

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

**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

To: The Commission

DOCKET FILE COPY ORIGINAL

**COMMENTS OF THE
AMERICAN MOBILE TELECOMMUNICATIONS ASSOCIATION, INC.**

Respectfully submitted,

**AMERICAN MOBILE TELECOMMUNICATIONS
ASSOCIATION, INC.**

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SUMMARY

The American Mobile Telecommunications Association, Inc. ("AMTA" or "Association") endorses generally the FCC's recommendations for a new regulatory framework for the 220 MHz band.

In response to the Commission's query regarding the treatment of the pending 220 MHz applications, AMTA urges the Commission to process the applications in accordance with the rules applicable at the time they were filed.

AMTA supports the FCC's proposal to allocate one hundred and twenty-five (125) of the remaining one hundred and forty (140) non-nationwide channels for use in either commercial or non-commercial operations throughout a defined geographic area. Although the Association generally endorses the FCC's recommended allocation of these channels on two, distinct geographic bases, the Association does recommend certain modifications in the allocation of channels within those two license categories.

Specifically, AMTA urges the Commission to retain, to the maximum extent possible, the existing intra-system channel separation. The Association also recommends that the FCC assign a smaller number of both EA and Regional licenses with larger numbers of frequencies. AMTA proposes that the FCC assign (i) sixty (60) channels for Regional licenses in the two thirty-channel blocks, and (ii) three fifteen-channel and two ten-channel EA licenses.

It is AMTA's opinion that the proposed technical and operational rules will not provide adequate protection for Phase I licensees from Phase II operations. AMTA urges the agency to revise its technical rules to reflect the actual performance of 220 MHz

systems.

Finally, AMTA agrees that simultaneous, multiple round auctions, in conjunction with the bidding rules, procedural and payment provisions, and other regulatory safeguards proposed, are a reasonable method of conducting 220 MHz competitive bidding proceedings.

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Regulatory Treatment of Mobile Services)	
)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 220-222 MHz)	PP Docket No. 93-253

COMMENTS

1. The American Mobile Telecommunications Association, Inc. ("AMTA" or "Association"), in accordance with Section 1.415 of the Federal Communications Commission ("FCC" or "Commission") Rules and Regulations, respectfully submits its Comments in the above-entitled proceeding.^{1/} In this Notice, the FCC has proposed a new regulatory framework for the 220 MHz band, one which it considers consistent with the Commission's ongoing efforts to promote regulatory parity among substantially

^{1/} Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking, PR Docket No. 89-552, 10 FCC Rcd ____ (1995)("Notice").

similar services.^{2/}

2. AMTA generally supports the FCC's recommendations. Although the Association does not necessarily agree with the agency's assessment that the 220 MHz service is or will become substantially similar to Commercial Mobile Radio Service ("CMRS") offerings such as cellular, PCS, or ESMR, it nonetheless supports the proposal to award geographic, rather than site-specific, licenses. AMTA also concurs that greater technical and operational flexibility will enhance the utility of this service to potential subscribers. However, the Association is not persuaded that the FCC's proposal will provide adequate protection to existing operations in light of the excellent performance being exhibited by 220 MHz systems today. Further technical analysis will be required to ensure interference-free co-habitation of the band by incumbents and geographic-based licensees. Finally, the Association is in general agreement with the Commission's proposal regarding competitive bidding procedures to be used in awarding geographic-based 220 MHz licenses.

I. INTRODUCTION

3. AMTA is a nationwide, non-profit trade association dedicated to the interests of the specialized wireless communications industry.^{3/} The Association's members include trunked and conventional 800 MHz and 900 MHz Specialized Mobile

^{2/} See 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 3rd R&O").

^{3/} These entities had been classified as private carriers prior to the 1993 amendments to the Communications Act. See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI § 6002 (b), 107 Stat. 312, 392 ("Budget Act").

Radio ("SMR") Service operators, licensees of wide-area SMR systems, and commercial licensees in the 220 MHz band. These members provide commercial wireless services throughout the country.

4. AMTA's 220 MHz Council ("Council") was formed in February, 1993. It includes representative of the vast majority of incumbent licensees, 220 MHz network organizers and narrowband 220 MHz equipment suppliers. The Council is actively involved in all aspects of the emerging 220 MHz marketplace, with particular emphasis on the evolving regulatory arena. Thus, AMTA and the Council have a direct, significant interest in the outcome of this proceeding.

II. BACKGROUND

5. The 220 MHz industry has a lengthy and more than ordinarily convoluted regulatory history. This spectrum was reallocated from the amateur service for private and Federal Government land mobile use in 1988.^{4/} It was "dedicated...for the development of spectrally-efficient narrowband technology to afford this technology an opportunity to gain acceptance in the marketplace."^{5/} The service rules themselves were adopted in 1991,^{6/} and applications were accepted that same year.

6. The original regulatory structure for this band provided for the assignment of two hundred (200) five kilohertz bandwidth channel pairs to private land mobile and

^{4/} Report and Order, Gen. Docket No. 87-14, 3 FCC Rcd 5287 (1988); recon. denied Memorandum Opinion and Order, 4 FCC Rcd 6407 (1989), aff'd American Radio Relay League, Inc. v. FCC, No. 89-1602 (D.C. Cir. Dec. 3, 1990).

^{5/} Notice at ¶ 3.

^{6/} Notice at ¶ 4, n. 8.

Federal Government users. Sixty (60) of those pairs were allocated for nationwide authorizations, ten (10) of which were reserved for Federal Government entities. The remaining fifty (50) were split with twenty (20) designated for four five-channel commercial systems and thirty (30) assigned for internal, non-commercial usage. The non-commercial spectrum was suballocated into two ten-channel and two five-channel blocks. The remaining one hundred and forty (140) channel pairs were made available for non-nationwide use by private and Federal Government entities. This block was subdivided also with one hundred (100) channels assigned for local trunked systems, ten (10) for public safety/mutual aid, and thirty (30) for conventional, single frequency operations, including the transmission of data.^{7/} Systems were authorized on a frequency-specific, site-by-site basis, consistent with the then-typical licensing practices in the private land mobile services.

7. The Commission began accepting applications for all 220 MHz system categories on May 1, 1991. Having received almost sixty thousand (60,000) requests, the FCC's Private Radio Bureau (now the Wireless Telecommunications Bureau) ("Bureau") suspended the acceptance of additional applications, effective May 24, 1991.^{8/} The FCC has never reopened the 220 MHz application process, but has completed random selection proceedings to resolve mutual exclusivity among the original applicants. It has granted licenses for the four nationwide commercial systems and

^{7/} 47 C.F.R. §§ 90.717-90.721.

^{8/} Acceptance of 220-222 MHz Private Land Mobile Applications, Order, 6 FCC Rcd 3333 (1991) ("220 MHz Freeze").

approximately thirty-eight hundred (3,800) non-nationwide systems (so-called "Phase I" licensees).^{9/} The FCC has not yet processed the thirty-three (33) still pending applications it received in 1991 for the nationwide, non-commercial spectrum or a small number of mutually exclusive local applications received on the last filing date. It also has not acted upon certain Petitions for Reconsideration relating to this service.

III. FCC PROPOSAL

8. In this Notice, the Commission proposes a fundamental restructuring of the 220 MHz regulatory environment. Its avowed objective in doing so 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.^{10/}

Additionally, the FCC has noted that it seeks:

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.^{11/}

9. Addressing these objectives in the context of a revised regulatory framework, the Commission has been guided by its actions in reconciling the regulatory environments of a variety of Commercial Mobile Radio Services ("CMRS") in response to the statutory mandate to adopt comparable rules for services deemed "substantially

^{9/} The FCC's application window procedures also were challenged in court. See, Evans v. FCC, Case No. 92-137 (D.C. Cir. Mar. 18, 1994). That case was resolved when the appeal was withdrawn pursuant to a settlement between the appellants and an industry group desirous of regulatory certainty after several years of litigation.

^{10/} Notice at ¶ 2.

^{11/} Id.

similar".^{12/} The agency previously had concluded that the 220 MHz service had the potential to compete with other CMRS offerings, and thus should be considered substantially similar to them for this purpose.^{13/} Nonetheless, the FCC deferred consideration of what rule changes were "necessary and practical" to facilitate comparability until a more comprehensive record could be developed.^{14/} It is those matters that are considered in the instant Notice.

10. Specifically, the Commission's 220 MHz proposal includes the following points:

- It queries whether the pending nationwide, non-commercial applications should be resolved by lottery, comparative hearing, or by being dismissed. If the applications are dismissed, it asks whether this spectrum should be available for all so-called "Phase II" applicants, whether proposing internal, non-commercial or commercial operations, and whether it should be assigned in three ten-channel licenses through competitive bidding procedures. It also seeks guidance as to the appropriate means of disposing of the few remaining, mutually exclusive local applications.

- It recommends that Phase II non-nationwide spectrum be subdivided with sixty (60) channels available on a Bureau of Economic Analysis Economic Areas ("EA") geographic basis ("EA licenses"), and sixty-five ("65") channels assigned throughout five 220 MHz regions, each comprised of EAs ("Regional licenses"). Applicants would be

^{12/} Budget Act, § 6002(d)(3).

^{13/} CMRS 3rd R&O at ¶ 67.

^{14/} Id. at ¶¶ 126-7.

permitted to utilize the spectrum for commercial, as well as private, internal purposes, but the agency has concluded tentatively that the principal use of the spectrum would be for commercial services, and thus licenses should be awarded through auctions.

- It proposes to eliminate existing channel use restrictions so the marketplace can determine the optimal mix of service offerings to be made available.
- It tentatively concludes that EA and Regional licensees should be subject to construction benchmarks, and should be required to protect the 38 dBu contours of incumbent, Phase I licensees.
- It recommends assignment of frequencies for Public Safety and Emergency Medical Radio Service use and proposes that instances of mutual exclusivity among applicants in those services be resolved through random selection procedures.
- It suggests substantial technical and operational flexibility for licensees. Fixed, paging and other heretofore ancillary operations could be conducted on a primary basis. Additionally, licensees would be permitted to aggregate channels and employ channel bandwidths of greater than five kilohertz if they maintain a spectral efficiency equivalent to that obtained with five kilohertz channelization.
- It specifies certain application procedures consistent with those applicable to other CMRS services.
- Finally, it proposes to use simultaneous, multiple round competitive bidding processes comparable to those used in other FCC auctions.

IV. DISCUSSION

A. **PENDING 220 MHz APPLICATIONS SHOULD BE PROCESSED UNDER RULES APPLICABLE WHEN RECEIVED.**

11. The FCC has questioned how it should treat those few 220 MHz applications, submitted more than four years ago, which have not yet been processed.^{15/} These include the thirty-three (33) pending nationwide, non-commercial requests, as well as five groups of applications, totalling thirty-four (34) individual requests, that were submitted on the last filing day and which are mutually exclusive with one another.

12. AMTA urges the Commission to process those applications in accordance with the rules applicable at the time they were filed. Thus, the thirty (30) nationwide, non-commercial channels should continue to be assigned for that purpose, and licenses should be awarded through random selection procedures.^{16/} The small number of mutually exclusive local applications should also be resolved by lottery.

13. In AMTA's opinion, the FCC's proposal to dismiss these pending applications, and reclassify the nationwide channels as available for both commercial and internal use, thereby rendering them potentially auctionable, raises serious questions

^{15/} Notice at ¶¶ 30-39.

^{16/} The rules extant at the time of these filings also permitted the use of comparative hearings to select among mutually exclusive applicants. Notice of Proposed Rulemaking, PR Docket No. 89-552, 4 FCC Rcd 8593(1989). In AMTA's opinion, any benefit to the public of using comparative hearings likely would be outweighed by the cost to the agency (and thereby the public) of conducting them and by the service capabilities lost while they are being completed. Although the nationwide applications may represent substantively distinguishable uses of this spectrum since it would be used to support each company's unique internal operations, the Association nonetheless recommends lotteries as preferable for the reason described herein.

regarding the permissibility of retroactive application of rules and fundamental equity. The applications on file were submitted to the Commission in good faith in accordance with the rules in existence in 1991. They were accepted by the FCC as consistent with those regulations. The Commission's failure to request the additional financial information required to complete the nationwide requests and proceed with their processing, as well as its failure to resolve the long-standing Petitions for Reconsideration regarding this service, were agency actions, or inactions. They should not now be used as a rationale for dismissing properly filed applications which already have tolerated an inordinate delay in processing.

14. AMTA recognizes the FCC's preference for using auctions to select among mutually exclusive applicants. The agency has made clear its belief that competitive bidding is the fastest, fairest and most efficient way to resolve such matters and to put spectrum within the control of those that value it most highly. The Commission has demonstrated a commendable proficiency at conducting auctions, as demonstrated by the monies deposited in the Federal Treasury as a result of employing this licensing method.

15. AMTA agrees that, under appropriate circumstances, competitive bidding provides the benefits attributed to it by the agency and is a reasonable means of awarding licenses. However, the Association is confident it need not remind the Commission that, whatever the virtues of auctions, the FCC's authority to employ them has been carefully delimited by Congress.^{17/} At present, Congress has not extended that authority to include spectrum used for internal, non-commercial communications such as that

^{17/} Communications Act, 47 USC § 309(j).

proposed by the pending nationwide applicants. Thus, these channels are not auctionable as currently assigned. They can be made so only by adopting a fundamental modification of the purposes for which they may be employed. Yet the pending nationwide applications of which the FCC is so eager to dispose present clear evidence of a need for nationwide, internal communications capability. If the marketplace did not have a demand for this type of internal, non-commercial capability, there would not be thirty-three (33) pending applications for this service. These applicants should not now find themselves competing to acquire spectrum with parties intending to use these channels for the provision of third-party, commercial service.

16. Additionally, if the FCC agrees with this recommendation and processes these applications under the then applicable rules, it also should retain the original construction requirements for nationwide systems. The instant Notice proposes new construction standards for 220 MHz nationwide systems, requirements equivalent to those adopted for the narrowband PCS service. In AMTA's opinion, these types of systems are not analogous and should not have comparable coverage obligations.

17. PCS is a subscriber-based commercial service intended to attract the broadest range of potential customers over the largest viable geographic area. Such systems typically are built to provide coverage in areas of population concentration. The construction requirements adopted for them reflect that type of ubiquitous, essentially indiscriminate coverage. By contrast, the non-commercial, internal systems for which the 220 MHz applications were filed do not necessarily require coverage in the markets of heaviest population. They are tailored to satisfy the nationwide communications

requirements of particular companies with individual, already established areas of operation. Under the FCC's proposal, they may be obligated to invest in facilities that are not needed for business purposes, but only to satisfy FCC-imposed construction requirements. The Association does not believe that result would constitute a prudent allocation of economic resources or serve the public interest. Instead, the Association urges the Commission to proceed promptly with random selection procedures to select among these groups of applicants.

B. THE REGIONAL AND EA LICENSING PROPOSALS WILL ENHANCE 220 MHz MARKETPLACE OPPORTUNITIES, WITH CERTAIN MODIFICATIONS.

18. AMTA supports the FCC's proposal to allocate one hundred and twenty-five (125) of the remaining one hundred and forty (140) non-nationwide channels for use in either commercial or non-commercial operations throughout a defined geographic area.^{18/} It agrees that there should be no limit on the aggregation of this spectrum by any entity within that area. Decisions regarding the channel capacity required to implement a particular business plan are best made in the marketplace by prospective operators rather than by government fiat. AMTA also endorses the agency's intention to allocate the remaining fifteen (15) channels to the Public Safety and Emergency Medical Radio Services, at least until the public safety community has had an opportunity to determine the utility of this spectrum for their particular requirements. Should it be

^{18/} As described *infra*, the Association's support for geographic-based licensing assumes that Phase I licensees will be afforded appropriate protection from these co-channel operations. AMTA is not persuaded that the current proposal provides adequate protection and urges the FCC to reconsider this aspect of its regulatory framework.

determined at some future date that these channels are not useful for that purpose, the Association assumes the FCC will revisit that allocation. AMTA takes no position regarding whether these frequencies should be sub-divided between these services or available to eligibles in each on a "pool" basis.

19. Additionally, the Association supports the FCC's recommendation that it remove certain technical and operational limitations that may no longer serve the public interest. In the increasingly competitive wireless marketplace, it is imperative that 220 MHz licensees have technical, operational and geographic flexibility sufficient to allow them to compete effectively. AMTA believes that the Commission's proposed regulatory framework will enhance their ability to do so with the inclusion of the modifications proposed herein.

20. Initially, the Association generally endorses the FCC's recommended allocation of these channels on two, distinct geographic bases. Under the Commission's proposal, approximately half of the spectrum would be assigned as EA licenses in the 172 geographic areas defined as Economic Areas by the Bureau of Economic Analysis, Department of Commerce.^{19/} The other half would be assigned as Regional licenses over five regions, comprised of multiple EAs, that resemble closely, although not exactly, the regions defined for narrowband PCS authorizations.

^{19/} AMTA originally proposed the use of EAs (or as the Association has referred to them, BEAs) as the geographic unit in the revised 800 MHz SMR regulatory framework. Comments of AMTA on Further Notice of Proposed Rulemaking, PR Docket No. 93-144, submitted Jan. 5, 1995. In the Association's opinion, EAs more closely approximate the coverage required by the typical customer of a traditional two-way radio system than do either MTAs or BTAs.

21. The operational history of this service, and other, potentially competitive businesses, underscores the need to migrate from a site-by-site to a geographic-based licensing structure.^{20/} Doing so enhances the operator's flexibility to deploy frequencies dynamically in a rational, marketplace-driven pattern without requiring ongoing prior FCC approval. This approach also is advantageous from the agency's perspective since it reduces to a minimal level resource-depleting licensing activities. In conjunction with the freedom to aggregate as much spectrum as is dictated by operational requirements, the conversion to an EA and Regional 220 MHz licensing approach will facilitate implementation of the spectrally-efficient, cost-effective 220 MHz networks already under development in this industry.^{21/}

22. However, the Association does recommend certain modifications in the allocation of channels within those two license categories. Specifically, AMTA recommends that the FCC **not** attempt to assign contiguous frequencies to EA and Regional authorizations, except to the extent that a small portion of the existing non-nationwide channel blocks already are assigned on a contiguous basis. The majority of this spectrum, the one hundred (100) so-called local trunking channels, does not employ contiguous frequencies. Rather, like the trunking assignments at 800 MHz, the FCC has

^{20/} Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order, Gen Docket No. 90-314, 8 FCC Rcd 7700 ¶ 76 (1993); CMRS 3rd R&O at ¶¶ 114-115; Land Mobile Radio Service, Second Report and Order, GN Docket No. 18262, 46 FCC2d 752 (1974).

^{21/} SunCom Mobile & Data, Inc. Request for Declaratory Ruling, filed Feb. 1, 1994; Wireless Plus, Inc. Request for Rule Waiver, filed Feb. 8, 1995.

provided for separation between frequencies assigned as a single authorization.^{22/} All Phase I systems are licensed and operate under this scheme. This separation greatly facilitates the implementation of 220 MHz stations on a cost-efficient economic basis, a savings that ultimately is reflected in the service charged to subscribers.

23. If the Commission now assigns its proposed three ten-channel and three five-channel EA licenses and three ten-channel, one fifteen-channel and one twenty-channel Regional licenses on contiguous frequencies, rather than maintaining the current separation pattern, it will create significant difficulties for both existing and potential 220 MHz licensees. Phase I licensees seeking to expand their geographic coverage by acquiring an EA or Regional license will find that their existing frequencies are scattered over multiple authorizations in these new categories. Similarly, prospective Phase II applicants will be required to design their systems around multiple, geographically dispersed Phase I systems with which they are co-channelled, thereby greatly complicating any proposed frequency deployment plan.

24. In AMTA's opinion, the potential advantages of securing contiguous frequencies will be outweighed by the unnecessary complications that will result from mixing these two band plans. Should such a plan be adopted, the marketplace will recognize these complexities in assessing the value of this spectrum in the competitive bidding process. Instead, AMTA urges the Commission to retain, to the maximum extent possible, the existing intra-system channel separation. Twenty-five (25) of the frequencies to be assigned to EA and Regional licenses already are assigned contiguously

^{22/} 47 C.F.R. § 90.621. 47 C.F.R. § 90.723.

in one ten and one fifteen channel blocks. These frequencies will be available for those requiring contiguous spectrum, while the rest will retain the current separation pattern.^{23/} The Association assumes that the FCC would permit post-auction, consensual frequency exchanges between and among Phase I and Phase II licensees should individual licensees prefer a different channel mix.

25. The Association also recommends that the FCC assign a smaller number of both EA and Regional licenses with larger numbers of frequencies. Frequencies in this band are only five kilohertz in bandwidth, much narrower than any other mobile service, and substantially narrower than all other CMRS offerings. At the same time that the Commission has recognized the need for greater technical and operational flexibility on these channels, it also should assign sufficient channel capacity to each authorization to attract participation by qualified operators.

26. Therefore, rather than the channel allocation plan proposed in the Order, AMTA recommends that the FCC assign (i) sixty (60) channels for Regional licenses in two thirty-channel blocks, and (ii) three fifteen-channel and two ten-channel EA licenses. The Commission has noted already that "...it will generally be necessary to allocate more than five channels to each Phase II licensee," since these systems will be offering services to a larger population over a larger geographic area.^{24/} While all estimations of the optimal size for these authorizations are necessarily speculative, the Association

^{23/} AMTA's 220 MHz Council is considering the optimal assignment pattern for its revised allocation plan, and will provide further detail in its Reply Comments.

^{24/} Notice at ¶ 62.

believes its plan is more likely to promote robust competition both within the 220 MHz industry and between 220 MHz operators and other CMRS providers. In addition, a somewhat smaller number of authorizations in each area should accelerate completion of the competitive bidding process and require fewer Commission resources to authorize and oversee.

27. Finally, AMTA accepts the proposed construction requirements for both EA and Regional licenses given the geographic size of these authorizations in comparison with other wireless services, and the fact that these frequencies likely will be "encumbered" by Phase I licensees in major markets. The Association also supports the proposal that these licenses be issued for ten-year terms.

**C. GREATER TECHNICAL AND OPERATIONAL FLEXIBILITY
WILL PROMOTE THE COMPETITIVE CAPABILITIES OF
220 MHz SYSTEMS.**

28. As noted supra, the 220 MHz band was allocated originally as a home in which the spectral efficiencies of narrowband technology could be evaluated by the private land mobile marketplace. The explosion in demand for wireless communications had prompted the FCC to encourage the development of spectrally efficient techniques, such as trunking and narrower bandwidth equipment, in its ongoing efforts to plan for the needs of future users in an increasingly spectrally-constrained universe.^{25/} Although narrowband equipment had been deployed in other land mobile environments and

^{25/} The Commission has continued to promote the utilization of narrower bandwidth technology in its proceeding involving the restructuring of the private land mobile bands below 800 MHz. Report and Order and Further Notice of Proposed Rule Making, PR Docket No. 92-235, 10 FCC Rcd ____ (1995).

appeared to promise efficiency enhancements, its full capabilities could not be evaluated when it had to co-exist with competitive, essentially incompatible technologies. The 220 MHz reallocation was intended to provide a clean band in which the anticipated efficiencies of very narrowband equipment could be enjoyed.

29. Several equipment manufacturers responded to the Commission's invitation by developing land mobile products designed specifically to comply with the technical specifications of the narrowband 220 MHz allocation.^{26/} The Operators' response to this technology has been positive, and systems are being implemented on a regular basis. However, the very significant regulatory delays that have plagued this service, in particular the delay until the industry forged a settlement to resolve the litigation involving the FCC's original application procedures, have slowed the introduction of narrowband equipment. In AMTA's opinion, this technology has not yet had sufficient time to gain the level of marketplace acceptance warranted by its performance, or to have the manufacturers recover the presumably significant costs invested in its development. It is far from certain that they would have responded to the FCC's invitation had they anticipated the very abbreviated opportunity they would have to enjoy a "narrowband home".

30. Nonetheless, AMTA is persuaded that the Commission's proposal to permit greater technical and operational flexibility in this band has merit. To the extent that the 220 MHz industry is perceived by the FCC as being or becoming competitive with wireless offerings classified as CMRS, 220 MHz operators will presumably have

^{26/} Notice at ¶ 76, n. 118.

regulatory obligations comparable to those imposed on CMRS licensees. They must enjoy equivalent opportunities as well if they are to be able to compete successfully.

31. Thus, the Association concurs with the Commission's recommendation to permit the aggregation of five kilohertz frequencies into wider channel bandwidths, as long as the aggregated channels maintain a spectral efficiency level equal or superior to that obtained through five kilohertz channelization. It also supports the FCC's proposal to remove those regulatory restrictions that limit paging, fixed and other non-mobile services to ancillary status on 220 MHz systems.^{27/} Like the Commission, AMTA recognizes that these changes constitute a fundamental revision of the 220 MHz licensing structure, and may deprive narrowband technology of a genuine opportunity to prove itself in a discrete marketplace. Ultimately, however, it should be that marketplace, not the FCC, that decides which technologies best satisfy the demands of subscribers. The FCC has determined, in AMTA's opinion correctly, that there now are a variety of technology choices that provide high degrees of spectrum efficiency. Narrowband equipment is one of those options, and AMTA is optimistic that it will continue to be selected by many 220 MHz licensees. However, each entity will have to make that determination individually, based on its particular business plan, in light of the operational freedom that also is being contemplated.

^{27/} The Association is in the process of considering the FCC's proposal for secondary, fixed use of these frequencies on a low-power basis outside major urban areas as described in paragraphs 78-9 of the Notice and expects to address this issue in its Reply Comments.

D. THE PROPOSED RULES WILL NOT PROVIDE ADEQUATE PROTECTION FOR PHASE I LICENSEES

32. The Association's support for the revised regulatory framework described in this Notice is predicated on AMTA's expectation that the FCC will adopt appropriate provisions protecting Phase I systems from Phase II operations. In AMTA's opinion, the instant proposal is not adequate.

33. The 220 MHz rules currently provide for a 120 kilometer separation between co-channel systems.^{28/} The FCC has not proposed to modify that rule, but the Notice does note that:

Phase II licensees will be permitted to operate less than 120 kilometers from co-channel stations if they provide us with a technical analysis demonstrating at least 10 dB protection to the 38 dBuV/m contour of the existing [Phase I] licensee's station.^{29/}

34. The genesis of this proposal presumably is the Commission's original estimation of the propagation likely to be typical of 220 MHz systems, an estimate reflected in the separation criteria adopted for this band. That hypothetical data now can, and should, be replaced with actual, verifiable documentation regarding the coverage provided by 220 MHz systems in the real world. In reality, these systems have outperformed the Commission's expectations to the benefit of their subscribers. Since the instant proposal is based on the Commission's original underestimation of the coverage these systems would provide, and therefore the co-channel separation they

^{28/} 47 C.F.R. § 90.723(f).

^{29/} Notice at ¶ 99. The Notice also explains that parties will be able to operate in even closer proximity on a consensual basis. AMTA has no objection to any co-channel separation agreement reached on a voluntary basis.

would require, it is inadequate to protect the operation of Phase I stations. As the agency did when presented with real world information regarding the coverage of cellular systems, the Commission should revise its technical rules to reflect the actual performance of these systems.

35. AMTA's 220 MHz Council is in the process of compiling and reviewing information regarding 220 MHz system propagation. It expects to provide the FCC with a specific proposal regarding this aspect of the proceeding in its Reply Comments.

36. On a related matter, AMTA recommends that all Phase I licensees be considered to have satisfied the "extraordinary circumstances" test for securing a Special Temporary Authority ("STA") to modify their facilities. All such licensees, whether classified as CMRS or grandfathered Private Mobile Radio Service ("PMRS"), have been subject to an almost five year licensing freeze. Unlike licensees in any other service regulated by the Commission, they have never been permitted to file for permanent modification of their licenses. It is difficult to imagine what might constitute a more extraordinary circumstance in the licensing process than being prohibited by the FCC itself from requesting a permanent authorization. Under these circumstances, no additional, individual showing should be required.

E. THE PROPOSED COMPETITIVE BIDDING RULES ARE APPROPRIATE FOR THIS SERVICE.

37. The Association agrees with the FCC's tentative conclusion that EA and Regional 220 MHz licenses will principally be used by carriers to provide for-profit

service.^{30/} The specific competitive bidding rules proposed for this service mirror those already used or proposed for most FCC auctions. AMTA concurs that simultaneous, multiple round auctions, in conjunction with the bidding rules, procedural and payment provisions, and other regulatory safeguards proposed, are a reasonable method of conducting 220 MHz competitive bidding proceedings.

38. AMTA also supports the Commission's proposals regarding designated entity treatment in these context. The agency is correct in its determination that it has not developed a record that would sustain race-based preferences in this service under the standard articulated by the Supreme Court in the Adarand decision.^{31/} The Notice invites comments on a variety of questions relating to the government's potential compelling interest in providing enhanced opportunities for minority and women-owned businesses in this service, and any evidence relating to past discrimination in the 220 MHz and other communications services generally.

39. AMTA is not able to provide the Commission with support for either proposition. The Association is not aware of any compelling government interest, as opposed to a broad societal benefit, that would be served by increased minority and female participation in the provision of 220 MHz communications services. It also is unaware of any evidence of discrimination in this regard, again, except for general

^{30/} As detailed supra, AMTA believes the FCC should retain a distinction between commercial and non-commercial nationwide systems. Non-commercial licenses would not be eligible for assignment by competitive bidding in accordance with the Communications Act.

^{31/} Adarand Construction v. Pena, 115 S.Ct. 2097 (1995).