to phones manufactured after a particular date.[96] NYNEX recommends that we not require the ESN chip to be secured to the main circuit board of the mobile transmitter as proposed. Rather, NYNEX suggests that the ESN chip be attached to the frame of the radio and attached to the logic board by cable.[97] In addition, it recommends that operating software be encoded or scattered over different memory chips.[98] Motorola, Inc. (Motorola) and Ericsson Corp. (Ericsson), two manufacturers of cellular mobile equipment, suggest that the proposal be modified to allow authorized service centers or representatives to make necessary and required changes to ESNs in mobile and portable units in the field.[99]

56. Southwestern Bell recommends that the rule also apply to mobile equipment associated with a wireless private branch exchange (PBX).[100] CTIA suggests that the proposal be modified in several respects. First, it states that we should clarify that requiring a mobile transmitter to have a "unique" ESN, means that any particular ESN will not exist in more than one mobile unit. Second, CTIA suggests that ESN manipulation not be permitted "outside a manufacturer's authorized facility." Third, it requests that cellular mobile units be required to be designed to comply with the "applicable industry standard for authentication."[101] New Vector supports the proposed rule, but emphasizes that the ESN criteria should be incorporated into the type-acceptance rules to clarify that manufacturers will be subject to the Commission's enforcement procedures if they do not comply with the ESN requirements.[102]

57. C2+ Technology (C2+) requests that we allow companies to market ancillary cellular equipment that emulates ESNs for the purpose of allowing more than one cellular phone to have the same telephone number. It argues that emulating ESNs in the way it describes benefits the public, does not involve fraud, and retains the security and integrity of the cellular phones.[103] In opposition, Ericsson asserts that the rules should include procedures to ensure that ESNs are not

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96 For example, BellSouth suggests that the anti-fraud measures should not apply to equipment type-accepted before January 1, 1993.

97 NYNEX Comments at 8.

98 Id. at 8-9.

99 Ericsson Reply Comments at 2-5; Motorola Reply Comments at 3. .

100 Southwestern Bell Comments at 29.

101 CTIA Comments at 8.

102 New Vector Comments at Appendix I, p.44.

103 C2+ Comments at 1-2.

easily transferable through the use of an encrypted data transfer device.[104] Similarly, New Par suggests that the proposed rule proscribe activity that does not physically alter the chip yet affects the radiated ESN by translating the ESN signal that the mobile unit transmits.[105]

58. **Discussion.** The record before us demonstrates the need for measures that will help reduce the fraudulent use of cellular equipment caused by tampering with the ESN. We therefore adopt the proposed rule for the reasons set forth below.

59. Contrary to the suggestion of one commenter, the ESN rule will not prevent a consumer from having two cellular telephones with the same telephone number. Changing the ESN emitted by a cellular telephone to be the same as that emitted by another cellular telephone does not create an "extension" cellular telephone. Rather, it merely makes it impossible for the cellular system to distinguish between the two telephones. We note that Commission rules do not prohibit assignment of the same telephone number to two or more cellular telephones.[106] It is technically possible to have the same telephone number for two or more cellular telephones, each having a unique ESN.[107] If a cellular carrier wishes to provide this service, it may. In this connection, we will not require that use of cellular telephones comply with an industry authentication procedure as requested by CTIA, as this could have the unintended effect of precluding multiple cellular telephones (each with a unique ESN) from having the same telephone number.

60. Further, we conclude that the practice of altering cellular phones to "emulate" ESNs without receiving the permission of the relevant cellular licensee should not be allowed because (1) simultaneous use of cellular telephones fraudulently emitting the same ESN without the licensee's permission could cause problems in some cellular systems such as erroneous tracking or billing; (2) fraudulent use of such phones without the licensee's permission could deprive cellular carriers of monthly per telephone revenues to which they are entitled; and (3) such altered phones not authorized by the carrier, would therefore not fall within the licensee's blanket license, and thus would be unlicensed transmitters in violation of Section 301 of the Act. Therefore, we agree with New Par and Ericsson that the ESN rule should proscribe activity that

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104 Ericsson Reply Comments at 3-4.

105 New Par Comments at 21-22.

106 The telephone number is referred to in the cellular compatibility specification as the Mobile Identification Number or "MIN".

107 It is not technically necessary to have the same ESN in order to have the same telephone number. Nevertheless, the authentication software used by some cellular systems does not permit two cellular telephones with the same telephone number. In such cases, cellular carriers should explain to consumers who request this service that their system is not yet capable of providing it.

does not physically alter the ESN, but affects the radiated ESN, including activities that transfer ESNs through the use of an encrypted data transfer device.

61. With respect to the proposal to allow alteration of ESNs by manufacturers' authorized service centers or representatives, we note that computer software to change ESNs, which is intended to be used only by authorized service personnel, might become available to unauthorized persons through privately operated computer "bulletin boards". We have no knowledge that it is now possible to prevent unauthorized use of such software for fraudulent purposes. Accordingly, we decline to make the exception requested by Motorola and Ericsson.

62. We further agree with the commenters that it would be impractical to apply the new rule to existing equipment. Accordingly, we are not requiring that cellular equipment that is currently in use or has received a grant of type-acceptance be modified or retrofitted to comply with the requirements of this rule. Thus, the ESN rule will apply only to cellular equipment for which initial type-acceptance is sought after the date that our rules become effective. Nevertheless, with regard to existing equipment, we conclude that cellular telephones with altered ESNs do not comply with the cellular system compatibility specification[108] and thus may not be considered authorized equipment under the original type acceptance. Accordingly, a consumer's knowing use of such altered equipment would violate our rules. We further believe that any individual or company that knowingly alters cellular telephones to cause them to transmit an ESN other than the one originally installed by the manufacturer is aiding in the violation of our rules. Thus, we advise all cellular licensees and subscribers that the use of the C2+ altered cellular telephones constitutes a violation of the Act and our rules.

63. With respect to NYNEX's proposed modifications for securing the ESN chip to the mobile transmitter, the record does not convince us that these modifications will make the ESN rule more effective. Therefore, we do not adopt NYNEX's proposal. We agree with Southwestern Bell that the ESN rule should apply to mobile equipment associated with wireless PBX if the equipment can also be used on cellular systems. We also clarify that the new ESN rule prohibits the installation of an ESN in more than one mobile transmitter. Finally, as suggested by New Vector, we amend the type-acceptance rule to refer to the newly adopted ESN rule.[109]

Use of Part 22 Transmitters in Non-Common Carrier Services

64. **Proposal.** Section 22.119 of the Rules currently prohibits the concurrent licensing and use of transmitters authorized to provide common carrier service under Part 22 of the Rules

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108 See old § 22.915, which becomes new § 22.933 in Appendices A and B.

109 See discussion of new § 22.377 in Appendix A.

for non-common carrier communications purposes.[110] Although the regulatory history is silent on the purpose of this rule, we believe that it was adopted to assure that radio common carrier transmitters would be used exclusively for common carrier service in order to prevent delays and interruptions in service to subscribers.

65. In the Notice of Proposed Rulemaking and Order (NPRM and Order),[111] we stated that several factors make it appropriate to reevaluate the Section 22.119 prohibition and to propose deleting or modifying the rule. First, advances in technology, such as improved digital transmission techniques and store-and-forward technology,[112] have resulted in dramatically increased capacity, thus reducing the need for a transmitter to be devoted on a full-time basis to common carrier uses. Second, licensees providing wide-area service could achieve substantial economies of scale by sharing transmitters when building a regional or nationwide system without diminishing the licensee's quality of service. Third, the 1993 Budget Act amends Sections 3(n) and 332 of the Communications Act to create a comprehensive framework for all mobile services, including Part 22 common carrier services, private land mobile services, and future services such as Personal Communications Services (PCS). The 1993 Budget Act also amends the Communications Act to specify a single "commercial mobile radio service."[113] Lastly, increased competition in the industry provides an assurance that service to existing customers will not suffer from joint use of transmitters when the carriers are offering distinct services on different channels.

66. Because of these factors, the NPRM and Order tentatively concluded that permitting a single transmitter to operate on both common carrier and private channels would not cause any disruption or impairment of service to existing Part 22 subscribers. Nevertheless, the NPRM and Order sought comment on whether the proposed rules should be limited to circumstances where the joint use will facilitate the provision of national or regional service as an overlay to local paging service or where the Part 22 licensee is utilizing batched paging. In addition, we sought

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110 Section 22.119 currently states:

> Transmitters licensed for operation in services governed by this part may not be concurrently licensed or used for non-common carrier communication purposes. However, mobile units may be concurrently licensed or used for non-common carrier purposes provided that the transmitter is type-accepted for use in each service.

111 Amendment of Part 22 of the Commission's Rules to Delete Section 22.119 and Permit the Concurrent Use of Transmitters in Common Carrier and Non-Common Carrier Services, CC Docket No. 94-46, Notice of Proposed Rulemaking and Order, 9 FCC Rcd 2578 (1994).

112 Under store and forward technology, pages are batched and then sent as a group. The transmission time is the same regardless of the number of paging messages in the group.

113 47 U.S.C. § 332(c)(1) (1993).

comment on whether there were any other circumstances where we should not permit the shared use of transmitters licensed under Part 22. In the event that we decided to modify or eliminate Section 22.119, we solicited comment on whether safeguards should be adopted to prevent warehousing of exclusively assigned channels. Finally, we sought comment on whether we should allow two different licensees to share the same transmitter.

67. **Comments and Discussion.** All of the commenters are in favor of permitting the joint licensing and use of transmitters in the common carrier and private carrier services.[114] We agree with the parties that elimination of Section 22.119 will serve the public interest. As the parties have indicated, radio common carriers (RCCs) providing wide-area service continue to expand their paging service throughout the United States. In an effort to meet subscriber demands for service that extends beyond their existing RCC coverage areas, Part 22 licensees have begun to offer nationwide or regional service on private carrier paging channels as an overlay to their common carrier service. Under the existing rule, carriers are required to construct private carrier paging facilities at locations where they already have Part 22 transmitters with additional capacity. The parties argue that elimination of the prohibition will promote economic efficiencies by reducing their costs of constructing and operating facilities dedicated to both private and common carrier paging when air time is available for both private carrier paging and common carrier paging on the existing common carrier transmitters. The parties note that the savings resulting from utilizing existing transmitters will allow them to offer lower prices to their subscribers.

68. Furthermore, we agree with the parties that eliminating Section 22.119 is consistent with the 1993 Budget Act's amendment of the Communications Act and the Commission's recent rulemakings to implement these amendments. The new regulatory structure in the Second Report and Order in GN Docket No. 93-252 (Second Report and Order), was designed to ensure symmetrical regulatory treatment of competing service providers, to promote further competition and economic growth in the mobile service marketplace, and to establish an appropriate level of regulation to protect mobile service customers.[115] Elimination of Section 22.119 will remove the existing rule requiring separate dedicated transmitters for private carrier paging (PCP) and RCC paging services. Thus, licensees that already operate RCC transmitters will be able to institute competitive PCP service at those locations earlier than they otherwise could. Moreover,

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114 Comments were filed by AirTouch Paging (AirTouch) and Arch Communications Group, Inc. (Arch); Celpage, Inc.; GTE; McCaw; Metrocall, Inc.; Message Center Beepers, Inc. and Beepage, Inc.; Metropolitan Houston Paging Services, Inc.; Personal Communications Industry Association (PCIA); PageNet; Paging Partners Corporation; PageMart II, Inc.; the Association for Private Carrier Paging Section of the National Association of Business and Educational Radio, Inc.; Southwestern Bell; and TeleComm Systems, Inc. PCIA filed Reply Comments while AirTouch and Arch filed Joint Reply Comments.

115 See Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411 (1994).

elimination of Section 22.119 is consistent with the Commission's determination in the Second Report and Order to classify PCP services and common carrier paging services as CMRS because it promotes symmetrical regulatory treatment of PCP and RCC services.

69. We also agree with the parties that the competitiveness of the paging industry provides assurance that service to existing paging customers will not suffer. For example, in the Second Report and Order the Commission concluded that the paging industry is highly competitive,[116] based on a recent study finding that, on average, a paging carrier competes with five carriers, and may compete with as many as 19 other carriers in a given market.[117] Paging companies compete on the basis of geographic coverage, customer service, enhanced service, and price. This highly competitive environment encourages paging carriers to provide high quality service or risk losing customers to other carriers.

70. We agree with the majority of commenters that Section 22.119 should be deleted in its entirety, and should not be retained based on the service being offered or the technology used by the carrier. Furthermore, we do not believe that elimination of Section 22.119 will encourage warehousing. As the parties have noted, the elimination of Section 22.119 will not allow licensees to duplicate interchangeable channels at common sites, but will only allow them to add channels capable of providing a distinct service. Hence, it appears unlikely that licensees will be capable of reserving channels for future use or hoarding channels to block competition. Therefore, we do not believe that it is necessary to impose safeguards to deter warehousing.

71. Finally, we do not believe that it is in the public interest to allow two different licensees to share the same transmitter. We are concerned that the shared use of the same transmitter by two different licensees may raise questions regarding the control and responsibility for the transmitter. We are also concerned about the broader service disruptions that outages of shared transmitters would cause.

Power Limits for 931 MHz Paging Stations

72. **Proposal.** In Height Power Increases in the Public Mobile Service, 4 FCC Rcd 5303 (1989), modified, 5 FCC Rcd 4604 (1990), the Commission increased the maximum power limit for transmitters operating in the 931 MHz band to 3500 Watts effective radiated power (ERP), and also adopted geographic separation requirements for higher power transmitters to prevent co-channel interference. Nationwide network paging licensees may operate transmitters on the three

116 See Second Report and Order, 9 FCC Rcd at 1468.

117 Id., citing R. Ridley, 1993 Survey of Mobile Radio Paging Operators, Communications, Sept. 1993 at 20.

nationwide paging channels (931.8875, 931.9125, and 931.9375 MHz),[118] with power up to, but not exceeding, 3500 Watts ERP, regardless of whether they have any co-channel transmitters in the vicinity. Because the nationwide licensees have been assigned a particular channel for exclusive use throughout the nation, co-channel interference to other licensees is not possible.

73. Licensees of paging transmitters on the other 931 MHz channels may operate transmitters with ERP exceeding 1000 Watts, up to a maximum of 3500 Watts, but only when the interfering contour of these transmitters is totally encompassed by the composite interference contour of existing co-channel transmitters of the same licensee.[119] This encompassment requirement limits the geographic area a single stand-alone transmitter can cover, allowing for a larger number of independent co-channel stations in any given area. The rule's reliance on surrounding transmitters, however, essentially limits the use of high power transmitters to interior locations in existing wide area 931 MHz paging systems. Carriers desiring to operate only a single 3500 Watt paging transmitter must first apply, receive authorization for, and construct several 1000 Watt transmitters covering the same area. This is impractical because of the delay and expense of constructing the unwanted surrounding transmitters.

74. In the Notice of Proposed Rulemaking and Order in CC Docket No. 93-116, (Paging Power Limits NPRM and Order),[120] we proposed to remove the encompassment requirement and allow licensees to operate 931 MHz paging stations with any ERP up to the maximum of 3500 Watts, provided that the applicable geographic separation requirements (which are designed to prevent co-channel interference) are satisfied. We pointed out that although operations in the 931 MHz band continues to increase rapidly, licensing activity consists in large part of applications for expansion of existing systems. Thus, the role of the encompassment rule in allowing more independent co-channel stations is less important than previously thought. In the Paging Power Limits NPRM and Order, we tentatively concluded that it would be in the public interest to allow operation of 931 MHz paging transmitters without the current requirement that such transmitters be surrounded by existing co-channel transmitters of the same licensee.[121] We

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118 These three channels are reserved for use by nationwide paging operators. See Allocation of Spectrum in the 928-941 Band, 89 FCC 2d 1337 (1982), recon. (Part 2), 93 FCC 2d 908 (1983), aff'd sub nom., NARUC v. FCC, No. 83-1485 (D.C. Cir. Jan. 17, 1984); Third Report and Order, 97 FCC 2d 900 (1984), recon., 57 RR 2d 1416 (1984). Thirty-seven other channels were made available for regional and local one-way paging service. Id.

119 The Commission adopted the encompassment requirement as a method of limiting co-channel interference because our computer software at that time would not accommodate the additional transmitter classes. This shortcoming has been corrected.

120 Amendment of Part 22 of the Commission's Rules Pertaining to Power Limits for Paging in the 931 MHz Band in the Public Mobile Services, CC Docket No. 93-116, Notice of Proposed Rulemaking and Order Granting Petition for Waiver, 8 FCC Rcd 2796 (1993).

121 See § 22.505(c)(2), 47 CFR § 22.505(c)(2).

suggested that this change would afford the benefits of higher power operation without unduly increasing the risk of interference. These benefits arise from the flexibility for paging licensees to use fewer transmitters to cover the same geographic area, resulting in efficiencies of scale, reductions in costs, and benefits to consumers. We indicated that any increased potential for interference resulting from high power operation would be balanced by reduction in the number of transmitters (each representing a possible source of interference).

75. Accordingly, in the Paging Power Limits NPRM and Order we proposed to eliminate the encompassment requirement and several related rules.[122] We stated, however, that we would continue to classify 931 MHz transmitters and require that locations of these transmitters be in compliance with current rules for the class-by-class distance separation criteria for co-channel 931 MHz transmitters.[123] We also noted that we were not proposing to change the existing reliable service area and interfering contour radii in the Rules. [124]

76. We requested comment on these proposals generally, and on the potential for interference that might result from increased use of high power transmitters. In addition, we sought comment on whether the separation distances in our rules are adequate to protect future and existing stations from interference, including co-channel interference to and from stations operating in Canada and Mexico.

77. **Comments.** The commenters generally favor our proposal to eliminate the encompassment requirement and related rules.[125] They agree that the proposed changes would serve the public interest by allowing increased flexibility in system design and lower system infrastructure cost. They note that 931 MHz paging systems would be able to serve larger geographic areas with fewer transmitters, thus decreasing both equipment costs and associated recurring costs such as site rental and equipment maintenance.

78. The Utilities Telecommunications Council (UTC), the only commenter opposing our proposal, argues that high power paging facilities in the 931 MHz band are more likely to cause interference to adjacent channel multiple address systems (MAS) operating at 928 and

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122 Specifically, we proposed to delete old Sections 22.505(b), 22.505(c)(2), and 22.505(f)(2) of the Rules.

123 We believed then, as we do now, that these measures alone are sufficient to guard against co-channel interference.

124 47 CFR § 22.504(b).

125 See, e.g., Telocator Comments at 2-3; Metromedia Paging Reply Comments at 2-3; SkyTel Reply Comments at 2; PacTel Paging Comments at 2-4; and PagePrompt USA Comments 2-3.

932 MHz.[126] UTC maintains that high power paging operations often reduce the range of MAS stations due to "receiver desensitization, transmitter noise, and intermodulation interference."[127] In this regard, UTC contends that, in GEN Docket 82-243,[128] the Commission acknowledged the potential for interference to MAS operations from paging systems in the 931-932 MHz band. UTC argues that the Commission should adopt procedures whereby applicants for higher power paging systems are required to remedy interference to MAS systems. For example, it suggests that applicants for higher power paging systems could be required to identify all MAS master stations within one mile of the proposed site, contact each of these MAS licensees, advise them of their pending applications, and correct at their own expense all interference to MAS systems.[129]

79. Although Pagenet supports the basic purpose of our proposal, it is concerned that elimination of the antenna height-power limits for 931 MHz would limit flexibility in modifying facilities that were established prior to the transmitter classification table. Pagenet argues that, so long as a 931 MHz transmitter has parameters that comply with the antenna height-power limits, the station operation should be treated as if it is Class L[130] and not have to meet the larger distance separation requirements of its actual class, if different from Class L. Although Pagenet agrees that all such transmitters should be reclassified (giving them a larger protecetd service area), it recommends that the Commission grandfather them insofar as the required minimum separation distances are concerned. Pagenet further recommends that the old height-power table be retained as a guideline for modification of those licensee classes, to avoid "stair-step" reductions in transmitter power resulting from small, unavoidable changes in antenna height.

80. **Discussion.** We conclude that it is in the public interest to adopt our proposal to remove the encompassment requirement and related rules. As the parties have noted, providing paging licensees with the flexibility to use fewer transmitters to cover a given geographic area will not only result in efficiencies in scale and reductions in equipment, construction, and

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126 UTC Comments at 4.

127 Id.

128 UTC cites Amendment of Parts 1, 21, 22, 74, and 94 of the Commission's Rules to Establish Service and Technical Rules for Government and Non-Government Fixed Service Usage of the Frequency Bands 932-935 MHz and 941-944 MHz, GN Docket No. 82-243, Memorandum Opinion and Order, 5 FCC Rcd 1624, 1627 (1990) (Memorandum Opinion and Order in GN Docket No. 82-243).

129 UTC Comments at 6.

130 Class L is the smallest class of 931 MHz paging transmitter, and is considered to have a 32.2 kilometer (20 mile) service radius and a 80.5 kilometer (50 mile) interfering contour radius. In the revision of the Paging and Radiotelephone Service rules, we are eliminating these class labels and simply specifying the service and interfering contour radii directly. See new § 22.537, Tables E-1 and E-2, in Appendix B.

operational costs, but also will conserve Commission resources,[131] improve the quality and cost of service to customers, and permit carriers to integrate new equipment and provide new services that otherwise might not be offered.[132] For example, PacTel states that facilitating the use of high power transmitters will enable licensees to use Telocator's proposed high speed data protocol to transmit large data files to subscribers over existing one-way paging channels.[133] As Telocator notes, adoption of our proposal conforms the 931-932 MHz band rules with the rules for national network paging systems and the rules for narrowband personal communications services (PCS).[134]

81. We do not expect that removing the encompassment requirement and related rules will cause interference to MAS operating on 928 and 932 MHz, as UTC predicts.[135] The encompassment rule does not and was never intended to protect MAS systems; the only measure of protection it provides is to independent 931 MHz co-channel paging operations. Moreover, PacTel and PageNet state that, based on their experience as licensees of both 931 MHz paging stations and control stations in the 928 MHz band, UTC's concerns about MAS interference are unwarranted.[136] We believe that proper site management and proper engineering in designing systems are the appropriate mechanisms for avoiding interference.[137] We do, however, require licensees to cooperate in resolving interference situations if they arise.

82. In regard to Pagenet's concern for existing 931 MHz paging transmitters at locations that meet required minimum separations for a Class L but not their actual class, we agree that disrupting these existing paging operations unnecessarily (by requiring them to operate at reduced parameters upon modification) would not serve the public interest.[138] Accordingly, we will allow licensees to continue to operate these facilities at the equivalent of their currently authorized parameters, while considering them to have a 32.2 kilometer (20 mile) service radius and a

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131 Metromedia Comments at 1.

132 See, e.g., PagePrompt Comments at 2-3; PacTel Comments at 3.

133 PacTel Comments at 3.

134 Telocator Comments at 3.

135 UTC cites the Commission's 1990 Memorandum Opinion and Order in GN Docket No. 82-243. That Memorandum Opinion and Order does not specifically address the potential for interference to MAS operations from paging operations in the 931-932 MHz frequency range.

136 PageNet Reply Comments at 3; PacTel Reply Comments at 2.

137 See Memorandum Opinion and Order in GN Docket No. 82-243, supra, at footnote 128.

138 We are not aware of any co-channel interference problems resulting from the existence of these "short-spaced" stations.

80.5 kilometer (50 mile) interfering contour radius. We disagree, however, with Pagenet's request that we retain the old height-power table as a guide for modifications. This table was based on an earlier propagation model that differs from the model used for the service and interfering contour radii tables that we are adopting today.[139] We believe that market area licensing, as suggested by several of the commenters, may be the best solution to the problem of allowing modifications to these grandfathered stations. As stated supra, however, we are not adopting such procedures herein. In the meantime, we will allow modifications to the affected 931 MHz paging facilities, using the same antenna height and power, or a higher antenna height with the effective radiated power reduced by a factor of 10 for every doubling of antenna height. This reduction is consistent with the interfering contour radii table and use of it will eliminate the "stair-step" problem that Pagenet cites.

Recent Cellular Proposals

83. **Proposals.** In the Further Notice, we proposed to streamline and improve our existing processing procedures in ways that will benefit existing licensees as well as future users of mobile services. The first group of proposals were directed at licensees in the cellular radio service, while the second group of proposals concerned initial licensing procedures for 931 MHz paging channels.

84. Initially, we shall discuss the proposals directed at licensees and applicants in the cellular radio service. In the Further Notice, we proposed to require that licensees state, when notifying the Commission of minor modifications to their systems that involve Service Area Boundary (SAB) extensions into an adjacent market, whether the five year build-out period for the adjacent market has expired and, if so, to state that the SAB extension does not cover any unserved area. This requirement would save our staff a significant amount of time which is currently used in making a determination as to whether an SAB extension covers any unserved area in a market where the five year build-out period for that block has expired.[140]

85. We also proposed revising the Commission's Rules to change the scale of maps which we require cellular applicants and licensees to file with the Commission. Currently, we require maps on a scale of 1:250,000. We concluded tentatively that maps with a scale of 1:500,000 would serve the public interest by reducing both filing burdens on applicants as well as review burdens on the staff.

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139 In fact, it was the poor correlation between the old height power limit table and the old station classification tables that led to the discrepancy between these stations' operating parameters and the separations under which they were authorized.

140 Eligible applicants may apply to serve such areas in accordance with the Commission's unserved area application procedures. See 47 C.F.R.. §§ 22.31 and 22.924 (1993).

86. In the Notice, we proposed to eliminate the requirement that licensees notify the Commission after making minor changes to their facilities or adding transmitters in the interior of the coverage areas of previously authorized stations. In this Report and Order, we adopt that proposal, with the exception that cellular licensees must continue to notify us of changes that affect their CGSA boundary. The reason for this exception lies in one of our proposals in the Further Notice.

87. In the Further Notice, we stated that if we adopted the proposal to eliminate the requirement that licensees notify us about certain minor changes, we planned to eliminate the listing of internal cell sites on our authorizations for existing licensees. In brief, we proposed to eliminate the "licensing" of inner cell sites. Further, we explained that we intend to maintain accurate, current information on cell sites that constitute CGSA boundaries ("external cell sites"), and to that end we proposed to require all cellular licensees to submit the following information for each external cell site: (1) the geographic coordinates and cell site location description, and (2) the operating and technical parameters for the cell site. The submission of this information would enable us to determine which cell sites are the "external" ones, and then delete from our computer data base the data for all cell sites except the "external" ones. We could at the same time correct errors or omissions in the technical data for the external cells. This would reduce the amount of data that we keep on cellular systems to the minimum necessary to accurately locate CGSA boundaries. One benefit of adopting the proposal would be that cellular authorizations would no longer list every cell site in a system, only the external ones that define the CGSA boundary. This would result in much shorter authorizations, especially for the large cellular systems, thus reducing the administrative and processing costs of issuing authorizations.

88. We also proposed to modify Section 22.925 of the Rules, which sets forth the updated information for existing cellular systems that licensees are required to submit to the Commission 60 days before the end of their five year build-out period. Currently, a licensee must file a full-size map on a scale of 1:250,000, a reduced map, and a current frequency utilization chart depicting the location of each cell site and the system's coverage area. We proposed to revise the scale of the full-size map to a scale of 1:500,000, to require that all maps submitted show only the exterior cell sites and the respective service area boundaries that make up the CGSA, and to require licensees to submit an exhibit providing the coordinates for each exterior cell site and the information currently required in the MOB 3 Table of FCC Form 401. Further, we proposed to no longer require the submission of a frequency utilization plan or chart. Lastly, we proposed that licensees be required to label all information filed with the number[141] of the relevant market. The foregoing proposals would reduce the amount of material submitted for system information updates and help to reduce staff processing time.

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141 The MOB 3 Table corresponds to the "C" section of new FCC Form 600, which will be utilized by all commercial mobile radio services.

89. **Comments and Discussion.** The majority of the parties that filed comments on our cellular radio proposals agreed with the essential elements of those proposals.[142] Except as noted herein, we adopt those proposals. Our Further Notice proposed that licensees state, when notifying the Commission (on FCC Form 489) of minor modifications to their systems that involve Service Area Boundary (SAB) extensions into an adjacent market, whether the five year build-out period for the adjacent market has expired, and if so, to state that the SAB extension does not cover any unserved area. No commenting party disagreed with this proposal. The Rural Cellular Association (Rural Cellular) suggests that we adopt the same procedure for major modification filings made on FCC Form 401 applications.[143] We agree with this suggestion and change our requirements accordingly.

90. Several comments addressed our proposed requirement that cellular licensees must submit certain data about their expanded systems 60 days before the expiration date of their five-year build-out period.[144] The information required for a given cellular system is commonly referred to as the system information update (SIU) and is used by potential unserved area applicants to determine which areas in a given MSA or RSA are unserved at the end of the build-out period. The SIU requirement is contained in Section 22.925 of our present Rules, and will be part of new Section 22.947(c) of our new Rules. U S WEST, Inc. (U S WEST) has recommended that we replace the requirement that SIUs be submitted sixty days before the expiration date of a licensee's five-year build-out period with a requirement that the SIUs be submitted on the expiration date itself.[145] U S WEST claims that licensees must currently file updates to their SIUs during the 60-day period preceding the relevant expiration date if those licensees file expansion applications after the current filing date. Further, U S WEST argues, potential unserved area applicants might need to consult the Commission's files several times prior to the date they file their applications to determine the actual service area of existing licensees whose five-year build-out periods are expiring.

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142 Comments on the recent cellular proposals were filed by: ALLTEL Mobile Communications, Inc. (ALLTEL); Bell Atlantic Mobile Systems, Inc. (Bell Atlantic); The Cellular Telecommunications Industry Association (CTIA); The Committee for Effective Cellular Rules (Cellular Committee); Comp Comm, Inc. (Comp Comm); GTE Service Corporation (GTE); McCaw Cellular Communications, Inc. (McCaw); New Par; Nextel Communications, Inc. (Nextel); NYNEX Corporation (NYNEX); The Rural Cellular Association (Rural Cellular); Southwestern Bell Mobile Systems, Inc. (Southwestern Bell); U S WEST; and Vanguard Cellular Systems, Inc. Reply Comments were filed by Cellular Committee, McCaw and Southwestern Bell.

143 Rural Cellular Comments at 3.

144 During the five-year build-out period, a licensee in a particular MSA or RSA is accorded an exclusive right to construct cellular facilities in that MSA or RSA on a particular frequency block. See Section 22.31(a)(1)(i) of the Commission's present Rules.

145 U S WEST Comments at 2-5.

91. We reject this recommendation for several reasons. First, neither our Notice nor our Further Notices in this proceeding proposed any such changes to our SIU requirement. Rather, our Further Notice dealt with the proposed data to be submitted as part of the SIUs, including the map of the cellular system and related data. Thus, it would appear that U S WEST's recommendation is beyond the scope of this proceeding. Second, licensees have five years to take advantage of their opportunity to file expansion applications free of any competing applications. In that light, we have not seen very many instances in which licensees have needed to update their SIUs prior to the end of their build-out period. In brief, even if we determined that U S WEST's recommendation could be considered in this proceeding, we do not perceive any compelling public interest reason for changing the due dates for SIUs.

92. Our Further Notice also proposed that licensees be required to label all information submitted as part of their SIUs with the number of the relevant market. No commenters have objected to this requirement. GTE Service Corporation (GTE) and AirTouch Communications (AirTouch) recommend that SIU filings include the frequency block as well as the relevant market number as part of the label identifying relevant documents.[146] We believe that this recommendation will assist our staff and members of the public in reviewing SIUs. Therefore, we accept this recommendation. Comp Comm,[147] Southwestern Bell,[148] and McCaw[149] request clarification as to what maps must be submitted when an SIU filing is required if a licensee has a contour extension into an adjacent market and the build-out period for that market is about to expire. Footnote 13 of the Further Notice explains that if a licensee in Market "Y" has received permission to extend a contour into an adjacent market (Market "X") and if Market X's build-out period is expiring, the licensee in Market "Y" must submit a map of Market X to the Commission by the same date that Market "X's" SIU is due. This map must show the extension into that market and must include the following statement: "This is the SIU for Market "X" filed by the Market "Y" carrier." The commenters ask whether the licensee of Market "Y" must submit a map showing all of Market X or just those portions of Market X which include the contour extension from Market "Y." The licensee of Market "Y" may submit the map for its market (Market "Y") as long as it shows enough of Market "X" to depict the complete contour extension into Market "X." Further, the map must be clearly labeled to indicate Market "X' and market "Y" and the boundary between the markets should be highlighted. The Committee for Effective Cellular Rules (Cellular Committee) requests that we require, as part of the SIU filing, the submission of a date-stamped FCC Form 489 for each of the external cell sites of a given cellular system.[150] We reject this request as excessive in light of the data we are already requiring for the SIU filing.

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146 GTE Comments at 6; AirTouch Comments at 4.

147 Comp Comm Comments at 4-5.

148 Southwestern Bell Comments at 4.

149 McCaw Reply comments at 6.

150 Cellular Committee Comments at 5-6.

93. Several comments addressed our plan to eliminate the listing of internal cell sites on our authoriziations for existing licensees. We proposed that licensees make a one-time filing of information concerning their external sites to enable us to update our database systems. The specific information sought is already required by Schedule B of FCC Form 401. Southwestern Bell asks whether licensees may submit the actual pages of existing Schedule Bs associated with each of the external cell sites.[151] McCaw supports this request.[152] We grant this request. We agree that submitting this information in this form would meet the requirement because the data sought would have been compiled in conjunction with previous applications. Of course, if any such information is no longer accurate, correct current information must be provided. Southwestern Bell suggests that the information from Table MOB-2 of FCC Form 401 should not be required in the one-time filing because it would be unnecessary if the information from Table MOB-3 is included.[153] The data requested in the two tables are not duplicative, however, we agree that it is the Table MOB-3 data that is used to determine the CGSA. Accordingly, we will not require that the information contained in Table MOB-2 be submitted with the one-time filing.

94. NYNEX recommends that when an external cell site is taken out of service and the service contour is thereby reduced, carriers should be required to submit information detailing the service area changes.[154] McCaw concurs in this recommendation,[155] as do several commenters who responded to our initial Notice herein. As explained in paragraph 25, supra, we have adopted this recommendation. Cellular Committee opposes our proposal to eliminate the licensing of inner cell sites. It claims that elimination of licensing information for inner cell sites will hinder the enforcement of numerous technical, environmental, land-use and operational requirements. One of the problems perceived by Cellular Committee is that internal cells might replace former external cells, but since internal cells are not licensed, the Commission would not know what constitutes the licensee's CGSA boundary.[156] We do not believe that Cellular Committee's fears are justified. First, a cellular licensee is responsible for complying with our rules and those of any other lawful state or federal authority, whether or not all of its internal cells are individually listed in our data base or on the authorization. We are eliminating our requirement that licensees notify us of additional or modified internal cells because it is the external cells that by definition, as a group form the system's CGSA. Nevertheless, a cellular licensee still remains responsible for its entire system, including its internal cells. Second, we

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151 Southwestern Bell Comments at 3.

152 McCaw Reply Comments at 5.

153 Southwestern Bell comments at 3.

154 Nynex Comments at 5-6.

155 McCaw Reply Comments at 3-4.

156 Cellular Committee Comments at 3 and 5.

are requiring cellular licensees to file notifications (FCC Form 489) with us when they delete or replace an external cell. Further, after the five year build-out period has expired, a new full-sized map must be filed with any application proposing a change in the CGSA.[157] Several commenters have specific recommendations concerning the precise timing and sequence in which the one-time filings should be submitted.[158] We hereby delegate authority to the Chief, Common Carrier Bureau, to decide the sequence and the timing for the one-time filings and any other matter pertaining thereto.

931 MHz Licensing Procedures

95. **Proposal.** In the Further Notice, we proposed special new licensing procedures for all 931 MHz paging applications in order to process such applications in a consistent, satisfactory manner. In brief, our proposals would require applicants to specify the frequency for which they seek authorization and the frequency requested must be deemed available under the relevant rules adopted in this rule making proceeding. Applications that are acceptable for filing would then be placed on public notice. Mutually exclusive applications received within 30 days after the public notice would be considered one processing group. We also proposed that applicants for 931 MHz paging frequencies with applications pending when the rules adopted herein become effective, be given 60 days from the effective date of the order in this proceeding to amend their applications to specify frequencies for which they seek authorization. We explained that we planned to include in the category of pending applications to which the new rules would apply, applications that have been granted, denied, or dismissed, but which remain before us due to the filing of petitions for reconsideration or applications for review. The pending applications would be placed on public notice. All pending amended applications and newly filed applications that are mutually exclusive with those pending applications and received within 60 days of the effective date of the order herein would be considered together as a processing group this one time only.

96. **Comments and Discussion.** Those entities commenting upon our proposed 931 MHz licensing procedures object to certain aspects of our proposals.[159] Most of these entities

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157 See new § 22.929(c).

158 See McCaw Reply Comments at 6; Southwestern Bell Comments at 3-4; AirTouch Communications Comments at 3.

159 Comments on the 931 MHz paging rule changes were filed by: AirTouch Paging; Alpha Express, Inc. (Alpha); Ameritech Mobile Services, Inc. (Ameritech); Comp Comm, Inc. (Comp Comm); Metrocall, Inc.; Paging Partners Corporation (Paging Partners); Paging Network, Inc. (PageNet); Personal Communications Industry Association (PCIA); Premiere Page, Inc. (Premiere); Priority Communications, Inc. (Priority); Pronet, Inc.; SkyTel Corporation (SkyTel); SMR Systems, Inc. (SSI); Source One Wireless, Inc. (Source One); and Tri-State Radio Co. (Tri-State). Reply Comments were filed by AirTouch Paging, McCaw, PageNet, Paging Partners, PCIA, SSI and SkyTel.

object to what they perceive as the "retroactive" aspect of our one-time licensing proposal, namely, the inclusion as part of a processing group of all "pending" applications that remain before us and newly-filed applications that are mutually exclusive with those pending applications and are received within 60 days of the effective date of the Order herein. Specifically, Paging Partners Corporation (Paging Partners) argues that applications pending before May 20, 1994 (the date our Further Notice was released), should be processed in accordance with rules in existence at the time those applications were filed rather than in accordance with the rules adopted in this proceeding.[160] Nevertheless, Paging Partners believes that the proposed rules may be applied to post-July 26, 1993 applications because parties to such applications were on notice of possible changes. Likewise, Premiere Page, Inc. (Premiere) objects to the application of the rules as proposed in the Further Notice.[161] Premiere argues that if the Commission decides to combine all applications currently on file, it should include only those applications pending before July 26, 1993, in a single processing group.[162] Premiere contends that the Commission should calculate the number of channels available at the time pending applications were initially filed to determine whether there are insufficient channels for all pending applicants, and if there are fewer channels available than applicants, the Commission should process mutually exclusive applications in accordance with its present procedures.[163] Pronet, Inc. (Pronet) asserts that the Commission should reject the proposed 931 MHz processing procedures as being both violative of Section of the Act and patently unfair as applied to applications which have been granted but are still subject to petitions for reconsideration or review. Thus, Pronet contends, grants of 931 MHz authority remain valid until the Commission issues an order pursuant to Section 405 of the Act stating otherwise. Pronet argues that the Commission should focus on resolving petitions filed against 931 MHz grants in accordance with the 931 MHz licensing procedures as initially established by the Commission.[164]

97. Skytel Corporation (Skytel) claims that the application of the processing rules as proposed is contrary to Congressional intent, judicial precedent, and Commission decisions.[165] Tri-State Radio Co. (Tri-State) contends that the Commission lacks the authority to reclassify as "pending" any 931 MHz applications that have been granted, denied or dismissed and are the subject of petitions for reconsideration or applications for review.[166] Tri-State also argues that

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160 Paging Partners Comments at 2-5.

161 Premiere Comments at 4-5.

162 Id. at 8.

163 Id. at 7-8.

164 Pronet Comments at 3-5.

165 See Skytel Comments at 15-17.

166 Tri-State Comments at 8-9.

the retroactive application of rules without examining the issues underlying the pending pleadings in relevant proceedings would violate the requirement of Section 405 of the Act and that the Commission must resolve the issues raised in pending proceedings. [167] Tri-State asserts that the retroactive application of the proposed rule changes would not satisfy judicial criteria for such action because: (1) the issue is not a matter of first impresssion; (2) the proposal represents a dramatic departure from existing procedures; (3) the licensees involved have relied extensively on license grants already made; (4) applicants already on file or granted would be substantially burdened; and (5) no statutory interest exists to support the proposal.[168] Alpha Express, Inc. (Alpha) contends that the application of the proposed rule changes to those applications already processed would operate in the same manner as an ex post facto law, violate due process of law, and contradict concepts of orderly and fair licensing. [169] Further, Alpha argues that because the proposed rule changes do not subject all non-final grants to further proceedings, but just 931 MHz grants are so subjected, these rule changes result in a dissimilar treatment of licensees violative of constitutional equal protection laws and cases.[170]

98. After having reviewed the Comments and Reply Comments in this proceeding, we have decided to follow the general pattern for processing 931 MHz paging applications which we proposed in our Further Notice. The confusion and uncertainty surrounding the old procedures for processing these applications require a rational "fresh start" pursuant to clearly articulated rules. Thus, we shall require applicants to specify the frequency for which they seek authorization and the frequency requested must be deemed available under the rules adopted in this rule making proceeding. Ordinarily, applications that are acceptable for filing will be placed on public notice and mutually exclusive applications received within 30 days after the public notice would be considered one processing group. See new Section 22.541 of our Rules. Nevertheless, all applicants that have applications pending when the rules adopted herein become effective will be given 60 days from the date those rules become effective to amend their applications to specify frequencies for which they seek authorization. Although we proposed to include in the category of pending applications to which the new rules would apply applications that have been granted, denied, or dismissed, but that remain before us due to the filing of petitions for reconsideration or applications for review, we agree with the commenters that, to the extent possible, all of these cases should be decided under the existing rules. Because of the ambiguous and confusing nature of our existing rules and related practice and precedent, however, it may not be possible to resolve some of these cases under the existing rules. In such cases, we see no alternative but to return the applications, even if initially granted, to pending status on the grounds that granting, denying, or dismissing applications pursuant to such ambiguous and

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167 Id. at 9-10.

168 Id. at 13-17.

169 Alpha Comments at 6-7.

170 See Alpha Comments at 8-9.

confusing rules could only lead to reversal, regardless of what action we take. In this more limited category of cases, we will process the pending applications under the new rules.

99. To effectuate this procedure, we instruct the Chief, Common Carrier Bureau, to act on all pending petitions for reconsideration of 931 MHz paging applications prior to the effective date of the new rules. Similarly, the Chief, Common Carrier Bureau, is instructed to prepare for Commission action the proposed resolution of any such pending applications for review so that they can be acted upon by the Commission prior to the effective date of the new rules.[171] To the extent these cases can be resolved under existing rules, they should be. To the extent they cannot, because of the ambiguity and confusion of the rules and associated practice and precedent, the applications, whether previously granted, denied, or dismissed, should be returned to pending status.[172] Should settlement agreements be filed in these cases prior to such action, we encourage the Bureau to look favorably on such settlements, assuming they otherwise serve the public interest.

100. Contrary to the views of some commenters, applying our new rules to pending applications, including those that have been previously granted but are subject to reversal because they cannot be resolved under the existing rules, does not constitute retroactive rule making. The fact that a new rule "is applied in a case arising from conduct antedating the [rule's] enactment" or "upsets expectations based in prior law" does not make it retroactive. Landgraf v. USI Film Products, 114 S. Ct. 1483, 1499 (1994). Rather, a rule is retroactive only if it "attaches new legal consequences to events completed before its enactment." Id. Accord, Chemical Waste Management, Inc. v. EPA, 869 F.2d 1526, 1536 (D.C.. Cir. 1989). ("It is often the case that a business will undertake a certain course of conduct based on the current law, and will then find its expectations frustrated when the law changes. This has never been thought to constitute retroactive rule making....")[173] In this regard, it is well-established that the Commission may apply new rules to pending applications.[174] The fact that an application remained pending because of petitions for reconsideration or applications for review does not alter the Commission's

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171 The rules adopted in this Report and Order take effect on January 1, 1995. If the Commission or the Bureau have not acted upon the pleadings described above by the date that the rules adopted herein are effective, we shall stay the effect of new Section 22.541 of our rules on 931 MHz applications and also stay the special one-time filing procedure for all pending applications until the Commission or the Bureau have issued any necessary orders dealing with those pleadings.

172 In cases where applications that have been granted are returned to pending status, the Bureau should grant interim operating authority to the prior grantee, as appropriate.

173 See also Bowen v. Georgetown University Hospital, 488 U.S. 204, 216-225 (1988) (Scalia, J. concurring).

174 See, e.g., United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); Hispanic Information and Telecommunications Network v. FCC, 865 F.2d 1289 (D.C. Cir. 1989).

authority in this regard. Until action on an application is final, processing has not been completed, and rule changes applied to that application are not retroactive.

101. **Proposal.** We proposed that the applications amended pursuant to our one-time filing procedure be subject to the competitive bidding process if they are initial applications, but also asked for comment on whether we should use lotteries for those applications.[175] We noted that, pursuant to our Second Report and Order in Implementation of Section 309(j) of the Communications Act, 9 FCC Rcd 2348 (1994) (Second Report), mutually exclusive applications for specific frequencies all of which are accepted for filing after July 26, 1993, will be subject to the competitive bidding process. Further, we noted that the Second Report stated that as a general rule we will regard mutually exclusive applications to modify existing licenses as not subject to competitive bidding. We asked for comment on the issue of whether modification applications that are mutually exclusive with initial applications should be treated as initial applications and be subject to competitive bidding. We proposed to consider the following applications to be "initial" applications: (1) an application anywhere for a new frequency, or (2) an application to locate a new facility more than two kilometers (1.2 miles) from any existing facility operating on the same frequency. A 931 MHz paging application would be considered to be a modification of an existing system only if (1) it proposes only new locations two kilometers (1.2 miles) or less from a previously authorized and fully operational base station licensed to the same licensee operating on the same frequency; or (2) the application is for a change of location within two kilometers (1.2 miles) of an existing station licensed to the same licensee on the same frequency; or (3) the application proposes a technical change that would not increase the service contour. We also asked whether we should use first-come, first-served procedures to process 931 MHz modification applications in cases in which we conclude that the use of auctions would not be legally permissible or otherwise appropriate.[176] Under the first-come, first-served procedure, only modification applications received on the same day would be deemed mutually exclusive. Consistent with the Omnibus Budget Reconciliation Act, such applications would be designated for comparative hearing to determine which modification application should be granted.

102. **Comments and Discussion.** The majority of commenters disagree with our proposed definition of the category of modification or expansion application which should be treated as an initial application and thus would be subject to competitive bidding with mutually exclusive initial applications. Most commenters were concerned that the adoption of such a

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175 Section 6002(e) of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993) (Budget Act), gives the Commission discretion to use the lottery procedure instead of competitive bidding procedures for licenses where applications were accepted for filing by the Commission before July 26, 1993. Further, the Budget Act allows post-July 26, 1993 applications and pre-July 26, 1993 applications that are mutually exclusive to be processed by lottery procedures.

176 See footnote 9.

definition would subject too many applications to auctions and would hinder the efficient and economical expansion of paging systems, especially wide-area systems.[177] With respect to the two kilometer limitation, Source One Wireless, Inc. and Paging Partners suggest that a modification application should be considered to be the equivalent of an initial application only if it it plans to locate a new facility more than 20 miles from one of its existing facilities operating on the same frequency.[178] Priority Communications, Inc. (Priority), Skytel, SMR Systems, Inc. (SSI), and McCaw Cellular Communications, Inc. (McCaw) recommend that an expansion or modification application should be viewed as an "initial" application if it is more than 40 miles from one of its existing facilities operating on the same frequency.[179] SSI suggests that we should use a maximum distance that is roughly twice the expected reliable service range for base stations licensed at the equivalent of 1000 watts at 1000 feet, which would be 64 kilometers or 40 miles for 931 MHz paging licensees.[180] Skytel claims that Section 22.525(b) of the Commission's Rules defines an "initial' application as one for facilities more than 40 miles from an existing station. [181]

103. Metrocall, Inc. (Metrocall) argues that applications subject to auctions should include only those that effectively constitute applications for new service, such as requests for new frequencies or for facilities with non-overlapping service areas.[182] Metrocall observes that in paragraph 37 of its Second Report and Order in PP Docket No. 93-253, supra, the Commission stated that any modification applications subject to auctions should be limited to those "so different in kind or so large in scope and scale" as to effectively constitute applications for new services. 9 FCC Rcd 2348, 2355 (1994). Comp Comm opposes the proposed two kilometer definition of an "initial" application, finding it arbitrary and lacking in technical merit. Comp Comm asserts that the current Part 22 definition of a 931 MHz paging service contour includes

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177 See, e.g., Metrocall, Inc. Comments at 5; Personal Communications Industry Association (PCIA) Comments at 6; Skytel Comments at 13; Source One Wireless, Inc. (Source One) Comments at 2-3; Paging Partners Comments at 5-6; Ameritech Mobile Services, Inc. Comments at 7-9; Pronet Comments at 7-8; Pagenet Comments at 15-16.

178 Source One Comments at 2-3; Paging Partners Comments at 5-6.

179 Priority Comments at 4; SMR Comments at 5; Skytel Comments at 12-15; McCaw Reply Comments at 10.

180 SSI Comments at 5.

181 Skytel Comments at 12-15. Section 22.525 (b) of the Rules states, inter alia, that an existing 900 MHz licensee requesting a one-way frequency will be deemed to be requesting an additional frequency for its existing station if its proposed base station is less than 64 kilometers (40 miles) from its existing 900 MHz base station.

182 Metrocall Comments at 8.

a minimum radius of 20 miles.[183] Comp Comm also notes that, under Section 22.16(e) of the Commission's Rules, an application for a new transmitter site is considered to be a "fill-in" application (i.e., a "modification" rather than an "initial" application) if the proposed service area is at least 50 percent encompassed by existing authorized service area. Further, Comp Comm observes that for 931 MHz paging, the separation between the centers of two circles each having a 20-mile radius, with 50 percent overlap between them, is 26.0 km (16.2 miles). In light of these factors, Comp Comm argues that a separation of 26 kilometers rather than 2 kilometers should be used to differentiate an initial from a modification application.[184] Ameritech Mobile Services, Inc. (Ameritech) concurs with Comp Comm's 50 percent overlap analysis, noting that an existing licensee that is forced to abandon a transmitter site may find that it is included in an auction for a new site if that site is more than two kilometers away.[185] Ameritech also observes that Section 22.16(b)(2) of the Commission's Rules states that: "Applications are considered to be requesting initial channels if less than 50 percent of the proposed reliable service area contour overlaps an existing contour."[186]

104. In its Reply Comments, McCaw suggests that a long-term solution to the problem of providing flexibility to allow 931 MHz paging licensees to make minor changes to their systems and yet expand operations to accommodate natural growth is to license 931 MHz paging facilities on a market-defined service area determined by the Commission.[187] AirTouch Paging states that there appears to be a general consensus that the Commission should adopt market area licensing in lieu of the current transmitter-specific type of licensing.[188]

105. We would like to consider market area licensing for paging operators in a future rule making proceeding. Until such time, however, we shall define an initial application which is subject to competitive bidding as one which proposes: (1) to use a new frequency anywhere and (2) to locate a new facility more than 2 kilometers from any existing facility operating on the same frequency. We believe that the 2 kilometer distance should allow a licensee who loses its transmitter site to find another one nearby. Further, if a licensee seeks to expand its service area by using a transmitter on the same channel as its existing station but more than 2 kilometers from its present transmitter site, we believe that it should be subject to an auction with other initial or expansion applications. We view such proposals to be new ventures which generally would

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183 Comp Comm Comments at 6.

184 Id.

185 Ameritech Comments at 7-9.

186 Id. at 8.

187 McCaw Reply Comments at 11.

188 AirTouch Paging Reply Comments at 7, citing its Comments at 8-13, PCIA's Comments at 7-8, PageNet's Comments at 7-8 and Premiere's Comments at 9.

be subject to competitive forces. Until we are able to investigate more fully the efficacies of a market-licensing plan, we believe that the expansion of paging systems, should be subject to competitive bidding. This way, the new venture will go to the party which most highly values the spectrum in that area. We also conclude that we will use the first come, first served procedure to accept 931 MHz modification applications for filing when the application involved cannot qualify as an "initial' application as defined above. . Thus, for example, a proposal to locate a new facility less than 2 kilometers from an existing facility operating on the same frequency would be subject to the first-come, first-served procedure. Under the first-come, first-served procedure, only mutually exclusive modification applications received on the same day would be entitled to comparative consideration. Consistent with the Omnibus Budget Reconciliation Act, those applications would be designated for comparative hearing to determine which modification application should be granted.

CONCLUSION

106. In this Report and Order, we revise Part 22 of our Rules. This comprehensive review and revision of our Rules governing the Public Mobile Services culminates several years of effort on the part of the Commission and the telecommunications industry. This rewrite and update of Part 22 will serve the goal of streamlining our licensing procedures to allow Public Mobile Services licensees greater flexibility in providing service to the public.

ADMINISTRATIVE MATTERS

Final Regulatory Flexibility Analysis

107. **Need and purpose of this action.** This Report and Order revises Title 47, Part 22 of the Code of Federal Regulations to eliminate unnecessary information collection requirements and, wherever possible, provide greater flexibility to carriers, while at the same time promoting the public interest. The objective of this proposal is to provide effective and adaptive regulation for communications.

108. **Summary of issues raised by the public.** Several commenters suggested modifications to some of the Commission's proposals. As a result of these comments, we have made some modifications to those proposals as appropriate.

109. **Significant alternatives considered.** The Notices and Further Notices of Proposed Rule Making in these proceedings offered numerous proposals. The commenters supported the majority of the proposed changes. Several commenters suggested modifications to some of the Commission's proposals. The regulatory burdens we have retained are necessary to carry out our duties under the Communications Act of 1934, as amended. Several of the commenters suggested that a market area licensing system be substituted for the transmitter by transmitter licensing used in some of the services. Because we did not initially propose this in the Notice, however, market area licensing is beyond the scope of this proceeding. We will continue to examine

alternatives in the future with the objective of eliminating unnecessary regulations and minimizing any significant economic impact on small business entities. A copy of the Report and Order shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

ORDERING CLAUSES

110. Authority for the rule changes adopted herein is contained in Sections 1, 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303(r).

111. Accordingly, IT IS ORDERED That Part 22 of the Commission's Rules IS HEREBY AMENDED as discussed herein and as shown in Appendix B.

112. IT IS FURTHER ORDERED That the rule changes made herein WILL BECOME EFFECTIVE on January 1, 1995.

113. IT IS FURTHER ORDERED That the rule making proceedings in CC Docket Nos. 92-115, 94-46, and 93-116 ARE HEREBY TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

William F. Caton
Acting Secretary

APPENDIX A

DETAILED DISCUSSION OF PART 22 RULE AMENDMENTS

In this appendix, we summarize the record and discuss the non-controversial but substantive rule revisions, including those involving procedural changes, and some of the rule revisions involving only editorial changes. We also provide additional detail on some of the controversial rule revisions. In many instances, we incorporate suggestions of the commenters into the final rules. Some rule changes are made to conform the new rules with rules adopted in other rule making proceedings that were pending at the time of the Notice of Proposed Rule Making (NPRM) or to finalize proposals in proceedings that we commenced during the pendency of this proceeding. Still other changes are the consequences of amendments to the Communications Act of 1934, as amended (the "Act"), that were enacted during 1993. Although we dispose of most minor matters briefly, we have nevertheless carefully considered the comments and arguments in the record. In this appendix, we refer to the previous rules as "old," the rules we are adopting herein as "new," and the rules set forth in the NPRM as "proposed." Appendix B sets forth the amendatory language, changes to Part 1, and new text of Part 22 in its entirety. Appendix C is a table cross-referencing the new rules with the old rules.

General Organization

In our rewrite, we depart significantly from the previous organization of Part 22. We attempt, to the extent feasible, to locate general rules applying to two or more of the Public Mobile Services in new Subparts A, B and C. Unless otherwise stated in a particular rule, one should assume that all rules in these first three subparts apply to all Public Mobile Services. In the case of Subparts A and B, we retained section numbers for the corresponding old rules, adding 100 in the case of Subpart B. For example, old § 22.19 became new § 22.119. We did this so that the general rules appear in the same approximate order as before. Many people in the industry who work with these rules are familiar with the old numbers. We hope these measures will ease the transition.

We no longer consider developmental applications and authorizations to be part of a "Developmental Service" because most developmental authorizations are not issued for the purpose of developing a new public mobile service, but are issued for trial operations within one of the established Public Mobile Services. We located all the rules concerning developmental application procedures in new Subpart D. Each of Subparts E, F, G, H and I covers a single public mobile service, and unless otherwise stated in a particular rule, the reader should assume that rules in a particular subpart apply only to the particular service that subpart covers. We have tried to reduce the amount of cross referencing that occured in the old rules between the service specific subparts, e.g., between the Rural Radiotelephone Service and the Paging and Radiotelephone Service.

Public Mobile Service Titles

We proposed to retitle several of the Public Mobile Services. For example, we proposed to rename the "Domestic Public Cellular Radio Telecommunications Service" as the "Cellular Radiotelephone Service". Some commenters dislike the proposed titles. In general, these commenters express concern that the new titles reflect an intent to place substantive limits on how the radio services may be used. They suggest that we adopt names for the services that encompass all uses of the services.

The foregoing arguments are without merit. The titles of the Public Mobile Services are merely short labels describing the main distinguishing characteristics and principal uses of those services. In recent years, we have increased the flexibility licensees have to use facilities licensed in these services for many purposes in addition to the main or original purpose. Nevertheless, we do not believe it is necessary or desirable to label the individual services with lengthy titles intended to encompass all conceivable uses. The names we proposed to use, are, for the most part, terms commonly known and used by the general public. For example, we proposed to replace the very general sounding title "Public Land Mobile Service" with "Paging and Radiotelephone Service." We believe that most people know what "paging" is, but they might not know what is meant by "land mobile one-way tone, voice and alphanumeric signaling," even though the latter may be more inclusive. Most importantly, we emphasize that the titles of the individual Public Mobile Services do not in any way place substantive limits on how these radio services may be used. Any such limits would be clearly stated in rules governing the services and would not be imposed by the names of the services. We continue to believe that the proposed titles are better than either the old titles or the alternatives suggested. Therefore, we adopt the new service titles as proposed.