industry's continued growth and competitive position with other CMRS licensees."[37] Moreover, in balancing the concerns with warehousing spectrum against the need to encourage the industry's continued growth and competitive position, the Commission determined that strict enforcement of construction requirements would adequately discourage any spectrum warehousing.

Given that these same factors exist in the 220 MHz industry, it seems clear that the 220 MHz forty mile rule no longer serves the purpose for which it was originally adopted. Accordingly, consistent with its disposition of the 800 MHz/900 MHz forty mile rule, the Commission should eliminate the 220 forty-mile rule for Phase I and Phase II Licensees.

D. Application Of The Forty-Mile Rule Solely To Phase I Licensees Undercuts Regulatory Parity Within The 220 MHz Industry And Discriminates Unfairly Against Phase I Licensees.

The Commission's 220 MHz Third Notice is not clear as to whether or how the forty mile rule will continue to be enforced against Phase I and Phase II Licensees. While the Commission's wide area licensing approach for Phase II Licensees is based on the concept of free aggregation of channels, the Commission nowhere explicitly addresses whether the forty-mile rule will or should be eliminated (at least prospectively) with respect to Phase I or Phase II Licensees. Certain references in the 220 MHz Third Notice reflect a belief by the Commission that the forty-mile rule would not apply to Phase II Licensees. The Commission

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[37] CMRS Third Report and Order, 9 FCC Rcd. at 8082. The Commission's conclusion was based, in part, on the fact that licenses in the 800 MHz and 900 MHz SMR services were going to be auctioned (as are the licenses in the 220 MHz Service). The Commission noted, however, that even to the extent it continued to license some 800 MHz SMR systems on a station-by-station basis (i.e., first-come, first-served), it still believed that the forty mile rule had outlived its regulatory purpose. Id.

suggests in this regard, for example, that acquisition of Phase I Licenses by Phase II Licensees could serve as a means to eliminate interference problems, although the 220 MHz forty mile rule would seem to be a potential obstacle for such acquisitions.[38] Other references seem to assume the elimination of the forty-mile rule for Phase I Licensees as well; the Commission proposes in this respect that an existing Phase I Licensee could apply for geographic areas encompassing its existing facilities in the Phase II licensing as an initial application, although the forty-mile rule would seem to prevent such action.[39] SMR Advisory submits that whatever action is taken by the Commission with respect to the forty-mile rule should be applied equally to both Phase I and Phase II Licensees.

There is no credible reason why Phase I Licensees should be treated any differently from Phase II Licensees when it comes to the forty-mile rule. Currently, Phase I Licensees can acquire additional channels in two ways: through the acquisition of constructed Phase I licenses or by participating in the auctions. Under either scenario, Phase I Licensees are paying full market value for fully constructed channels and will need to load these channels as soon as possible to realize a return on investment. In this sense, the Phase I Licensees are in precisely the same position as the Phase II Licensees acquiring their licenses in the auction and should be treated accordingly.

Moreover, a significant portion of the competitive potential of the 220 MHz Service lies with existing licensees. Phase I Licenses already hold a substantial share of the spectrum for the 220 MHz Service and have been responsible for the development of the 220 MHz industry

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[38] 220 MHz Third Notice, FCC 95-312 at ¶ 99.

[39] 220 MHz Third Notice, FCC 95-312 at ¶ 101.

to date. These early entrants should be acknowledged and rewarded for their development of an infant industry into one that is becoming highly competitive with the more mature commercial mobile radio services. It would be patently unfair to penalize them for their early entry into the field by restricting their use of the spectrum while at the same time expanding use of the spectrum for newcomers.

To continue to apply the forty-mile rule for Phase I licensees while allowing Phase II licensees to develop expansive systems that can utilize advanced technologies and provide seamless networks clearly would violate the Congressional mandate for regulatory parity.[40] It also would constitute differential treatment of similarly situated parties in violation of the law.[41] To the extent the Commission eliminates the forty-mile rule for Phase II Licensees, therefore, it must do the same for Phase I Licensees.

III.

CONCLUSION

For the reasons stated above, SMR Advisory respectfully submits that Section 90.739 of the Commission's Rules – the so-called forty-mile rule – no longer serves the purpose for which it was originally intended and significantly detracts from the ability of 220 MHz licensees to develop the full competitive potential of 220 MHz in the mobile services

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[40] Budget Act, § 6002(d)(3).

[41] Washington Ass'n. for Television and Children v. F.C.C., 665 F.2d 1264, 1268 n.6 (D.C. Cir. 1981); Melody Music, Inc. v. F.C.C., 345 F.2d 730, 735 (D.C. Cir. 1965); see McElroy Electronics Corp. v. F.C.C., 990 F.2d 1351, 1365-66 (D.C. Cir. 1993)("[w]e remind the Commission of the importance of treating similarly situated parties alike or providing an adequate justification for disparate treatment.").

marketplace. In addition, the forty-mile rule directly undercuts regulatory parity between the 220 MHz Service and other commercial mobile radio services and, between Phase I Licensees and Phase II Licensees to the extent that the rule is selectively eliminated for Phase II Licensees only. In considering this issue in its 220 MHz Third Notice, therefore, SMR Advisory urges the Commission to eliminate Section 90.739 prospectively for all Phase I and Phase II Licensees.

Respectfully submitted,

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