determined by the Commission (*i.e.*, FCC Date Stamp) rather than by the applicant.

B. FCC Form 489

1. Instructions

As with the proposed FCC Form 401 instructions, corrections should be made to the FCC Form 489 instructions to cross-reference the revised rules instead of the current rules.

2. Item 6, code E — Uncompleted partial assignment

Consistent with the NPRM, Item 6, code E should be corrected to read "Partial assignment was not completed within 60 days." See proposed § 22.137(b). In addition, the word "license" should be corrected to read, "licensee".

3. Item 6, new code C — Minor modifications

Consistent with the discussion in the body of BellSouth's Comments on notification filings for minor modifications, and the corresponding rule revision modifications for §§ 22.163 and 22.165 in Appendix 2, a new code C should be added, with the description, "Minor modifications have been made pursuant to § 22.163,"¹ should be added to Item 6. The addition of this category would provide applicants an opportunity to obtain interference protection for minor modifications by registering such modifications (including additional transmitter locations) with the Commission through notifications on FCC Form 489.

4. Item 11 — Capacity of signer: see comment 3 to Form 401, above.

C. FCC Form 490

1. Instructions

As with the proposed instructions for the other forms, corrections should be made to the FCC Form 490 instructions to cross-reference the revised rules instead of current rules.

Consistent with the discussion in the body of BellSouth's Comments, the Commission should no longer require that an FCC Form 430 for the assignee or transferee be attached to (or referenced in) all FCC Form 490 filings. Accordingly, BellSouth recommends that all references to the FCC Form 430 be removed from the instructions. The instructions should, however, reference the requirements in the rules that require disclosure of all real parties in interest and the applicant's qualifications to hold a license.

2. Item 4 — Transfer of control or assignment of authorization

BellSouth suggests that item 4 be removed from the FCC Form 490. As discussed in the body of BellSouth's Comments, there are no significant differences between assignments and transfers of control. There does not, therefore, appear to be any reason for requiring the identification of a given transaction as being either an assignment or a transfer.

¹ Should the Commission not combine §§ 22.163 and 22.165, the new category should read "C Minor modifications have been made pursuant to §§ 22.163, 22.165."

3. Item 5 — *Pro forma* assignment

This Item should be amended to read, "Is this a *pro forma* application?", because both assignment and transfer applications may be *pro forma*.

4. Item 8 — Means of accomplishing assignment or transfer

BellSouth suggests that Item 8 be deleted in its entirety. Part (a) of this Item provides for the designation of the means of accomplishing the assignment or transfer as either a sale/stock transaction or other. In the event of a sale/stock transaction, part (b) provides spaces for certain information about the stock.

This item appears to be unnecessary. It is unclear whether the response is used in processing, or whether it should be in any event. Most assignments and transfers involve a governing agreement as well as a mixture of various types of consideration, including on some occasions multiple classes and types of securities. In the case of stock transactions, the space in part (b) may be inadequate to describe the various types of stock involved. To the extent the Commission requires information about the nature of the transaction or the type of consideration involved, it would appear preferable to require that the transaction be described in an exhibit. This would accord with current practice.

5. Item 9 — Anti-drug certification by assignor or transferor

This Item should be amended to make replace the term "applicant" with "assignor or transferor (applicant)" upon its first occurrence to remove ambiguity cause by the fact that there are two applicants involved in a Form 490 application.

6. Signature block for assignor or transferor

The signature block should be moved to the bottom of page 1 of the form, which would separate Part 1, which is completed by the assignor/transferor, from Part 2, which is completed by the assignee/transferee.

To be consistent with the signature blocks on revised FCC Forms 401 and 489, each section of the signature block should be numbered as a separate item.

The "Signature of Authorized Officer or Agent" block should be re-titled, "Signature", and the parenthetical instruction should be moved to the instruction sheet.

The mailing address of the assignor/transferor should be deleted, because the same information is provided in Item 1.

An item should be added to the signature block to designate the capacity in which the signing party has executed the application. *See* comment 3 to Form 401. Because an involuntary assignment or transfer will generally be signed by a person not acting in the same

capacity as those listed in the box illustrated in comment 3 to Form 401, an additional code should be included in the signer's capacity block, such as "See attached document of authorization".

7. Item 14 — Anti-drug certification by assignee or transferee

The first occurrence of "applicant" should be replaced by "assignee or transferee (applicant)" for the reasons set forth in comment 5 above.

8. Item 15 — Certification by assignee or transferee

The first paragraph of the certification is phrased in terms only of an assignment of authorization, and does not include language appropriate for a transfer of control; it also presumes that the assignee or transferee is an individual, which is frequently not the case. BellSouth suggest that this paragraph be rewritten to read:

The applicant waives any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests that written consent be granted to the assignment of authorization(s) or transfer of control of a licensee or permittee as herein described.

BellSouth submits that the second paragraph of the certification should be deleted in its entirety. This paragraph retains language contained in Item 20 of the current FCC Form 490 concerning the assignee's or transferee's assumption of the assignor's or transferor's obligations and conditions and provides that the assignee or transferee will not be liable for certain matters involving the assignor or transferor prior to consummation.

This paragraph appears to be obsolete. It is unclear why this language has been included in this and one other FCC application form. Identical language is contained in the assignee's certification on FCC Form 702 (non-broadcast assignment of authorization), but there is no trace of this language in FCC Form 704 (non-broadcast transfer of control). The detailed forms for broadcast long-form assignments and transfers (FCC Forms 314 and 315) do not contain similar language, nor does the short-form broadcast assignment and transfer application form (FCC Form 316).

This paragraph does not appear to be required by any regulation or policy in the current or revised Part 22 or by any provision of the Communications Act. Furthermore, to the extent this language purports to affect an assignee's or transferee's liabilities regarding private parties, it would appear to be beyond the Commission's jurisdiction. The United States Supreme Court has held that the FCC does not have jurisdiction to modify or invalidate a contract or agreement. *Regents v. Carroll*, 338 U.S. 586 (1950). Furthermore, the Commission and its staff have consistently held that the Commission is not the proper forum for the resolution of contractual disputes among applicants or parties to a settlement agreement. See, e.g., *American Cellular Network Corporation of Nevada*, 2 FCC Rcd. 4530

(1987), *aff'g* 60 Rad. Reg. 2d 1460 (Com. Car. Bur. 1986); *Columbia Cellular Partnership*, 4 FCC Rcd. 6432 (Mob. Ser. Div. 1989); *Ellis Thompson*, 4 FCC Rcd. 2599 (Com. Car. Bur. 1989), *aff'g* 3 FCC Rcd. 3962 (Mob. Ser. Div. 1988).

9. Signature Block for Assignee or Transferee

To be consistent with the signature blocks on revised FCC Forms 401 and 489, each section of the signature block should be numbered as a separate item.

The block entitled "Designate Appropriate Classification" should be revised in accordance with comment 3 to Form 401.

APPENDIX 2

TABLE OF CONTENTS

	<u>Page</u>
§ 22.99 Definitions	1
§ 22.105	7
§ 22.105 (Table B-1)	7
§ 22.107	8
§ 22.108 Parties to applications.	8
§ 22.121 Repetitious, inconsistent or conflicting applications.	11
§ 22.123 Classification of filings as major or minor.	12
§ 22.123(a)	13
§ 22.123(b)	14
§ 22.123(e) Channel usage.	15
§ 22.123(e)(ii)(E)	16
§ 22.123(e)(2)	16
§ 22.125 Applications for special temporary authorizations	17
§ 22.125(b)	18
§ 22.129 Agreements to dismiss applications, amendments or petitions to deny.	19
§ 22.137 Assignment of authorization; transfer of control.	19
§ 22.137(a)	20
§ 22.137(b)	20
§ 22.137(c)(2)	21
§ 22.137(d)(3)	21
§ 22.137(e) (Proposed new subsection)	22
§ 22.137(f) (Proposed new subsection)	23
§ 22.142 Commencement of service; notification requirement.	23

	<u>Page</u>
§ 22.143(e) Construction prior to grant of application.	24
§ 22.144 Termination of authorizations.	24
§ 22.147(a) Authorization conditions.	24
§ 22.150(d)(3)	25
§ 22.159(c)	26
§ 22.163 Minor modifications to existing stations.	26
§ 22.165 Additional transmitters for existing systems.	26
§ 22.167 Applications for assigned but unused channels.	28
§ 22.167(d)	28
§ 22.307 Operation during emergency.	28
§ 22.317 Discontinuance of station operation.	29
22.323 Incidental communications services.	30
§ 22.507 Number of transmitters per station.	30
§ 22.509 Procedure for mutually exclusive applications.	31
§ 22.569 Additional channel policies.	32
§ 22.907 Coordination of channel usage.	32
§ 22.911 Cellular geographic service area.	33
§ 22.911(b)	33
§ 22.911(c)(1) Cellular geographic service area.	34
§ 22.911(d)	34
§ 22.912(a) Service area boundary extensions.	35
§ 22.919 Electronic serial numbers.	36
§ 22.923 Cellular system configuration.	36

	<u>Page</u>
§ 22.933 Cellular system compatibility specifications	37
§ 22.935 Procedures for comparative renewal proceedings.	37
§ 22.937 Demonstration of financial qualifications.	38
§ 22.937(d)	39
§ 22.937(f)	39
§ 22.937	40
§ 22.937(g)	41
§ 22.939 Limitations on amendments to applications.	41
§ 22.939(c) New subsection	42
§ 22.941 System identification numbers.	43
§ 22.943 Limitations on assignment of cellular authorizations.	43
§ 22.943(a)(3) New Subsection	44
§ 22.943 Limitations on assignment and transfers — cellular renewals.	45
§ 22.946(a) Construction periods and requirements for cellular systems.	45
§ 22.946(b)(1) and (b)(2)	46
§ 22.947 Five year fill-in period.	46
§ 22.947(a)	46
§ 22.947(b)	47
§ 22.947(c)	48
§ 22.949(a)-(b) Unserved area licensing phases, procedures and filing windows.	48
§ 22.951 Minimum coverage requirement.	49
§ 22.953(a)-(e) Content and form of applications.	49

APPENDIX 2

Detailed Comments and Recommendations

§ 22.99 Definitions.

NPRM: *Assignment of Authorization.* A transfer of a Public Mobile Services authorization from one party to another, voluntarily or involuntary, directly or indirectly, or by transfer of control of the licensee.

Recommendation:

Option 1:

Assignment of Authorization. A transfer, assignment, or other disposition of a Public Mobile Services authorization from the licensee to another party, voluntarily or involuntarily, directly or indirectly.

Option 2:

Assignment of Authorization. A transfer, assignment, or other disposition of a Public Mobile Services authorization, from the licensee or the person(s) owning or controlling the licensee to another party or parties, voluntarily or involuntarily, directly or indirectly. Except where the context indicates otherwise, this definition also includes a transfer of control of the licensee (*see* definition).

Discussion:

As noted in the body of BellSouth's comments, Section 310(d) is worded so as to apply to all dispositions of authorizations, including dispositions through transfers of control; the NPRM's proposed definition attempted to be similarly all-inclusive. Some of the rules, however, still discuss both assignments and transfers. The only situation in which there would appear to be any difference in regulatory treatment between assignments and transfers is in the case of partial assignments, where some (but not all) of a licensee's facilities are transferred to another.

BellSouth suggests that greater precision in the definition, and inclusion of more of the statutory terms, would be beneficial. Two options are presented. The first option would be to retain the definitional distinction between assignments and transfers, while the second option would be, as in the NPRM, to define assignments as including transfers of control. Under the second option, BellSouth recommends that the definition make clear that in some contexts the term "assignment" may not include transfers of control. BellSouth recommends that if the second option (or the current definition) is adopted, the Commission revise its rules where appropriate to refer only to assignments, rather than assignments and transfers. *See* proposed § 22.137 (Assignment of authorization; transfer of control); revised

FCC Form 490; *but see* proposed § 22.943 (assignment of authorizations in the Cellular Radiotelephone Service includes transfers of control).

NPRM: *Authorization.* A written instrument issued by the Commission conveying authority to operate, for a specified term, a station in the Public Mobile Services.

Recommendation:

Amend to read as follows:

Authorization. A written instrument issued by the Commission conveying authority to construct and operate, for a specified term, a station in the Public Mobile Services.

Discussion:

BellSouth recommends that the above definition include the word "construct" to clarify that authorizations include both types of authority. The NPRM appears to have eliminated the distinction between "construction permits" and "licenses" to operate facilities by reference to both types of authority as a single authorization. *See, e.g.,* Proposed § 22.142(a) (Construction period). Thus, the definition should be modified accordingly.

NPRM: *Cellular Radiotelephone Service.* A radio service in which common carriers are authorized to offer and provide cellular service for hire to the general public. This service was formerly titled Domestic Public Cellular Radio Telecommunications Service.

Recommendation:

Amend to read:

Cellular Radiotelephone Service. A radio service in which common carriers are authorized to offer and provide cellular service and auxiliary common carrier services for hire to the general public. This service was formerly titled Domestic Public Cellular Radio Telecommunications Service.

Discussion:

BellSouth suggests that the proposed definition be expanded consistent with proposed § 22.901(d) which permits cellular carriers to "use alternative cellular technologies and/or provide auxiliary common carrier services on" their assigned frequency channel blocks.

BellSouth notes that the term "radiotelephone" in the service title may be viewed as somewhat more limited in scope than "radio telecommunications", as in the current service title, but assumes that no substantive change is intended. The Commission may wish to consider alternative titles that indicate the broader scope of the service, such as Cellular Radio Service, Cellular Telecommunications Service, or Cellular Radiotelecommunications Service. These alternatives would not give rise to an inference that cellular systems are necessarily limited to voice telephone services.

NPRM: *Channel bandwidth.* The spectral width of a channel, as specified in this part, within which 99% of the emission power must be contained.

Recommendation:

Channel bandwidth. The occupied bandwidth of a channel, as specified in this part; the width of the channel from the lower to upper frequency limits of the channel, within which 99% of the total mean power of a given emission must be contained. *See also* § 2.1 (Occupied bandwidth).

NPRM: *Channel.* The portion of the electromagnetic spectrum assigned by the Commission for one emission. However, in certain circumstances, more than one emission may be transmitted on a channel. *See, for example,* § 22.161 and § 22.757, *et seq.*

Recommendation:

Delete the citation to § 22.161 and 22.757, *et seq.* and replace with the following:

* * * Certain channels are assigned on a paired basis, *e.g.*, a channel for base station transmissions and a channel for mobile station transmissions may be associated together and assigned to a licensee as a paired unit.

Discussion:

The reference to § 22.161 is unclear and the reference to § 22.757 is unnecessary. The reference to the sections following § 22.757 is incorrect, as the next numbered section, § 22.801, does not address channels. The additional sentence would clarify that each half of a channel pair is itself a channel, but that the pair is assigned as a unit.

NPRM: *Equivalent isotropically radiated power (EIRP).* The equivalent isotropically radiated power of a transmitter (with antenna, transmission line, duplexers

etc.) is the power at the input terminals of a reference isotropic radiator that would produce the same maximum field intensity.

Recommendation:

Add the following sentence to define "isotropic radiator" at the end.

An isotropic radiator is a theoretical lossless point source of radiation with unity gain in all directions.

NPRM: *Five year fill-in period.* A five year period during which the licensee of the first cellular system authorized on each channel block in each cellular market may expand the system within that market. See § 22.947.

Recommendation:

Amend to read as follows:

Five year fill-in period. A five year period, beginning on the date of grant of the initial cellular authorization for each frequency block in a cellular market, during which the licensee may expand the system within the market free from competing applications. See § 22.947.

Discussion:

BellSouth recommends that the definition be clarified and expanded to reference a carriers' expansion rights during the fill-in period.

NPRM: *Initial applications.* Applications for authority to operate the first cellular system on a channel block in a cellular market.

Recommendation:

Add "cellular" to the title, i.e., "*Initial cellular applications.*"

Discussion:

The definition is specific to the Cellular Radiotelephone Service. Thus, for clarity, the title should reference cellular.

NPRM: *Partitioned RSA.* A Rural Service Area with two or more authorized cellular systems on the same channel block during the five year fill-in period, as a

result of contract(s) between the licensee of the first cellular system and the licensee(s) of the subsequent systems. See § 22.947(b).

Recommendation:

The definition should be amended to read as follows:

Partitioned cellular market. A Metropolitan Service Area (MSA) or Rural Service Area (RSA) with two or more authorized cellular systems on the same channel block as a result of settlements or contract(s) between the licensee of the first cellular system and the licensee(s) of the subsequent systems. See § 22.947(b). Partitioned markets are considered separate cellular markets as defined in § 22.909.

Discussion:

The definition should not be restricted to RSAs, but rather broadened to include any partitioned cellular market. The Commission's records reflect that there is at least one partitioned MSA market -- Oklahoma City, MSA (Market No. 045, B1 and B2). Further, as of the date of this filing, there are 57 MSAs where the five year fill-in period has not yet expired, and accordingly additional MSAs may yet be partitioned. Consistent with BellSouth's proposed revision to § 22.947(b), licensees of the first cellular system on each channel block in any unexpired market should be permitted to enter into agreements to partially assign their markets -- regardless of the MSA/RSA distinction.

In addition, the rights of licensees in partitioned markets should continue to be protected after the five year fill-in period expires. The proposed definition appears to limit partitioned markets to the fill-in period. Thus, reference to proposed Section 22.909 makes clear that partitioned markets remain partitioned after expiration of the fill-in period.

NPRM: *Radiotelephone service.* Transmission of sound from one place to another by means of radio.

Recommendation:

Amend to read as follows:

Radiotelephone service. Transmission of voice-grade telecommunications by means of radio.

Discussion:

The definition as proposed would include only sound transmissions and would not include the various forms of data communications that are commonly transmitted over voice-grade telephone lines and radio telephone circuits, such as facsimile and modem communications. The recommended revision would not be so limited.

NPRM: *Radio common carrier and Wireline common carrier*

Recommendation:

Delete both definitions.

Discussion:

These terms are not used in the revised Part 22 and, therefore, the definitions do not appear to be necessary. While the wireline/non-wireline distinction served an important purpose in the initial cellular licensing scheme (*see Cellular Communications Systems*, 86 FCC 2d 469, 482-83 (1981) (subsequent history omitted)), it was largely eliminated in the Unserved Area proceeding and should be reflected as such in the rewrite of Part 22.

Additional definitions not included in proposed § 22.99:

The following definitions are not discussed in proposed Section 22.99 and should be added.

CGSA. See Cellular Geographic Service Area.

Cellular markets. Cellular markets are standard geographic areas used by the Commission for administrative convenience in the licensing of cellular systems. Cellular markets comprise Metropolitan Statistical Areas (MSAs) and Rural Service Areas (RSAs). See § 22.909.

Cellular Geographic Service Area. The Cellular Geographic Service Area (CGSA) of a cellular system is the geographic area considered by the Commission to be served by the cellular system. See § 22.911.

Non-Initial Cellular Applications. Applications for modifications, transfer of control and assignment of authorizations for existing systems.

Unserved Areas. Any area within the United States, its territories, and possessions, which is outside an existing cellular geographic service area in a specific frequency block after the five year fill-in period has expired. See also Five year fill-in period.

Discussion:

The first three terms are defined in proposed Sections 22.909 and 22.911, but the terms "cellular markets" and "CGSA" are used in Subpart B - Application Requirements

and Procedures of the proposed rules. For simplicity, they should be defined in § 22.99 with cross references to the relevant cellular rules.

BellSouth suggests that the last two definitions be added to distinguish applications filed by existing carriers (*e.g.*, modifications, transfers *etc.*) from initial cellular applications defined above. Further, since adoption of the *First Report and Order* and the *Second Report and Order* in the unserved area proceeding, the Commission will soon begin accepting applications to serve unserved areas. Proposed § 22.99 does not define unserved areas. The term is used throughout the rules and should be included in the definition section. The suggested definition has been modified from that which was adopted by the Commission in the unserved area proceeding, *First Report and Order*, 6 FCC Rcd. 6158 (1991) to clarify that unserved areas are defined after the expiration of the five year fill-in period. Prior to expiration, the licensee in the market may expand its system, partition its market, *etc.* See proposed § 22.947. Thus, unserved areas cannot be determined until after expiration of the fill-in period.

§ 22.105

NPRM: Except for authorizations granted under the emergency conditions set forth in § 308 of the Communications Act . . . the Commission may grant authorizations only upon written application received by it. A separate written application is required for each authorization. . . .

Recommendation:

Delete the sentence reading, "A separate written application is required for each authorization."

Discussion:

The Communications Act requires only that a written application be submitted for Commission authorization. Requiring a separate application for each authorization unnecessarily restricts Commission flexibility to allow a single application to be filed affecting more than one authorization. For example, applications for Commission consent to the transfer of control or the assignment of authorizations, should not require a separate written application for each authorization. The Commission may make the required findings regarding the transferee or assignee's qualifications, consistent with proposed §§ 22.132(a) and § 22.137(d) from a single application. Eliminating the second sentence of the proposed rule retains Commission flexibility within the rules and reduces the burden on the Commission's resources.

§ 22.105 (Table B-1)

NPRM: [Table B-1 - Standard Forms for the Public Mobile Service]

Recommendation:

The table should be expanded to include additional purposes for the various application forms. Further, a footnote should be added to clarify that there may be additional uses not listed in the table.

§ 22.107

NPRM: [Proposed § 22.107 requires, that "applications for authorizations or approval of assignments of authorizations" demonstrate, among other things, that the applicant is qualified to hold a Commission license. The proposed rule does not reference applications seeking Commission consent to the transfer of control.]

Recommendation:

Amend consistent with BellSouth's recommendation regarding the definition of "assignment of authorization" in proposed § 22.99. Under Option 1 therein, this section would be amended to read:

In general, applications for authorizations or approval of assignment of authorizations or transfer of control of licensees in the Public Mobile Services must:

Discussion:

See discussion above in connection with the definition of "assignment of authorization " in proposed § 22.99.

§ 22.108 Parties to applications.

NPRM: Each application for an authorization or for approval of an assignment of authorization in the Public Mobile Services must disclose fully the real party or parties in interest to the application. Such disclosure must include:

(a) a list of the applicant's subsidiaries, if any. For the purposes of this section, a subsidiary is any business for which the applicant or any officer, director, stockholder or key manager of the applicant owns 5% or more of the stock, warrants, options or debt securities. This list must include a description of each subsidiary's principal business and relationship to the applicant.

(b) a list of the applicant's affiliates, if any. For the purposes of this section, an affiliate is:

(1) any business that holds a 5% or more interest in the applicant; or

(2) any business in which a 5% or more interest is held by a business that also holds a 5% or more interest in the applicant.

(c) a list of the names, addresses, citizenship and principal business of any person holding 5% or more of each class of stock, warrants, options or debt securities of the applicant, indicating the amount and percentage held, and providing the name, address, citizenship and principal place of business of any person, if other than the holder, for whose benefit such interest is held. If any such persons are related by blood or marriage, the relationship must be disclosed.

Recommendation:

Revise the rule to read:

Each application for an authorization, for approval of an assignment of authorization, or for transfer of control of a licensee in the Public Mobile Services must disclose fully the real party or parties in interest in the application. In the case of an assignment or transfer application, the "applicant" for purposes of this rule is the assignee or transferee. A determination of real party in interest may be made on a case-by-case basis. To facilitate this determination, each application must identify all parties to the application as set forth below. This includes identification of those owning or controlling the applicant as described in paragraph (a) and identification of subsidiaries and affiliates as described in paragraph (b). For each party identified, the information set forth in paragraph (c) must be supplied.

(a) (1) All persons having *de facto* or *de jure* control of the applicant, whether by ownership, contract, or otherwise;

(2) For corporations, all persons holding 5% or more of any class of stock or other equity securities of the corporation, including preferred stock and nonvoting stock, must be identified; in the event such stock is held for the benefit of others, the beneficial owner(s) must be identified in addition to the holder.

(3) For partnerships, all partners must be identified.

(4) For trusts, the trustee(s) and the beneficiary(ies) must be identified; in the case of a revocable trust, the grantor must also be identified.

(5) For individual applicants, joint tenancies, tenancies in common, tenancies by the entirety, joint ventures, and joint applications, each person must be identified.

(6) For each party who must be identified pursuant to (1)-(5), identification must also be made of all persons who would have an identifiable interest in such party if such party were in turn the applicant.

(b) Subsidiaries and affiliates of the applicant must be identified if such subsidiaries or affiliates are engaged in the provision of Public Mobile Services under the same Subpart of Part 22 as governs the application or have a pending application for the same, and if the services provided or applied for by such subsidiaries or affiliates are within the same geographical area as the applicant, as defined by the rules of the service involved. (Geographical area is defined in §§ 22.539(a)-(b) and 22.569(a) for the Paging and Radiotelephone Service and § 22.909 for the Cellular Radiotelephone Service.)

(1) For purposes of this rule, a subsidiary is any entity for which the applicant or any officer, director, stockholder, or key manager of the applicant owns 5% or more of any class of the stock or equity securities.

(2) For purposes of this section, an affiliate is any entity that holds a 5% or greater interest in the applicant or any entity in which a 5% or greater interest is held by an entity that in turn also holds a 5% or greater interest in the applicant.

(3) For each party that must be identified, the following information must be supplied: name, address, citizenship, and agreements with other parties identified that affect control of the applicant (*e.g.*, voting trusts).

Discussion:

BellSouth suggests that the Commission revise its proposed rule to reflect a comprehensive description of the parties who must be identified in an application, based on existing case law and practice, while eliminating unnecessary information.

Recommended subsection (a)(1) ensures that *de facto* control must be disclosed, consistent with the Commission's decisions regarding real parties in interest and *de facto* control. See *Ellis Thompson*, 3 FCC Rcd. 3962 (Com. Car. Bur. 1988), *aff'd*, 4 FCC Rcd. 2599 (1989); *Integrated Communication Systems, Inc.*, 14 FCC 2d 698 (1969).

For corporate applicants, recommended subsection (a)(2) tracks the current and proposed rule, except that the holders of non-equity interests would not have to be identified; the holding of a debt interest, option, or warrant, without more, is not viewed as conferring ownership or control status under case law, while equity securities, including non-voting and preferred stock, are viewed as ownership interests. See *Wilner & Scheiner*, 103 FCC 2d 511, 513 n.37, 519 (1985), *recon. in part*, 1 FCC Rcd. 12, 13-14 & n.27 (1986); *Data Transmission Co.*, 52 FCC 2d 439, 440-41 (1975); *Belo Broadcasting Corp.*, 49 FCC 2d 181 (1974); *Bay Video, Inc.*, 17 FCC 2d 628 (1969); *Atlantic Coast Broadcasting Corp.*, 22 Rad. Reg. (P&F) 1045 (1962); *M&M Broadcasting Co.*, 26 FCC 2d 35 (1959); *KSOO-TV, Inc.*, 19 Rad. Reg. 28 (1959). To the extent a holder of nonequity securities has *de facto* control,

however, that party would have to be identified in response to recommended subsection (a)(1).

Recommended subsection (a)(3) would codify the Common Carrier Bureau's policy with respect to persons who must be disclosed in the case of partnerships. *See Eric Fishman, Esq.*, 65 Rad. Reg. 2d (P&F) 694 (Com. Car. Bur. 1988), *application for review pending*. To the extent this constitutes the Commission's policy, it should be codified. Recommended subsections (a)(4) and (5) set forth the disclosures that would appear to be standard practice in the case of trusts, individual applicants, and various forms of joint applications.

Recommended subsection (b) specifically incorporates the policy from the current rule and case law that affiliates and subsidiaries must be disclosed only if they are engaged in the same service in the same area. The Commission adopted an earlier version of the real party-in-interest disclosure requirement "to prevent an applicant from filing numerous applications in the same geographic area under different names." *Real Party in Interest Disclosure Requirements in the Public Mobile Services (PMRS)*, FCC Public Notice Mimeo 1060 (released November 26, 1982). *See also Eldon L. Hueber d/b/a Cellutech*, 6 FCC Rcd 736, 738 (Mob. Ser. Div. 1991). Thus, the recommended changes to this subsection codifies current policy. A minor change to the definition of subsidiary eliminates reference to nonequity securities for the reasons discussed above.

Recommended subsection (c) states the information that must be supplied for each identified party. The current rules only state the information that must be supplied for corporate shareholders. The recommended disclosure is similar to that for corporate shareholders at present, except that familial relationships have been omitted consistent with Commission policy of not attributing familial interests, principal business has been omitted as unnecessary, and a requirement has been added for disclosure of agreements affecting control, such as voting trusts. The latter requirement would facilitate real-party-in-interest determinations.

§ 22.121 Repetitious, inconsistent or conflicting applications.

NPRM: [Proposed § 22.121 incorporates current § 22.21 and § 22.22 and adds a new subsection (d) as follows:]

(d) If an authorization is automatically terminated because of failure to commence service to the public (*see* § 22.144), the Commission will not consider an application for another authorization to operate a station on the same channel (or, in the case of a 931 MHz paging station, the same frequency range) in the same geographical area by that party, or by its successor or assignee, or on behalf of or for the benefit of the parties in interest to the terminated authorization, until one year after the date the authorization terminated.

Recommendation:

Amend subsections (a) and (d) to reference a new proposed subsection (e) as follows:

- (a) Except as provided in paragraph (e), . . .
- (d) Except as provided in paragraph (e) . . .
- (e) This section does not apply to:
 - (1) Authorizations which are automatically terminated for reasons beyond the licensee's control (*e.g.*, lack of state approval which was timely sought, loss of site, *etc.*) or voluntarily surrendered.
 - (2) Applications which become repetitious, inconsistent or conflicting as a result of a transfer of control or assignment of license which has been previously approved by the Commission. Applicants will have 60 days from the date of consummation of the transfer of control or assignment of license to amend or dismiss pending application(s) to remove any conflict, inconsistency or repetitiveness.

Discussion:

BellSouth urges the Commission to modify proposed § 22.121 by adding a new subsection (e) to allow flexibility within the rule for exceptions. Proposed subsection (e)(1) recognizes that an authorization may be terminated pursuant to proposed § 22.144 for reasons beyond the licensee's control. Where termination results through no fault of the licensee or the licensee voluntarily surrenders an authorization, the one year filing prohibition can delay or preclude system expansion.

Subsection (e)(2) is intended to provide licensees involved in acquisitions flexibility and eliminate the need to request a waiver of this rule in their transfer or assignment application. The proposed change will conserve Commission resources and expedite processing of the assignment or transfer application. Further, it gives the applicant time to select which applications it wishes to remain in the processing line.

§ 22.123 Classification of filings as major or minor.

NPRM: Applications and amendments to applications are classified as major or minor. Categories of major and minor filings are listed in § 309 of the Communications Act of 1934, as amended (47 U.S.C. [§] 309). In general, a major filing is a request for a Commission action that has the potential to affect parties other than the applicant. Filings are minor if they are not classified as major.

Recommendation:

The introductory paragraph should be amended to read:

Pursuant to § 309 of the Communications Act of 1934, as amended (47 U.S.C. § 309) the filings listed below are classified as major. All filings not classified herein as major are minor.

Discussion:

The stated rationale for classifying filings is ambiguous and will likely lead to protracted litigation. Every filing has the "potential" to affect another party, in that it will affect the applicant's competitive position *vis-à-vis* others. Thus, BellSouth recommends that this section be all inclusive and set out a clear demarcation line regarding which filings the Commission will consider major. The proposed revision to the introductory paragraph and suggested changes discussed below should provide carriers sufficient notice regarding filings which are classified as major.

§ 22.123(a)

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

Recommendation:

Amend to read as follows:

(a) *Changes in ownership or control.* Filings are major if the assignment of authorization or transfer of control does not constitute a *pro forma* assignment or transfer. A filing will be deemed major, and not entitled to *pro forma* consideration, if it specifies a substantial *de facto* or *de jure* change in ownership or control, unless such change is involuntary or if the filing amends an application to reflect a change in ownership or control that has previously been approved by the Commission (*see* § 22.137). Determination whether a change is *pro forma* in nature will be made on a case-by-case basis.

Discussion:

BellSouth suggests that this subsection be revised to make clear that transfers and assignments that are not *pro forma* are major, and that a determination of this