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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C.

In the Matter of

Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service	)	PR Docket No. 89-552 RM-8506
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
Regulatory Treatment of Mobile Services	)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 220-222 MHz	)	PP Docket No. 93-253

SECOND MEMORANDUM OPINION AND ORDER

and

THIRD NOTICE OF PROPOSED RULEMAKING

Adopted: July 28, 1995; **Released:** August 28, 1995

Comments Due: **September 27, 1995**
Reply Comments Due: **October 12, 1995**

By the Commission: Commissioner Quello issuing a separate statement.

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I. INTRODUCTION

1. By this Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking, we propose a new framework for the operation and licensing of the 220-222 MHz band (220 MHz service).[1] This action is taken as part of our continuing implementation of the new regulatory framework for mobile radio services enacted by Congress in Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 (Budget Act), which amended Sections 3(n) and 332 of the Communications Act of 1934.[2] We began the implementation of the provisions of the Budget Act with the adoption of a Notice of Proposed Rulemaking in GN Docket No. 93-252.[3] In that proceeding, we adopted rules governing the commercial and private mobile radio services, including the 220 MHz service, consistent with the policy of regulatory parity as reflected in the Congressional revisions to Section 332 of the Act. The proceeding we are initiating with this Notice is an outgrowth of the *CMRS Third Report and Order*,[4] which deferred a comprehensive examination of the 220 MHz service to a separate rulemaking proceeding. In addition, we address various petitions and waiver requests relating to 220 MHz operations and address certain decisions made in the *CMRS Third Report and Order* with regard to the 220 MHz service.

2. Our primary goal in this proceeding is to establish a flexible regulatory framework that will allow for more efficient licensing of the 220-222 MHz band, eliminate unnecessary regulatory burdens on both existing and future licensees, and enhance the competitive potential of the 220 MHz service in the mobile services marketplace. In addition, we seek to ensure that licenses are granted to those who value the spectrum most highly and will maximize its use to provide the best quality and variety of service to consumers. The 220 MHz service is an infant industry that presents unique issues and concerns. We believe our proposals strike a fair balance between the interests of current licensees and licensees to be authorized under the new rules. The adoption of the rules set forth in this Notice will enable the continued development of the 220 MHz radio service and the implementation of a variety of new communications services to meet the future needs of the American public.

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[1] We will refer herein to any licenses granted pursuant to this new framework as Phase II licenses. Licenses granted under the current rules are referred to herein as Phase I licenses.

[2] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI § 6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392 (1993) (Budget Act).

[3] Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Notice of Proposed Rulemaking, 8 FCC Rcd 7988 (1993).

[4] Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Third Report and Order, 9 FCC Rcd 7988 (1994) (*CMRS Third Report and Order*).

II. BACKGROUND

A. THE 220-222 MHZ SERVICE

3. In 1988, we adopted a Report and Order in GN Docket No. 87-14,[5] reallocating the 220-222 MHz band for private and Federal Government land mobile use. In so doing, we dedicated this spectrum for the development of spectrally-efficient narrowband technology to afford this technology an opportunity to gain acceptance in the marketplace. The 220 MHz service was then established in 1991 with the adoption of the *220 MHz Report and Order*.[6] It is regulated under Subpart T of Part 90 of our rules.[7]

4. In the *220 MHz Report and Order,* we adopted service rules for the assignment of 200 five kilohertz channel pairs in the 220-222 MHz band to both Federal Government and private land mobile users. We authorized 60 of the 200 channel pairs for nationwide licensing, with 10 of these designated for assignment to Federal Government entities. The remaining 50 nationwide channel pairs were reserved for non-Government users, with 20 channel pairs designated for "commercial" use and 30 channel pairs designated for "non-commercial" use.[8] The 20 commercial channel pairs were divided into four five-channel blocks and the 30 non-commercial channel pairs were divided into two 10-channel and two five-channel blocks. We allocated the remaining 140 channel pairs for non-nationwide use by both Government and non-Government licensees. We also decided that all applications

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[5] Amendment of Part 2 of the Commission's Rules Regarding the Allocation of the 216-225 MHz Band, Report and Order, Gen. Docket No. 87-14, 3 FCC Rcd. 5287 (1988) (*220 MHz Allocation Order*); *recon. denied*, Memorandum Opinion and Order, 4 FCC Rcd 6407 (1989), *affd.* American Radio Relay League, Inc., v. FCC, No. 89-1602 (D.C. Cir. Dec. 3, 1990).

[6] Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services, PR Docket No. 89-552, Notice of Proposed Rule Making, 4 FCC Rcd 8593 (1989) (*220 MHz Notice*); Report and Order, 6 FCC Rcd 2356 (1991) (*220 MHz Report and Order)*; Further Notice of Proposed Rule Making, 7 FCC Rcd 898 (1992) (*220 MHz Further Notice); recon. granted in part and denied in part and rules amended,* Memorandum Opinion and Order, 7 FCC Rcd 4484 (1992) (*220 MHz Memorandum Opinion and Order*); Erratum, DA 92-1177, released Aug. 28, 1992; Second Erratum, 7 FCC Rcd 6297 (1992); *recon. granted in part and denied in part*, Order, 8 FCC Rcd 4161 (1993) (*220 MHz Second Reconsideration Order*); *appeal dismissed*, Evans v. FCC, Case No. 92-137, (D.C. Cir. Mar. 18, 1994).

[7] Subpart T of Part 90 of the Commission's Rules, 47 C.F.R. §§ 90.701-90.741.

[8] At the time of the adoption of the *220 MHz Report and Order*, we used the term "commercial" to refer to licensees who would operate as carriers under Part 90 of our rules and provide commercial radio services to end users. We used the term "non-commercial" to refer to licensees who would use spectrum to satisfy their own internal communications requirements. These terms do not correlate directly with the terms Commercial Mobile Radio Service (CMRS) and Private Mobile Radio Service (PMRS), as defined in Section 20.3 of the Commission's Rules, 47 C.F.R. § 20.3.

for 220 MHz channels would be granted on a first-come, first-served basis and that mutually exclusive applications would be assigned through random selection procedures.

5. On May 1, 1991, the Commission began accepting applications for nationwide and non-nationwide licenses in the 220-222 MHz band. We received more than 59,000 applications, and on May 24, 1991, the former Private Radio Bureau suspended the acceptance of applications.[9] We have not re-opened the filing window for 220 MHz applications since that date. In 1992[10] and 1993[11] we conducted random selection proceedings to resolve mutually exclusive non-nationwide and nationwide applications, respectively, and have since issued nearly 3,800 authorizations for non-nationwide stations and four licenses for nationwide, commercial systems.

B. LEGISLATIVE AND COMMISSION ACTIONS PURSUANT TO THE BUDGET ACT

6. On August 10, 1993, Congress enacted the Budget Act, in which it, *inter alia*, amended Section 332 of the Communications Act of 1934[12] to replace the existing mobile common carrier and private land mobile radio definitions with two newly defined categories of mobile services: commercial mobile radio service (CMRS) and private mobile radio service (PMRS). CMRS is defined as "any mobile service (as defined in section 3(n) [of the Communications Act]) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public."[13] PMRS is defined as "any mobile service (as defined in section 3(n)) that is not a commercial mobile service or the functional equivalent of a commercial mobile service,[14] as specified by regulation by the Commission."

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[9] Acceptance of 220-222 MHz Private Land Mobile Applications, Order, 6 FCC Rcd 3333 (1991) (*220 MHz Freeze Order*). The former Private Radio Bureau imposed the freeze so that it could process the large number of applications before accepting more applications.

[10] Public Notice, Commission Announces Lottery for Rank Ordering of 220-222 MHz Private Land Mobile "Local" Channels, 7 FCC Rcd 6378 (1992) (*Public Notice: Non-Nationwide Lottery*).

[11] Public Notice, Commission Announces Lottery to Select Commercial Nationwide 220-222 MHz Band Private Land Mobile Licensees, DA 93-159 (released February 16, 1993), 58 Fed. Reg. 09174 (February 19, 1993) (*Public Notice: Nationwide Lottery*).

[12] Communications Act of 1934, 47 U.S.C. §§ 151-713 (Communications Act).

[13] *Id.*, Section 332(d)(1), 47 U.S.C. § 332(d)(1).

[14] *Id.*, Section 332(d)(3), 47 U.S.C. § 332(d)(3). The term "mobile service," as used in the quoted language in the text, is defined in Section 3(n) of the Communications Act, 47 U.S.C. § 153(n).

7. The statute directed the Commission to implement these classifications in its regulations and to provide for comparable regulation of substantially similar CMRS services. Accordingly, we initiated our CMRS proceeding in GN Docket No. 93-252 and began the process of implementing the Budget Act in the *CMRS Second Report and Order* released on March 7, 1994.[15] In the *CMRS Second Report and Order*, we determined that our private land mobile service rules with respect to Specialized Mobile Radio (SMR), Business Radio, 220-222 MHz, and private paging allow, but do not require, licensees to offer for-profit, interconnected service to the public, thus meeting the CMRS definition.[16] We found that, to the extent that 220-222 MHz channels are used to offer for-profit and interconnected service, the channels fall within the definition of CMRS.[17]

8. On April 20, 1994, we adopted the *CMRS Further Notice*, in which we proposed revisions to our technical, operational, and licensing rules and procedures for reclassified CMRS services.[18] The Budget Act required that we determine if a reclassified private land mobile service is "substantially similar" to a common carrier service and, if so, the extent to which it is "necessary and practical" to modify our rules to ensure that the two services are subject to "comparable" technical requirements.[19] We observed that, because licensing of the 220-222 MHz band only commenced in 1993 and most systems were not yet constructed, it was difficult to assess whether commercial 220 MHz licensees would provide service that is similar to any common carrier mobile service licensed under Part 22 of our rules. We requested specific comment on certain aspects of the 220 MHz service, including channel assignment policy, definition of service area, construction periods, and coverage requirements.

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[15] Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411 (1994) (*CMRS Second Report and Order*); Erratum, 9 FCC Rcd 2156 (1994).

[16] *CMRS Second Report and Order,* 9 FCC Rcd at 1450-53 (paras. 88-97).

[17] *Id.* We adopted the timetable for transition to the new regulatory structure for reclassified CMRS licensees as set forth in the Budget Act. Licensees authorized before enactment of the Act on August 10, 1993, and reclassified as CMRS will continue to be regulated as private service providers for a three-year period, until August 10, 1996. *Id.* at 1512-14 (paras. 278-284).

[18] Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Further Notice of Proposed Rule Making, 9 FCC Rcd 2863 (1994) (*CMRS Further Notice*).

[19] Budget Act, § 6002(d)(3).

9. On August 9, 1994, we adopted the *CMRS Third Report and Order*. We noted therein that the vast majority of commenters addressing the 220 MHz service contended that, for technical reasons, 220 MHz service is not substantially similar to any Part 22 service.[20] We concluded, however, that most commenters had taken a relatively narrow view of CMRS competition, and that, for the purposes of determining whether CMRS services are substantially similar, 220 MHz offerings have the potential to compete with other commercial mobile offerings as technology evolves and the offerings begin to gain commercial acceptance.[21]

10. After reviewing the comments, we decided to defer consideration of a new licensing plan for the 220 MHz service based on different-sized channel blocks or service areas to a separate proceeding, where a more comprehensive record could be developed.[22] While adopting the use of competitive bidding procedures to resolve competing CMRS applications, we specifically deferred the adoption of new application filing and selection procedures for the 220 MHz service to this instant proceeding. We also deferred any decision on how to define initial applications, amendments to applications and license modifications for the service to this proceeding.[23]

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[20] *CMRS Third Report and Order,* 9 FCC Rcd at 8006-07 (para. 34).

[21] *Id.* at 8026 (para. 67).

[22] *Id.* at 8055 (paras. 126-127).

[23] Because of the freeze on 220 MHz applications, licensees relied on grants of Special Temporary Authority (STAs) to modify their authorizations, and many of the commenters requested special provisions to enable them to file modification applications before any new application procedures were put in place. *CMRS Third Report and Order,* 9 FCC Rcd at 8147-8148 (paras. 359 and 362).

III. EXECUTIVE SUMMARY

A. THIRD NOTICE OF PROPOSED RULEMAKING

11. The following is a summary of the various rules and procedures proposed in this Notice:

1. Phase II Licensing

a. Nationwide Licensing

12. We seek comment regarding whether to resolve pending mutually exclusive, non-commercial, nationwide applications by lottery, comparative hearing, or to return the applications and adopt a new licensing scheme for the 30 channels associated with the applications. If we return the applications, we make the following proposals for Phase II nationwide licensing of these channels:

- To license the 30 channels on a nationwide basis to all applicants -- *i.e.*, applicants that intend to use the channels to offer commercial services as well as applicants that intend to use the channels for their private, internal use.

- To assign these channels, in the form of three 10-channel authorizations, through competitive bidding pursuant to our tentative conclusion that the principal use of the spectrum will be for the provision of for-profit, subscriber-based services.

b. Non-Nationwide Licensing

13. We make the following proposals for Phase II, non-nationwide licensing of the 220 MHz band:

- To assign 60 channels in the 172 geographic areas defined as Economic Areas by the Bureau of Economic Analysis, Department of Commerce (''EA licenses'') and 65 channels in the geographic areas defined by five ''220 MHz Regions'' (''Regional licenses'') in the following manner:

NON-NATIONWIDE 220 MHz
PROPOSED CHANNEL ALLOCATION PLAN

EA BLOCK	CHANNELS
Channels 61-70	10
Channels 71-80	10
Channels 91-100	10
Channels 101-110	10
Channels 121-125	5
Channels 126-130	5
Channels 131-135	5
Channels 136-140	5
TOTAL	60

REGIONAL BLOCK	CHANNELS
Channels 171-180	10
Channels 186-200	15
Channels 1-10	10
Channels 11-20	10
Channels 31-50	20
TOTAL	65

- To allow all applicants to apply for these channels -- *i.e.*, applicants that intend to use the channels for private, internal use as well as applicants that intend to use the channels to offer commercial services.

- To assign these channels through competitive bidding based on our tentative conclusion that the principal use of the spectrum will be for the provision of for-profit, subscriber-based services.

- To permit EA and Regional licensees to operate stations anywhere within their geographic borders, provided that their transmissions do not exceed a predicted field strength of 38 dBuV/m at their border and they protect Phase I licensees in accordance with existing co-channel separation criteria.

- To provide a 10-year license term for EA and Regional licensees and require EA and Regional licensees to meet five and ten-year construction benchmarks.

- To eliminate existing channel use restrictions, *i.e.*, the "data-only" and "non-trunked" channel designations.

- To continue to assign, on a single-station basis, 10 channels exclusively to applicants eligible in the Public Safety Radio Service (the "Public Safety Pool") and five channels exclusively to applicants eligible in the Emergency Medical Radio Service (the "EMRS Pool").

- To continue to assign channels in the Public Safety and EMRS Pools on a first-come, first-served basis and resolve mutually exclusive applications by random selection procedures.

2. Technical and Operational Matters

14. We propose modifications to our existing rules with regard to fixed operations, paging operations, and the use of 5 kHz-wide channels. Specifically, we propose:

- To allow fixed and paging operations for all 220 MHz licensees without the requirement that such use be on an ancillary basis to land mobile operations.

- To allow licensees, under certain conditions, to aggregate any and all of their authorized channels to operate on channels wider than 5 kHz.

3. Application Procedures

15. We propose to adopt definitions for initial applications, amended applications, and applications to modify authorizations in the following manner:

- To define initial applications for 220 MHz licenses as applications for the nationwide, EA, and Regional licenses to be assigned in Phase II.

- To adopt the same procedures for amending applications and modifying authorizations for Phase II 220 MHz licenses that are established for other Part 90 CMRS services.

- To require non-grandfathered CMRS 220 MHz licensees to obtain STAs under the same restrictions applicable to other non-grandfathered Part 90 CMRS licensees.

- To extend to all 220 MHz licensees the Part 22 renewal standards adopted in the *CMRS Third Report and Order* for Part 90 CMRS services.

4. Auction Procedures

16. We propose competitive bidding procedures to resolve mutually exclusive initial applications filed in Phase II.

B. SECOND MEMORANDUM OPINION AND ORDER

1. Petitions for Reconsideration and Waiver Requests

17. In the *CMRS Third Report and Order*,[24] we denied a Request for Declaratory Ruling filed by SunCom Mobile & Data, Inc. (SunCom) which sought approval to aggregate non-nationwide 220 MHz five-channel blocks on a regional basis to provide multiple-market service on a single system. We also denied a concurrently filed waiver request by SunCom to allow an extended period for the construction of its system. SunCom filed a Petition for Reconsideration of these decisions. Wireless Plus, Inc., a manager of 220 MHz stations, filed a waiver request similar to SunCom's Request for Declaratory Ruling. We deny these three requests in this Order.

18. We also received waiver requests from the 220 MHz QO Coalition and Northeast Florida Telephone Company seeking waiver of our rules to permit licensees authorized on Channels 171-180 to operate in the trunked mode. We deny both of these requests.

2. 220 MHz Licensees Near the Canadian Border

19. We extend the construction deadline for Phase I 220 MHz licensees located within Line A of the Canadian border until 12 months after the signing of an agreement with Canada on the sharing of 220-222 MHz channels near the border.

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[24] *Id.* at 8056 (paras. 128-129).

IV. THIRD NOTICE OF PROPOSED RULEMAKING

A. OVERVIEW

20. Based on our review of the comments in the *CMRS Further Notice*,[25] the *CMRS Third Report and Order* and related CMRS decisions, and the status of the 220 MHz service under the current regulations, we propose to adopt a revised regulatory scheme for the 220 MHz service. The proposed rules would govern all applications filed in Phase II of licensing of the 220 MHz service and certain existing Phase I licensees as described herein. The Budget Act replaced the traditional regulation of mobile services with an approach that brings all mobile service providers under a comprehensive, consistent regulatory framework and that gives the Commission flexibility to establish appropriate levels of regulation for mobile service providers. While the other private mobile radio services classified as CMRS and covered by the Budget Act have all been subject to the revision of their pre-Budget Act rules to remove operating restrictions and open up service areas to permit licensees more flexible operations, we have not examined the 220 MHz service band since creating the service in 1991. In the *CMRS Third Report and Order*, we decided to undertake a comprehensive review of the service in this instant rulemaking proceeding.

21. Virtually all 220 MHz commenters to the *CMRS Further Notice* emphasized the unique nature of the 220 MHz service as a new and largely undeveloped service, confined to a tiny bandwidth with technical limitations that make two-way interconnected voice communications an uncertainty. As a result, they contend the service currently is not similar to the other reclassified private services. They are concerned about the impact of CMRS regulations on the newly-emerging systems and urge the Commission to consider their special circumstances.

22. Some of the commenters oppose changes that would alter the service at this time. SEA, Inc. (SEA) is a manufacturer of narrowband radio equipment, as well as a service manager and a holder of several licenses for five-channel, trunked local systems. SEA urges the Commission to preserve the original goal of the service to permit meaningful development of narrowband technology and create a "niche" service for local dispatch customers. It contends that, because only a few providers will be reclassified as CMRS, imposing CMRS rules comparable to those of other reclassified services would be burdensome and impractical.[26]

23. SmartLink Development Limited Partnership (SmartLink) manufactures radio products for mobile services. Like SEA, it is concerned about the nascent state of the 220

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[25] The comments and reply comments are incorporated in the record in this proceeding and are listed in Appendix B.

[26] SEA Comments at 4 and 7.

MHz service and urges that no changes be made in the rules until the service develops.[27] Global Cellular Communications, Inc. and Jean M. Warren (Global and Warren) argue that any rule changes would be disruptive to the newly established 220 MHz service, contending that the current rules are sufficiently flexible to permit companies to build systems and implement regional networks.[28]

24. Most of the commenters, however, support changes that permit more flexible operations. The RF Technologies Group requests that we revise our rules, or grant waivers, to permit the spectrum to be reconfigured to provide the greatest benefit to users.[29] Simrom, Inc. (Simrom) and its affiliates are involved in establishing two-way radio systems and managing some 300 220 MHz systems in about 150 markets. While urging us to be careful in crafting a new regulatory treatment, Simrom supports changes such as area-based licensing to make the service competitive with narrowband PCS service and other mobile services.[30] US MobilComm, Inc. (USM) also builds, manages, and operates major market wireless voice and data networks of individually owned five-channel 220 MHz systems. Like Simrom, USM seeks to be able to develop regional 220 MHz networks. It contends that the market niche would be enhanced by eliminating those rules that inhibit growth.[31] The National Association of Business and Educational Radio, Inc. (NABER) and the American Mobile Telecommunications Association, Inc. (AMTA) support rule changes to permit regional licensing.[32]

25. As described more fully below, we propose to retain the basic framework of the technical and operational rules consistent with the original service goals, but to revise them to permit more flexible operations consistent with the goals of the Budget Act for reclassified CMRS licensees and the service needs identified by comments filed in response to the *CMRS Further Notice* and our CMRS decisions.

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[27] SmartLink Comments at 7.

[28] Global and Warren Comments at 2.

[29] RF Technologies Comments at 3.

[30] Simrom Comments at 1.

[31] USM Comments at 6.

[32] NABER Comments at 24 and AMTA Comments at 24.

B. CHANNEL ASSIGNMENT AND SERVICE AREA RULES

26. In the *CMRS Further Notice*, we requested comment on whether and to what extent we should revise the channel assignment and service area rules applicable to 220 MHz service. We invited comment on whether the statutory goals would be furthered by allowing regional licensing of 220 MHz systems and, if so, what regulatory restrictions on 220 MHz systems would be appropriate to ensure comparable treatment for similar mobile services. Such restrictions might include limiting the number of channels available to a single licensee within a particular area or designating areas of operation in accordance with Commission-defined regions, such as Basic Trading Areas (BTAs) or Major Trading Areas (MTAs).

27. The current rules, which provide for both nationwide and non-nationwide channels, were established to enable licensees to meet the diverse demands for narrowband communications in the 220 MHz band.[33] We continue to believe that both nationwide and non-nationwide channels should be made available in the band to enable a variety of services to be made available to the public. We therefore propose to retain the identification of these two categories of channels.

1. Nationwide Licensing

a. Background

28. We decided, in our *220 MHz Report and Order*, to authorize 60 of the 200 channel pairs in the 220-222 MHz band for nationwide licensing. Ten of these channel pairs were for assignment to Federal Government entities and of the remaining 50 channel pairs reserved for non-Government users, 20 were designated for "commercial" use and 30 were designated for "non-commercial" use.[34] The 20 commercial channel pairs were divided into four five-channel blocks (Channels 21-25, 26-30, 151-155, and 156-160). The 30 non-commercial channel pairs were divided into two 10-channel blocks (Channels 51-60 and 141-150), and two five-channel blocks (Channels 81-85 and 86-90). On May 1, 1991, we received 140 applications for the four commercial licenses. We also received 14 applications for the two 10-channel non-commercial licenses and 20 applications for the two five-channel non-commercial licenses.[35]

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[33] *220 MHz Report and Order*, 6 FCC Rcd at 2362 (para. 38).

[34] *Id.* at 2361-62 (paras. 34-36).

[35] Subsequently, one of the 34 applicants withdrew its application pursuant to the rule changes we adopted in the *220 MHz Memorandum Opinion and Order* that we found significantly altered the construction and operational requirements for the nationwide, non-commercial channels. We permitted nationwide, non-commercial applicants to withdraw their applications and provided for the refund of their filing fees. *220 MHz Memorandum Opinion and Order*, 7 FCC Rcd at 4489 n. 66

29. The rules adopted in the *220 MHz Report and Order* provided that applicants for nationwide authorizations would have to submit additional information to satisfy specified entry criteria and financial requirements.[36] Applicants were not required to file this information at the time they filed their applications, but rather were to be notified in a public notice when this information should be submitted.[37] In our *220 MHz Memorandum Opinion and Order*, released July 16, 1992, we modified the entry criteria and financial requirements for nationwide authorizations.[38] Subsequently, a petition was filed seeking reconsideration of certain of these modifications relating to the licensing of nationwide, *non-commercial* systems. Consequently, the Private Radio Bureau announced, in a September 29, 1992, Public Notice,[39] that it would require the amending application information from nationwide commercial applicants by November 19, 1992, but that it would not accept filings from non-commercial applicants until the adoption of an order addressing the petition for reconsideration of the *220 MHz Memorandum Opinion and Order*. Following the receipt of the filings from the commercial applicants, the Bureau conducted a lottery on March 31, 1993,[40] that led to the assignment of the four nationwide commercial licenses.[41] In the *220 MHz Second Reconsideration Order,* released June 21, 1993, we addressed the matters relating to non-commercial nationwide licensing raised on reconsideration.[42] However, following the adoption of the *220 MHz Second Reconsideration Order*, we received three additional petitions seeking reconsideration of certain decisions in that Order. With this proceeding not yet terminated, we have not solicited the amending application information from the applicants for non-commercial licenses.

(para. 23).

[36] *220 MHz Report and Order,* 6 FCC Rcd at 2363-64 (paras. 50-55); Section 90.713 of the Commission's Rules, 47 C.F.R. § 90.713.

[37] *Id.* at 2364 n. 118 (para. 55).

[38] *220 MHz Memorandum Opinion and Order,* 7 FCC Rcd at 4493 (para. 41).

[39] Public Notice, November 19, 1992 Date Established for Commercial Nationwide 220-222 MHz Band Applicants To File Application Amendments To Satisfy Entry Criteria, DA 92-1321 (released Sept. 29, 1992), 57 Fed. Reg. 49475 (Sept. 29, 1992).

[40] *Public Notice: Nationwide Lottery*, DA 93-159 (rel. Feb. 16, 1993).

[41] Public Notice, Commission Announces Tentative Selectees for 220-222 MHz Nationwide Commercial Private Land Mobile Channels, DA 93-376 (released April 1, 1993), 58 Fed. Reg. 26322 (May 3, 1993).

[42] *220 MHz Second Reconsideration Order*, 8 FCC Rcd at 4164 (para. 11).

b. Pending Applications for 220 MHz Channels

30. We have not yet solicited the amending information necessary to process the 33 pending Phase I applications for the nationwide, non-commercial channels and therefore we are unable to take any action with respect to these applications at this time. We seek comment on three possible ways in which to address these applications. First, we could, upon adoption of final rules in this proceeding, return these applications without prejudice, as well as the appropriate filing fees, to the 33 applicants, and proceed to auction nationwide licenses as discussed in Section c.3, *infra*.[43] Second, we could act on the pending petitions for reconsideration of our June 21, 1993, Order, solicit the required amending information from the 33 applicants, and then conduct a lottery to award the four available nationwide licenses.[44] The third option would be to grant authorizations among the 33 applicants through comparative hearings. We seek comment on the advantages and disadvantages of each of these proposals. We note that the statute granting the Commission discretion to determine the method that will be used to dispose of applications filed prior to its receipt of auction authority does not set forth factors which the Commission must consider when making such a determination.[45] Therefore, commenters should address factors that should be deemed relevant for the purposes of ascertaining the method used to dispose of the pending 220 MHz applications discussed above.

31. Relatedly, we have processed nearly all of the nearly 60,000 applications filed for non-nationwide licenses. However, there are five groups of applications, totalling 34 applications, that were filed on the final day we accepted 220 MHz applications and are mutually exclusive with one another. We therefore ask comment on whether we should treat these pending applications for non-nationwide licenses in a manner similar to the way we ultimately treat the pending nationwide licenses. In other words, commenters should address whether the Commission should resolve these mutually exclusive situations using competitive bidding, lotteries, or comparative hearings.

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[43] Communications Act, § 309(j)(3)(B).

[44] *See* Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, MM Docket No. 94-131, and Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Report and Order, FCC 95-230, released June 30, 1995, at paras. 87-95 (*MMDS Report and Order*); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Memorandum Opinion and Order, 9 FCC Rcd 7387 (1994) (*Unserved Cellular Lottery Order*); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Notice of Proposed Rulemaking, 8 FCC Rcd 7635, 7659 (note 150, pertaining to applications for Interactive Video and Data Service).

[45] Budget Act, § 6002(e).

c. Proposals

(1) Nationwide Licensing

32. As we go forward with the second phase of licensing of the 220 MHz band, we consider whether the 30 currently unassigned nationwide, non-commercial channels should continue to be allocated for nationwide use. In the *220 MHz Report and Order*, we concluded that an allocation of nationwide channels was needed to help promote the development of 5 kHz technology.[46] In 1993, we granted nationwide authorizations for paging services because we recognized the demand for nationwide operation in that service.[47] Most recently, we also provided for nationwide channel blocks in narrowband PCS, stating that "large regional and nationwide licensed service areas would provide for flexibility in the design and implementation of narrowband PCS services" and would "alleviate some of the problems licensees have experienced when they tried to aggregate smaller licensed service areas."[48]

33. The success of the narrowband PCS auction indicates that there is interest in the mobile communications marketplace for nationwide licenses. Although it is too soon to determine whether existing Phase I nationwide, commercial 220 MHz operations will be successful, we find, based on the apparent demand for nationwide 900 MHz PCS spectrum, that there is merit to continuing to provide 220 MHz spectrum on a nationwide basis. We find that nationwide licenses will increase competition among nationwide wireless communications providers and will help meet future customer demand for nationwide service. We therefore tentatively conclude that the 30 channels originally designated for "nationwide, non-commercial" use should continue to be allocated for nationwide operations. We seek comment on whether these channels should be so designated or whether they should be allocated for some form of non-nationwide (*i.e.*, regional or local) operations.

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[46] *220 MHz Report and Order*, 6 FCC Rcd at 2361 (para. 34).

[47] Amendment of the Commission's Rules To Provide Exclusivity to Qualified Private Paging Systems at 929-930 MHz, PR Docket No. 93-35, Report and Order, 8 FCC Rcd 8318 (1993) (*900 MHz PCP Exclusivity Order)*.

[48] Amendment of the Commission's Rules To Establish New Narrowband Personal Communications Services, GEN Docket No. 90-314, First Report and Order, 8 FCC Rcd 7162 at 7166 (para. 26) (1993) (*Narrowband PCS Order), recon.*, Memorandum Opinion and Order, 9 FCC Rcd 1337 (1994) (*Narrowband PCS Reconsideration Order), further recon.*, Second Memorandum Opinion and Order, 9 FCC Rcd 4441 (1994); *further recon.*, Memorandum Opinion and Order, 9 FCC Rcd 5031 at 5076 (para. 94).

(2) Non-Commercial Channel Set-Aside

34. In the *220 MHz Report and Order*, we did not decide to allocate spectrum for nationwide, non-commercial operations to satisfy some perceived demand on the part of the public for the use of such spectrum. Rather, we were concerned with implementing rules that would encourage the development of 5 kHz technology, and thus concluded that a combination of commercial and non-commercial nationwide channels would "promote the widest variety of advanced narrowband development."[49] With our Phase I authorization of 3,800 non-nationwide licenses, which will be used for both commercial and non-commercial purposes, we believe that we have taken steps to promote the development of narrowband technology, as envisioned in the *220 MHz Report and Order*. We tentatively conclude, therefore, that it is no longer necessary to require a separate non-commercial allocation in the 220 MHz service. We find that licensees should be allowed to use their authorized spectrum to meet the demands of consumers and be permitted to compete with other 220 MHz and CMRS licensees. We tentatively conclude, therefore, that there should be no set-aside for non-commercial channels in Phase II of licensing, and that nationwide channels should be made available equally to all applicants -- *i.e.*, applicants that intend to use the channels for their internal communications needs and applicants that intend to use the channels to offer service to subscribers. We seek comment on this tentative conclusion.

(3) Assignment of Nationwide Channels

(a) Channel Assignment Method

35. In deciding the assignment methodology for resolving mutually exclusive applications for the 30 Phase II nationwide channels, we are instructed by Section 309(j) of the Communications Act and the *Competitive Bidding Second Report and Order* to determine the "principal" use of the spectrum.[50] The *Competitive Bidding Second Report and Order* specifically indicates that, in making this determination, we must "compare the amount of non-subscription use made by the licensees in a service as a class with the amount of use rendered to eligible subscribers for compensation on the basis of information throughput, time, or spectrum" and that "[a]t least a majority of such use would have to be for service to subscribers for compensation in order for a service to be subject to competitive bidding."[51]

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[49] *220 MHz Report and Order*, 6 FCC Rcd at 2361 (para. 36).

[50] Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, Second Report and Order, 9 FCC Rcd 2348, 2353-54 (paras. 30-36) (1994) (*Competitive Bidding Second Report and Order*).

[51] *Id.* at 2354 (para. 34).

36. In making the 30 Phase II nationwide channels available to all prospective applicants, we cannot determine with absolute certainty, in advance of authorization, whether the primary use of this spectrum will be for licensees' internal use or for the provision of for-profit, subscriber-based services. However, based on a review of our records, it is reasonable to conclude that only a small percentage of the more than 59,000 applicants for 220 MHz non-nationwide stations intended to use their authorized spectrum to meet their internal communications needs and that the vast majority of the applicants were those that intended to provide services to subscibers on a for-profit basis. Although the projected use of 220 MHz channels for non-nationwide operations may not necessarily parallel the planned use of the channels by nationwide licensees, we believe that the fact that most non-nationwide applicants apparently intended to use the channels for the provision of service to subscribers for compensation is a strong indication that this will likely be the principal use of the spectrum by prospective nationwide licensees. We thus tentatively conclude that the principal use of the 30 channels allocated for nationwide use is most likely to be for the transmission or reception of communications signals to subscribers for compensation and therefore, in accordance with Section 309(j)(2)(A) of the Communications Act,[52] mutually exclusive applications for initial licensing of these channels should be assigned by competitive bidding.[53] We request comment on this tentative conclusion, including to what extent potential applicants for nationwide licenses intend to use this spectrum to provide subscriber services for compensation. Commenters who argue that the principal use of this service will not be for subscription-based services for compensation should also propose alternative methods of channel assignment.

(b) Channel Block Sizes

37. In the *220 MHz Report and Order*, we assigned the 30 nationwide, non-commercial channels in two five-channel and two 10-channel blocks. Our rationale for selecting this channel allocation, as indicated in the *220 MHz Notice*, was that, in providing both five- and 10-channel blocks for nationwide, non-commercial licensees we would allow applicants to select the amount of capacity that reflected their needs.[54] In this proceeding, we propose to allow future 220 MHz licensees to offer a wider variety of communications services than are currently permitted in the 220 MHz service. In order to provide these services, we believe that nationwide licensees may require more spectrum than would be available in an authorization consisting of only five 5 kHz channels. We therefore propose to assign the 30 nationwide channels in Phase II in three 10-channel blocks (Channels 51-60, 81-90, and 141-150). We request comment on this proposed channel assignment scheme, as

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[52] 47 U.S.C. § 309(j)(2)(A).

[53] Proposed rules governing competitive bidding procedures are discussed in Section E, *infra*.

[54] *220 MHz Notice*, 4 FCC Rcd at 8595 (para. 18).

well as any alternative channel assignment proposals that commenters believe would be appropriate for Phase II nationwide licensing.

(c) Limit on Nationwide Authorizations

38. With our proposed expansion of permissible uses for 220 MHz spectrum, we look forward to the provision of increased and varied services by 220 MHz licensees to meet the future communications needs of the American public. By restricting the number of nationwide authorizations any single 220 MHz licensee may acquire, we may be able to provide for a greater degree of competition among Phase II nationwide licensees providing services to subscribers. On the other hand, if such licensees are in competition with many other CMRS providers, a restriction on the number of authorizations a single 220 MHz licensee may hold may not be necessary or appropriate. We therefore ask comment on whether a limit should be placed on the number of Phase II nationwide authorizations that may be obtained by a single licensee. Commenters suggesting channel block schemes other than our proposed 10-channel-per-assignment approach should also propose nationwide authorization limits applicable to their preferred scheme.

(d) License Term

39. We recently adopted rules establishing 10-year license terms for both the narrowband and broadband PCS services[55] and the 900 MHz SMR service.[56] Additionally, in the *CMRS Third Report and Order*, we adopted a uniform 10-year licensing term for all CMRS licensees.[57] We believe that a similar license term is appropriate for nationwide 220 MHz licensees because it will encourage investment in the nationwide 220 MHz service. A 10-year license term is also necessary to provide sufficient time to enable nationwide licensees to complete construction of their systems. We therefore propose a 10-year license term for nationwide 220 MHz authorizations and ask comment on this proposal.

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[55] Section 24.15 of the Commission's Rules, 47 C.F.R. § 24.15.

[56] Amendments of Parts 2 and 90 of the Commission's Rules To Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-902 MHz and 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-553, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253; and Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Second Report and Order and Second Further Notice of Proposed Rule Making, FCC 95-159, released April 17, 1995, at Appendix A, para. 8 (*900 MHz Second Report and Order*) (adopting new Section 90.665(a) of the Commission's Rules, 47 C.F.R. § 90.665(a)).

[57] *CMRS Third Report and Order*, 9 FCC Rcd at 8157 (para. 386) (adopting amended Section 90.149 of the Commission's Rules, 47 C.F.R. § 90.149).

2. Non-Nationwide Licensing

a. Background

40. In the *220 MHz Report and Order*, we allocated 140 of the 200 channel pairs in the 220 MHz service for non-nationwide use by both Government and non-Government licensees. The non-Government users eligible for authorization on these channels are those entities eligible for assignment under Subparts B, C, D, and E of Part 90 of our rules[58] as well as those who intend to use the spectrum to provide commercial services.[59] Channels in the non-nationwide 220 MHz service were to be assigned on a first-come, first-served basis, with all mutually exclusive applications filed on the same day assigned through random selection, or lottery, procedures.

41. Applicants for non-nationwide assignments were required to indicate the exact coordinates of their planned 220 MHz base stations. Upon receipt of over 59,000 applications for non-nationwide stations in May, 1991, we decided to conduct the lottery to resolve mutually exclusive applications by "rank ordering" the applications and then assigning authorizations sequentially based on category of channel requested and in accordance with our co-channel station separation criteria. The rank ordering of the applications took place on October 19, 1992[60] and on January 26, 1993 we issued a Public Notice announcing 3,800 tentative selectees.[61] The licenses authorized to these applicants represented virtually all of the stations that could be granted from the original pool of more than 59,000 non-nationwide applications.[62]

42. Most of the 3,800 220 MHz non-nationwide licenses were initially authorized during 1992 and 1993. In accordance with Section 90.725(f) of our Rules, licensees obtaining these authorizations were required to construct their base stations and begin

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[58] These are entities eligible in the Public Safety Radio Services (Subpart B), the Special Emergency Radio Services (Subpart C), the Industrial Radio Services (Subpart D), and the Land Transporation Radio Service (Subpart E). *See* Section 90.703(a) of the Commission's Rules, 47 C.F.R. § 90.703(a). The licensees eligible in these services would use 220 MHz spectrum to meet their internal communications needs.

[59] Section 90.703(c) of the Commission's Rules, 47 C.F.R. § 90.703(c).

[60] *Public Notice: Non-nationwide Lottery,* 7 FCC Rcd at 6378; Section 90.723 of the Commission's Rules, 47 C.F.R. § 90.723.

[61] Public Notice, Commission Announces Tentative Selectees for 220-222 MHz Private Land Mobile "Local" Channels, DA 93-71 (released January 26, 1993).

[62] As explained in paragraph 31, *supra*, five groups of applications, totalling 34 applications, are mutually exclusive with one another.

operation within eight months of initial authorization.[63] However, due to the existence of a pending court appeal which challenged certain aspects of our procedures for the filing and acceptance of 220 MHz applications,[64] the Private Radio Bureau extended the construction deadline for all non-nationwide 220 MHz licensees to a date 120 days after the disposition of the appeal by the Court.[65] Following the disposition of the appeal in March, 1994, the construction deadline for non-nationwide 220 MHz licensees' stations was extended further on three different occasions.[66] The construction deadline is December 31, 1995.

b. Phase II Assignment and Permissible Uses of Channels 161-200

43. In the rules, 40 of the 140 non-nationwide channels (Channels 161-200) are designated for "individual, non-trunked local use,"[67] distinguishing these channels from the 20 five-channel blocks designated for trunked operation.[68] Ten of these 40 channels (Channels 161-170) are reserved exclusively for applicants eligible in the Public Safety Radio Services, five (Channels 181-185) are to be used exclusively by applicants eligible in the Emergency Medical Radio Service (EMRS),[69] and 15 channels (Channels 186-200) are

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[63] Section 90.725(f) of the Commission's Rules, 47 C.F.R. § 90.725(f).

[64] Evans v. FCC, Case No. 92-137 (D.C. Cir. Mar. 18, 1994).

[65] *Public Notice: Non-nationwide Lottery*, 7 FCC Rcd at 6379.

[66] Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services, Order, 9 FCC Rcd 1739 (1994) (extending the deadline to December 2, 1994); *CMRS Third Report and Order*, 9 FCC Rcd at 8077 (para. 184) (extending the deadline to April 4, 1995) (*see also* Public Notice, Private Radio Bureau Extends Time to Construct Non-Nationwide 220 MHz Stations Through April 4, 1995, and Lifts Freeze for Applications to Modify Site Locations, 10 FCC Rcd 744 (1994)); Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services, Order, 10 FCC Rcd 3356 (1995) (extending the deadline to December 31, 1995).

[67] *220 MHz Report and Order*, 6 FCC Rcd at 2362 (paras. 40-44); Section 90.719 of the Commission's Rules, 47 C.F.R. § 90.719.

[68] *Id.* at 2358 (para. 16); Section 90.721 of the Commission's Rules, 47 C.F.R. § 90.721. In the non-trunked, or "conventional" mode of operation, end users on a land mobile system must manually search for an unused channel. Trunking is a computerized technology that automatically selects an unused channel on the system and assigns it to the end user.

[69] Amendment of Part 90 of the Commission's Rules To Create the Emergency Medical Radio Service, PR Docket No. 91-72, RM 7336, Report and Order, 8 FCC Rcd 1454 (1993) (*EMRS Report and Order*).