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

In the Matter of	)	
	)	
Amendment of Part 90 of the	)	PR Docket No. 89-552
	)	
Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service	)	
	)	DOCKET FILE COPY ORIGINAL
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

SUPPLEMENTAL COMMENTS OF SMR ADVISORY GROUP, L.C.

SMR Advisory Group, L.C. ("SMR Advisory"), by its attorneys, hereby submits these supplemental comments in response to the request by the Federal Communications Commission ("FCC" or "Commission") for further comment on the issue of whether Section 90.739 of the Commission's Rule -- the so-called "forty-mile rule" -- should be eliminated with respect to all

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existing and future 220 MHz licenses.[1] This Notice was prompted by the ex parte comments of SMR Advisory[2] and other parties[3] on the Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking in the captioned proceeding,[4] in which the Commission proposed a new framework for the operation and licensing of the 220-222 MHz Band (the "220 MHz Service").

SMR Advisory's positions on the various legal, policy and practical issues concerning the 220 MHz forty-mile rule were set forth in some detail in its Ex Parte Comments. Those comments remain relevant to the Commission's current consideration of whether to eliminate the 220 MHz forty-mile rule, and SMR Advisory accordingly incorporates that filing in its entirety for consideration as supplemental comments in this proceeding. As noted in its Ex Parte Comments, SMR Advisory strongly believes that the forty-mile rule no longer serves its original purpose and will prevent the 220 MHz Service from realizing its full competitive potential.[5]

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1 Public Notice, "Commission Seeks Supplemental Comment on Request to Eliminate 40-Mile Rule for 220 MHz Radio Service," FCC 96-448, released November 19, 1996 ("Notice").

2 See "Ex Parte Comments of SMR Advisory Group, L.C.," filed April 5, 1996, a copy of which is attached hereto as Exhibit A ("Ex Parte Comments").

3 See Letter from Thomas J. Keller, Esq. (on behalf of SEA, Inc.) to Martin Liebman, dated May 10, 1996; Letter from Robert B. Kelly (on behalf of Securicor Radiocoms, Ltd.) to William F. Caton, dated May 17, 1996; Letter from Alan R. Shark (on behalf of the American Mobile Telecommunications Association) to David Furth, dated May 22, 1996.

4 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, FCC 95-312, PR Docket No. 89-552, RM-8506 (released August 28, 1995) ("220 MHz Third Notice").

5 Indeed, the Commission itself has acknowledged in the 220 MHz Radio Service section of its own Web site that "limited channel capacity will hinder [the] competitiveness [of

Continued enforcement of the 220 MHz forty-mile rule also undermines regulatory parity (i) between 220 MHz licensees and licensees in other commercial mobile services, and (ii) between Phase I Licensees and Phase II Licensees, to the extent that the forty mile rule is selectively applied to Phase I Licenses only. Moreover, unless the 220 MHz forty-mile rule is eliminated across the board for Phase I and Phase II Licensees alike, Phase I Licensees will be unfairly penalized given their investment in and development of, the 220 MHz technology.

Since the filing of the SMR Advisory's Ex Parte Comments, it has become even clearer that the ability of Phase I Licensees to consolidate the ownership of multiple systems will be critical to the ultimate success of the upcoming auctions for Phase II Licenses. Operators and/or managers of existing Phase I 220 MHz systems almost certainly will be active participants in the Phase II auction. Most such entities currently are reviewing possible auction strategies and pursuing the financial sources necessary to support their auction participation. To the extent that these entities are precluded from consolidating ownership of existing 220 MHz systems, including systems located within 40 miles of each other, their asset base is diminished and their ability to attract capital in anticipation of the Phase II auctions will be severely constrained.

For the reasons stated above and in its Ex Parte Comments attached hereto as Exhibit A and incorporated in their entirety, SMR Advisory respectfully submits that the forty mile rule

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the 220 MHz Service] unless licensee consolidations occur in the future."

should be repealed and Phase I Licensees permitted immediately to consolidate ownership of Phase I systems in anticipation of the Phase II auction.

Respectfully submitted,

SMR ADVISORY GROUP, L.C.

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December 10, 1996

Its Counsel

EXHIBIT A

Ex Parte Comments of SMR Advisory Group, L.C.
filed April 5, 1996

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To: The Commission

EX PARTE COMMENTS OF SMR ADVISORY GROUP, L.C.

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April 5, 1996

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SUMMARY

These Ex Parte Comments are being filed to highlight an issue of great concern to 220 MHz system operators – whether Section 90.739 of the Commission's Rules (also known as the 220 MHz forty-mile rule – should be eliminated for Phase I and Phase II Licensees. The forty-mile rule currently precludes any licensee in the 220 MHz Service from holding more than one 220 MHz license within the same forty mile area, unless that licensee can show that "the additional system is justified on the basis of its communications requirements." The Commission has interpreted this justification to mean the submission of outstanding service requests. Before any 220 MHz Licensee can add a second system within the same forty-mile area, therefore, it must demonstrate that its first system is loaded to capacity such that potential subscribers are unable to receive service from the first system.

The continued enforcement of this rule has become a major obstacle to efforts to provide the wide area coverage and advanced technologies necessary to make the 220 MHz Service competitive with other commercial mobile service providers. As the Commission moves forward with its new regulatory framework in this proceeding, SMR Advisory urges that the debate incorporate a specific look at whether it is appropriate to retain the 220 MHz forty-mile rule in any respect.

The justification required by the Commission for waiver of the forty-mile rule dramatically restricts the ability of 220 MHz system operators to act in a proactive manner and respond quickly to perceived needs in the marketplace. 220 MHz system operators are unable to react with the speed and the foresight afforded its competitors in the mobile services marketplace – none of which are subject to a similar rule restriction. 220 MHz system operators also

are unable to take advantage of the numerous economic and administrative efficiencies associated with consolidated ownership of multiple licenses, and are instead forced to operate under the constraints inherent in management or joint operating arrangements subject to strict licensee control requirements.

Moreover, even if the 220 MHz system operator attempted in good faith to make the showing required by the Commission for waiver of the forty-mile rule, the 220 MHz market has evolved to where that showing would be difficult, if not impossible, to make. In many instances, for example, different systems within the same forty mile area are designed to serve completely different types of subscribers. The fact that one system is being used to capacity (with, for example, portable units) would have no relation to the demand for the second system designed to serve dash-mounted vehicular mobile units. 220 MHz system operators seeking to network a number of systems along a particular interstate highway would have similar problems making the required showing because the individual systems are not designed to serve the same subscriber base, but rather to provide seamless coverage over a wider geographic area.

The 220 MHz forty-mile rule also flies in the face of the regulatory parity mandated by the Omnibus Budget Reconciliation Act of 1993, in which Congress directed that substantially similar mobile services be subject to similar regulatory restrictions. Following enactment of the Budget Act, the Commission eliminated a comparable forty-mile rule in the 800 MHz/ 900 MHz SMR services on the grounds that the rule no longer served its original purpose (to prevent warehousing of spectrum) and that it hindered the ability of licensees in these services to compete with other commercial mobile radio services. Those same considerations apply to the 220 MHz Service.

Finally, to the extent that the Commission adopts its proposed wide area licensing scheme and eliminates the 220 MHz forty-mile rule for Phase II Licensees, regulatory parity and simple fairness require that it eliminate the rule for Phase I Licensees as well. Phase I Licensees will pay market value for second systems within the same forty-mile area just as Phase II Licensees will, and it was the Phase I Licensees that invested the time, money and energy into developing the 220 MHz marketplace in the first place. If the Commission retains disparate regulatory burdens on these two groups of licensees, it ultimately will detract from the full competitive development of the 220 MHz Service and will unfairly discriminate against Phase I Licensees.

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To: The Commission

EX PARTE COMMENTS OF SMR ADVISORY GROUP, L.C.

SMR Advisory Group, L.C. ("SMR Advisory"), by its attorneys and pursuant to the Section 1.1206 of the Federal Communications Commission ("FCC or Commission") Rules and Regulations, 47 C.F.R. § 1.1206, hereby submits these Ex Parte Comments on the Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking in the captioned proceeding.[1] In the 220 MHz Third Notice, the Commission proposes a new framework for

[1] 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, FCC 95-312, PR Docket No. 89-552, RM-8506 (released August 28, 1995) ("220 MHz Third Notice").

the operation and licensing of the 220-222 MHz Band (the "220 MHz Service"). In these Ex Parte Comments, SMR Advisory urges the Commission to eliminate Section 90.739 of the Commission's Rules – the so-called "forty-mile rule" – with respect to all existing and future 220 MHz licensees.[2] This rule no longer serves its original purpose and will prevent the 220 MHz Service from realizing its full competitive potential. Continued enforcement of the 220 MHz forty-mile rule also undermines regulatory parity (i) between 220 MHz licensees and licensees in other commercial mobile services, and (ii) between Phase I Licensees and Phase II Licensees, to the extent that the forty mile rule is selectively applied to Phase I Licenses only. Moreover, unless the 220 MHz forty-mile rule is eliminated across the board for Phase I and Phase II Licensees alike, Phase I Licensees will be unfairly penalized given their investment in, and development of, the 220 MHz technology.

I.

FACTUAL STATEMENT

The 220 MHz "forty-mile rule," as embodied in Section 90.739 of the Commission's Rules and interpreted by the Commission, currently precludes any licensee in the 220 MHz Service from holding more than one 220 MHz license within the same forty (40) mile area, unless that licensee can demonstrate that "the additional system is justified on the basis of its communications requirements."[3] Section 90.739 was patterned after a similar prohibition first

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[2] Throughout these Ex Parte Comments, existing and future licensees in the 220 MHz Service will be referred to as Phase I Licensees and Phase II Licensees, respectively.

[3] 47 C.F.R. § 90.739. This prohibition applies to multiple licenses in the same category, i.e., non-nationwide 5 channel trunked systems, commercial nationwide systems, etc. Moreover, this rule prohibition is triggered whenever there is less than 40 miles separating the

established by the Commission more than twenty years ago for specialized mobile radio ("SMR") services in the 800 MHz band and later extended to SMR licensees in the 900 MHz band.[4] Although slightly different in application, the 220 MHz forty-mile rule was intended to accomplish the same purpose as the pre-existing 800/900 MHz forty-mile rule – to discourage speculators from hoarding or warehousing frequencies rather than using them for their intended purpose.[5]

Since 1991, the technological and regulatory landscapes for wireless services have changed dramatically. On the technological front, new wireless services, such as personal communications services, have come on line; existing services, such as 800 MHZ SMR and 900 MHz SMR have expanded in scope to encompass wide area systems and in capability to provide more sophisticated two-way services. The development of digital technology has

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two licenses, even if the actual service area of each license is substantially different.

[4] See 47 C.F.R. § 90. 627(b) (1994), which provided generally that no 800 MHz and 900 MHz SMR licensee would be authorized an additional trunked system within 40 miles of an existing trunked system held by that same licensee, unless the licensee's existing trunked system was loaded to at least 70 mobile units and control stations per channel. The service area for these SMR licensees was defined as the area encompassed by a 40 dBu contour of a conventional facility using maximum permissible power and antenna height. The resulting service area typically extends for a distance of twenty miles from the base station. By adopting a 40 mile spacing requirement, therefore, the Commission ensured that no two licenses held by the same licensee would have overlapping service areas. See An Inquiry Relative to the Future Use of the Frequency Band 806-960 MHz, Memorandum Opinion and Order, 33 Rad. Reg. 2d (P&F) 457, 502 (1975). See also Amendment 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 896-901 MHz and 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool, 4 FCC Rcd. 8673, 8676 (1989) (proposing certain exemptions to the 800 MHz/900 MHz "forty mile rule" for rural areas and national licenses).

[5] 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 Services, PR Docket 89-552, 6 FCC Rcd. 2356, 2364-65 (1991) ("220 MHz Report and Order").

further enhanced the potential capacity and performance of existing and future communications systems. As a result of these technological developments, the competitive potential for all mobile services – including 220 MHz – has been substantially enhanced.

Regulatory developments have been similarly striking. In 1993, Congress enacted the Omnibus Budget Reconciliation Act of 1993, in which it sought to encourage competition among substantially similar services by mandating that similar mobile services be accorded similar regulatory treatment.[6] Thereafter, the Commission launched a series of proceedings to implement the Budget Act and to eliminate those regulations hindering the ability of similar services to compete effectively in the marketplace.[7] Among the changes made during this period was the elimination of the 800/900 MHz forty-mile rule in order to permit greater flexibility for operators in those services to develop wide-area and advanced technology systems that would be more competitive with other commercial mobile radio services.[8] In this same order, the Commission deferred consideration of similar regulatory restrictions in the 220 MHz context to this proceeding.[9]

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

[7] See, e.g., 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"); 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"); 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 Rulemaking, 9 FCC Rcd. 2863 (1994) ("CMRS Further Notice").

[8] CMRS Third Report and Order, 9 FCC Rcd. at 8082.

[9] Id. at 8055.

The 220 MHz Third Notice initiated the process of reforming the 220 MHz Service pursuant to the Budget Act's directives. Accordingly, consistent with its treatment of substantially similar mobile services (such as 800 MHz and 900 MHz), the Commission's 220 MHz Third Notice proposed a series of significant regulatory changes for the 220 MHz Service designed to "enhance the competitive potential of the 220 MHz service in the mobile services marketplace."[10] Thus, for example, the Commission proposed to auction all future licenses for 220 MHz Service channels,[11] to create a wider service area with five regional areas and 172 economic areas ("EAs") for licensing,[12] and to generally increase the number of channels available to each licensee for these areas.[13] The Commission also proposed to expand the permissible uses of the 220 MHz frequencies for Phase I and Phase II licensees to enable these licensees to compete effectively with "the growing number of competing services in the mobile communications marketplace," including cellular service, narrowband and broadband personal communications services, the 900 MHz SMR service and the 800 MHz SMR service.[14]

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[10] 220 MHz Third Notice, FCC 95-312 at ¶ 6.

[11] 220 MHz Third Notice, FCC 95-312 at ¶ 109. Non-nationwide licensees under the current licensing scheme were awarded licenses on a first-come, first-served basis with mutually exclusive applications filed on the same day assigned through a random selection process. Most of these non-nationwide licenses were for five-channel blocks designated for trunked operation.

[12] 220 MHz Third Notice, FCC 95-312 at ¶ 59. Economic areas are approximately eight times larger than the service areas of existing non-nationwide 220 MHz licenses. Id. at ¶ 62.

[13] The Commission has proposed to allocate one 20, one 15 and three 10 channel blocks to each of the five regional areas. 220 MHz Third Notice, FCC 95-312 at ¶ 66. In addition, the Commission has proposed to allocate four 10 and four 5 channel blocks to each of the Economic Areas. Id.

[14] See, e.g., 220 MHz Third Notice, FCC 95-312 at ¶ 77 (permitting fixed operations on a primary basis); Id. at ¶ 82 (permitting the aggregation of contiguous channels to create wider bandwidths); Id. at ¶ 87 (removing the current restriction on paging operations).

Even as it was considering extensive regulatory changes appropriate to enhance the competitive potential of the 220 MHz Service, however, the Commission denied two requests for relief related to the 220 MHz forty-mile rule as it related to Phase I Licenses.[15] In each case, the Commission indicated that relief from the forty-mile rule could only be granted through a showing of "outstanding requests for communications service," and denied the petitions on the grounds that neither petitioner had made such a showing.[16] With respect to the prospective application of the 220 MHz forty-mile rule to Phase I and Phase II Licenses, the Commission's 220 MHz Third Notice implicitly solicited comment on the continued viability of this rule when it proposed a comprehensive wide area licensing framework which could be fully implemented only with the elimination of the restrictions contained in Section 90.739 of the Commission's Rules.

In response to the Commission's 220 MHz Third Notice, several commenters urged the Commission to eliminate the forty-mile rule both for Phase I and Phase II Licensees.[17] SMR

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[15] Specifically, SunCom Mobile & Data, Inc. ("SunCom") sought reconsideration of the FCC's denial of its request for declaratory ruling that it could aggregate constructed channels to form a regional network without violating the forty-mile rule and Wireless Plus, Inc. ("Wireless Plus") requested a waiver of the forty-mile rule to consolidate two networks of licenses that it was managing in northern and southern California. See SunCom, Petition for Reconsideration, filed December 21, 1994; Wireless Plus, Request for Waiver, filed February 8, 1995. Suncom has since appealed the Commission's action on its petition for reconsideration in the United States Court of Appeal for the District of Columbia (No. 95-1478). Of course, any action taken by the Commission in this proceeding would be prospectively applied.

[16] 220 MHz Third Notice, FCC 95-312 at ¶¶ 183-188.

[17] See e.g., Comments of Comtech Communications, Inc. ("Comtech"), filed September 27, 1995 at pp. 10-11 (proposing that the Commission eliminate Section 90.739 of its Rules, "so that channels can be aggregated."); Comments of US MobilComm, Inc. ("US MobilComm"), filed September 27, 1995 at p. 5 ("[l]imits on aggregation restrict the commercial viability of the spectrum and prevent 220 MHz license holders from competing with other CMRS

Advisory, for its part, referenced the Commission's apparent acknowledgement in the new licensing scheme that more than five channels were needed to adequately serve a given area, and urged that the Commission adopt a more flexible stance on waivers of Section 90.739.[18] In the five months since filing its original comments in this proceeding, however, SMR Advisory has continued actively to construct and place stations in operation and to assess the practical implications of showing "outstanding service requests" to justify additional channels. As a result of this activity, it has become apparent to SMR Advisory that the forty-mile rule will be a major obstacle to efforts to provide the wide area coverage and advanced technologies necessary to make the 220 MHz Service competitive with the other commercial mobile radio services.[19]

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providers").

[18] SMR Advisory urged, for example, that the manager/operator be permitted to justify additional channels by adequately supported engineering and marketing projections, and not just by the submission of outstanding requests for service, the latter of which is more reactive in nature. See Comments of SMR Advisory, filed September 27, 1996 at p. 15, n. 14.

[19] SMR Advisory manages 220 MHz systems for approximately ninety (90) independently owned licensees on the east and west coast of the United States. Of these systems, approximately seventy (70) are constructed and operational consistent with the Commission's rules and regulations. At least fifty-five (55) of the licensees of the constructed systems would like to consolidate their systems into a single company to be owned by all of the licensees. Once combined, these systems would comprise a consolidated network which has been designed based on (i) commissioned economic analyses as to the location and type of customer demand; and (ii) technical analyses of terrain features and other propagation effects showing projected coverage and capacity needs. As a general matter, this network is designed to encompass major inter-urban corridors rather than metropolitan centers and to serve the needs of customers who are located in or travel through these corridors, although provision also has been made to cover certain "in-town" areas in order to accommodate portable units (to be used by, for example, construction workers at the work site). Currently, approximately one-third of the licensees who wish to contribute their licenses to a consolidated company in return for an ownership share in that company cannot do so because their systems are located within forty miles of one or more other systems contemplated to be part of this network. Under the 220 MHz forty-mile rule as currently applied, the consolidated entity would be forced to fold

II.

DISCUSSION

A. Elimination Of The Forty-Mile Rule For All 220 MHz Licensees Is Necessary In Order To Realize The Full Competitive Potential Of The 220 MHz Service.

One of the primary goals in this proceeding is to establish a flexible regulatory framework that will enhance the competitive potential in the mobile services marketplace.[20] In particular, the Commission expects that the rules adopted here will encourage the continued development of the 220 MHz service and the implementation of a variety of new communications services to meet the future needs of the American public.[21] Elimination of the 220 MHz forty-mile rule for Phase I Licensees and Phase II Licensees is essential to the ultimate success of this goal.

Many of the changes proposed by the Commission in the 220 MHz Third Notice are designed to enhance the competitive development of the 220 MHz Service. Lifting the current restriction on primary fixed use, for example, was seen as "broaden[ing] the array of services offered by [220 MHz licensees]" so as to better compete with the growing number of competing services in the mobile communications marketplace.[22] Removal of the current restriction that licensees use only five kHz channels, in the Commission's view, also would

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in each of these licenses one-by-one only as the first system within a given forty mile area achieves capacity loading.

[20] 220 MHz Third Notice, 95-312 at ¶ 2.

[21] Id.

[22] 220 MHz Third Notice, FCC 95-312 at ¶ 77.

permit 220 MHz licensees "the flexibility to use their spectrum to employ the widest variety of technologies to best meet the communications requirements of consumers."[23] And permitting 220 MHz licensees to provide paging on a primary basis, the Commission observed, would "enable such licensees to compete more effectively in the wireless marketplace."[24] The Commission has proposed each of these changes because it believes – with good reason – that the 220 MHz Service can compete with other mobile services in the marketplace only if many of the regulatory restrictions currently imposed on 220 MHz licensees are lifted.[25]

If the forty-mile rule is not eliminated, it will remain as a significant regulatory obstacle to the ability of all 220 MHz licensees to respond to current market demands. The forty-mile rule forces the 220 MHz licensee into a reactive business mode by prohibiting the licensee from taking any action to expand or enhance its system until its existing channel capacity is filled. As a result, a 220 MHz Service licensee cannot acquire and place additional capacity in service in anticipation of demand by relying on projected growth, but instead must plan its system on the basis of current demand and show need for expansion through outstanding service orders. In order to compete effectively in the current marketplace, however, licensees of all commercial mobile services, including the 220 MHz Service, must be able to pursue a proactive business plan so as to act without having to prepare and submit a showing of need to a regulatory agency and then to wait for approval of the showing by that agency. To the extent

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[23] Id. at ¶ 81.

[24] Id. at ¶ 87.

[25] In this regard, the Commission has noted that 220 MHz has the potential to compete with PCS for two-way narrowband service; that it is likely to compete with cellular for use in package tracking; and that its equipment has greater data capabilities than equipment for 800 MHz SMR. CMRS Third Report and Order, 9 FCC Rcd. at 8030 - 8033.

220 MHz licensees are forced to wait until sufficient service requests have accumulated to justify waivers of the forty mile rule, they will be unable to keep pace with those other service operators who have the flexibility to move quickly in response to market forces. The Commission will best further the competitive potential of the 220 MHz Service by ensuring that its rules generally are proactive, rather than reactive, in nature.

Continued enforcement of the forty-mile rule also will prevent 220 MHz licensees from taking advantage of the numerous economic and administrative efficiencies associated with consolidated ownership of multiple licenses within a single forty-mile area. From a financial perspective, for example, the licensee able to consolidate licenses within a given forty mile area could pool all revenues and costs from the various sites without concern for the autonomy of each individual site.[26] Centralized billing also could be handled far more efficiently if the system were not partitioned into separate, purportedly autonomous mini-systems. Factors relating to ownership – such as tax filings and profit distributions – could be centralized and consolidated rather than compartmentalized to preserve control for each site.

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[26] Some would argue that the use of management agreements or joint operating agreements obviate the concerns addressed here. These arrangements are poor substitutes, however, for an unfettered ability to consolidate without constant concern that any one site has "ceded control" to the consolidated entity. Indeed, the Commission has warned licensees in the 220 MHz Service and other CMRS services, that such agreements will be subject to far more rigorous scrutiny than in the past to ensure licensee autonomy and control. In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Fourth Report and Order, 9 FCC Rcd. 7123 (1994). Moreover, if the purpose of the management agreement and/or joint operating agreement is establish a vehicle to allow multiple licensees to operate essentially as a consolidated system, it would be far more efficient to simply eliminate the rule requiring licensees to undergo such contortions only to get to the same place in the end.

Moreover, if the forty-mile rule is retained, the 220 MHz licensee who wants to make the justification required for waiver of the rule may well be precluded from making such a showing. This is because two or more 220 MHz systems in a particular forty mile area may be serving entirely different segments of the market; a 220 MHz licensee attempting to submit the outstanding service requests required by the Commission to justify the acquisition of a second 220 MHz system in the same area could submit requests only for the customer types being served by the first system. During the period of time that the first system is being loaded, therefore, the licensee would be forced to lose market share for those customer types which are served only by the second system.[27] This result directly undermines the Commission's stated desire that 220 MHz licensees are afforded the flexibility to provide a wide array of services over the 220 MHz spectrum.

A 220 MHz licensee seeking to network a number of systems along a particular well-traveled route (i.e., a classic wide-area system) also would have difficulty making the waiver showing required by the Commission. In this case, the second system is not designed to serve the same geographic area as the first system; rather the second system is designed to permit seamless, uninterrupted coverage to the area adjoining the first system. Under such

[27] The following example illustrates this dilemma faced by 220 MHz operators. A particular 220 MHz system within a given forty mile area is designed to serve subscribers using dash-mounted units in their business (e.g., trucking companies with multiple trucks on service routes). A second 220 MHz system located within the same forty-mile area is designed to serve an entirely different segment of the potential 220 MHz market (i.e., construction workers using portable units at the work site). In this example, each site will have distinctly different marketing strategies and techniques. If the licensee of the first site is forced to reach capacity on vehicular units before acquiring the second site, it will have sacrificed the market for portable units during the time it was waiting to build up the customer base for vehicular units. This enforced delay will occur every time a licensee seeks to acquire additional sites within a particular forty mile area to the detriment of the competitive position of that licensee.

circumstances, it is impossible for existing licensees to develop seamless networks of channels in overlapping markets to respond to demand resulting from new urban or highway development because they must leave gaps in their system to comply with the forty-mile rule. Because the demand for the channels in adjacent areas does not necessarily translate into new service orders for their existing service areas, existing licensees seeking to offer wider area coverage cannot meet the showing required to obtain these channels.[28] The forty-mile rule in this context serves no purpose other than to delay the implementation of the network coverage to the target wide area.

The Commission cannot intend to restrict 220 MHz licensees in this way. All 220 MHz licensees must be permitted freely to aggregate channels within a given geographic area to respond to new types of demand. Otherwise, their 220 MHz systems are likely to remain underutilized and the competitive potential of the 220 MHz Service will remain unrealized.

B. The 220 MHz Forty-Mile Rule Seriously Undermines The Commission's Goal Of Regulatory Parity Between Substantially Similar Mobile Radio Services.

In 1993, Congress mandated regulatory parity for substantially similar mobile radio services.[29] The broad goal of this action was to ensure that economic forces – not disparate regulatory burdens – shaped the development of the CMRS marketplace.[30] As part of this

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[28] To the extent that the 220 MHz systems at issue are located in rural areas, the licensee seeking to consolidate these systems may well find it impossible to show the required subscriber base because the systems will be primarily used by roamers rather than home subscribers.

[29] Budget Act, §6002(d)(3).

[30] CMRS Third Report and Order, 9 FCC Rcd. at 7994.

effort to promote regulatory parity, Congress specifically instructed the Commission to make a complete assessment of its rules, "including loading requirements, spacing limitations and others" to determine whether such rules still serve the public interest.[31]

In its regulatory proceedings to implement the provisions of the Budget Act, the Commission determined that 220 MHz channels would be considered CMRS if they were used to offer for-profit and interconnected service.[32] In the CMRS Third Report and Order, the Commission concluded that commercial mobile radio services would be deemed to be substantially similar if they were competitive or potentially competitive services. Applying this standard broadly, the Commission found that all reclassified CMRS services should be considered substantially similar, including the 220 MHz service.[33]

In reviewing its regulations for the 800 MHz and 900 MHz SMR services, the Commission looked particularly at the forty-mile rule since it was a spacing limitation of the very type which Congress had urged be reviewed. Upon consideration of the comments by the parties – most of which urged the elimination of this restriction[34] – the Commission eliminated the forty-mile rule for these services. In so doing, the Commission noted that the

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[31] H.R. Rep. No. 111, 103d Cong., 1st Sess., at 262 (1993).

[32] CMRS Second Report and Order, 9 FCC Rcd. at 1450 - 53.

[33] CMRS Third Report and Order, 9 FCC Rcd. at 7996.

[34] See e.g., Comments of PCC Management Corporation, filed June 20, 1994, at pp. 9-10; Comments of RAM Mobile Data USA Limited Partnership, filed June 20, 1994, at p. 10; Comments of American Mobile Telecommunications Association, Inc. ("AMTA"), filed June 20, 1994, at pp. 12-13; Reply Comments of AMTA, filed July 11, 1994, at p. 15; Reply Comments of CellCall, Inc., filed July 11, 1994, at pp. 9-10; Reply Comments of Dial Page, Inc., filed July 11, 1994, at p. 6.

forty-mile rule could impose a competitive disadvantage on SMR licensees reclassified as CMRS and that the elimination of that rule would further the objective of regulatory symmetry.[35]

Given its action with respect to the 800 MHz/900 MHz forty-mile rule, the Commission is compelled to eliminate the same restriction currently existing in the 220 MHz Service. The 220 MHz Service can be competitive with other CMRS services, including in particular the 800 MHz and the 900 MHz services, only if it is subject to similar regulatory restrictions. To the extent that the 800 MHz and 900 MHz licensees have been freed of the burden of loading initial systems before acquiring a second system within the same forty mile area, 220 MHz licensees should be afforded this same freedom. To do otherwise places the 220 MHz licensees at a distinct competitive disadvantage vis a vis 800 MHz and 900 MHz operators (as well as operators in other CMRS services, such as cellular, without a similar restriction).

C. The 220 MHz Forty-Mile Rule No Longer Serves Its Original Purpose.

The original motivation for adoption of the 220 MHz forty mile rule – to prevent warehousing of spectrum – is no longer a relevant concern today. Conditions for warehousing or hoarding of spectrum generally arise when the licensee is able to acquire spectrum at a nominal or below-market value, and then is able to hold the spectrum without constructing and operating the systems until the spectrum becomes more valuable either because of technological advancement or spectrum scarcity in the market area. The current 220 MHz licensing environment – both for Phase I and Phase II Licensees – does not give rise to these conditions.

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[35] CMRS Third Report and Order, 9 FCC Rcd at 8082 - 83.

During the past several years of the Phase I licensing process, a number of system operators have taken a lead role in developing the 220 MHz technology in the marketplace. As a result, the majority of the licenses issued following the Phase I lottery have been (or are in the process of being) acquired from the original licenses by entities seeking to implement a business plan for constructing and operating 220 MHz systems and providing 220 MHz Service to the public. These entities have paid full market value for these Phase I Licenses and are motivated to make a return on their investment. Similarly, entities who are likely to bid in the upcoming auctions for Phase II Licenses – many of which will be the same system operators described above – will pay full market value for the Phase II Licenses acquired and will have no incentive to "warehouse" that spectrum. For both Phase I and Phase II Licensees, the Commission either has already adopted, or proposes to adopt, strict construction deadlines and operational requirements to ensure that systems are not "stockpiled," but rather are actually built and placed in service.[36]

The Commission acknowledged similar changes in the 800/900 MHz licensing environment when it eliminated the forty mile rule for those services in the CMRS Third Report and Order. While conceding that this rule "served a significant regulatory purpose during the initial development of the industry by preventing strategic manipulation of the Commission's licensing procedures to warehouse spectrum," the Commission concluded that the "40-mile rule no longer serve[ed] its intended purpose, and could in fact hamper the

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[36] See 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, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, PR Docket No. 89-552, GN Docket, 93-252, released January 26, 1996 at ¶¶ 29 - 30 ("220 MHz Modification Order"); 220 MHz Third Notice, FCC 95-312 at ¶¶ 88 - 96.