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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	)	PP Docket No. 93-253

THIRD REPORT AND ORDER; FIFTH NOTICE OF PROPOSED RULEMAKING

Adopted: February 19, 1997 **Released: March 12, 1997**

Comments Due: April 15, 1997 Reply Comments Due: April 30, 1997

By the Commission: Chairman Hundt approving in part, dissenting in part, and issuing a statement; Commissioners Ness and Chong issuing separate statements.

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THIRD REPORT AND ORDER

I. INTRODUCTION

1. By this Third Report and Order, we adopt rules to govern the future operation and licensing of the 220-222 MHz band (220 MHz service). This action is taken as part of our continuing implementation of the regulatory framework for mobile radio services enacted by Congress in Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, which amended Sections 3(n) and 332 of the Communications Act of 1934.[1] As part of the implementation of the Budget Act, we initiated a series of rulemaking proceedings to provide guidelines for the regulation of commercial and private mobile radio services, including the 220 MHz service, consistent with the policy of regulatory symmetry as reflected in the revisions to Section 332 of the Act.

2. One of our actions resulting from these proceedings, the *CMRS Third Report and Order* in GN Docket No. 93-252,[2] addressed a variety of issues relating to the licensing of the 220 MHz service, but deferred a detailed examination of that service to a separate rulemaking proceeding. That proceeding was initiated by the adoption of the Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking in PR Docket No. 89-552 (*Third Notice*),[3] where we proposed a new licensing plan for 220 MHz service. The Third Report and Order adopted today generally establishes that proposal for the Phase II[4] licensing of the 220-222 MHz band, with some modifications that we discuss in the following sections.

3. As stated in the *Third Notice*, our goal is to establish a flexible regulatory framework that will allow for the efficient licensing of the 220-222 MHz band, eliminate

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[1] 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). Section 3(n) of the Communications Act has been redesignated as Section 3(14). *See* Section 3(c)(4) of the Telecommunications Act of 1996. The reference to former Section 3(n) in Section 332 has been changed to a reference to Section 3. *See* Section 3(d)(2) of the Telecommunications Act of 1996.

[2] 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*), *recon. pending*.

[3] 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, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, and 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, 11 FCC Rcd 188 (1995) (*Third Notice*).

[4] We refer herein to licenses granted pursuant to this new framework as Phase II licenses. Licenses granted under the rules that existed prior to the adoption of this Order are referred to herein as Phase I licenses.

unnecessary regulatory burdens on both Phase I and Phase II licensees, and enhance the competitive potential of the 220 MHz service in the mobile services marketplace.[5] We believe that the adoption of the rules set forth in today's Order will enable us to continue to promote the development of advanced radio technologies, while making the widest variety of mobile communications services available to the American public.

4. In the Fifth Notice of Proposed Rulemaking, we propose to permit Phase I nationwide licensees to partition their licenses. We also seek comment on whether to permit and how to implement spectrum disaggregation for both Phase I and Phase II licensees.

II. EXECUTIVE SUMMARY

5. The following is a summary of the rules adopted in this Order for Phase II licensing of the 220-222 MHz band:

A. NATIONWIDE LICENSING

6. We will return the pending, mutually exclusive applications for the four non-commercial, Phase I nationwide licenses and adopt a new licensing procedure for the 30 channels associated with these licenses. The Phase II licensing of these channels will be governed by the following rules:

- The 30 channels will be licensed 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.

- The channels will be assigned, in the form of three 10-channel authorizations, through competitive bidding, based upon our conclusion that the principal use of the spectrum will be for the provision of for-profit, subscriber-based services.

B. NON-NATIONWIDE LICENSING

7. We will assign Phase II, non-nationwide 220 MHz channels in the following manner:

- Fifty channels in 175 geographic areas defined as Economic Areas by the Bureau of Economic Analysis, Department of Commerce ("EA licenses") and 75 channels in the geographic areas defined by six "Regional Economic Area Groupings" ("Regional licenses") as follows:

[5] *Third Notice*, 11 FCC Rcd at 193 (para. 2).

NON-NATIONWIDE 220 MHz CHANNEL ALLOCATION PLAN

EA BLOCK	CHANNELS
A: Channel Groups[6] 2, 13	10
B: Channel Groups 3, 16	10
C: Channel Groups 5, 18	10
D: Channel Groups 8, 19	10
E: Channels 171-180	10
TOTAL	50

REGIONAL BLOCK	CHANNELS
F: Channel Groups 1, 6, 11	15
G: Channel Groups 4, 9, 14	15
H: Channel Groups 7, 12, 17	15
I: Channel Groups 10, 15, 20	15
J: Channels 186-200	15
TOTAL	75

- We make these channels available to all eligible applicants, and we resolve mutually exclusive applications for these channels through competitive bidding.
- We 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 the base stations of Phase I licensees in accordance with the existing co-channel separation criteria for 220 MHz stations.
- We provide a 10-year license term for EA and Regional licensees, and we require EA and Regional licensees to meet five- and ten-year construction benchmarks.

[6] The Channel Groups indicated in the allocation plan are the 5-channel, non-contiguous assignments identified as "Group Nos. 1, 2, 3" *etc.*, in Section 90.721 of the Commission's Rules, 47 C.F.R. § 90.721.

- We continue to assign, on a single-station basis, 10 channels to applicants eligible in the Public Safety Radio Services (PSRS) and five channels to applicants eligible in the Emergency Medical Radio Service (EMRS) to meet internal communications needs.

- We assign five of the 10 PSRS channel pairs on a shared basis to all public safety eligibles. In so doing, we enable public safety licensees within a particular geographic area to share these channels and coordinate the location and operation of base stations on these channels, which will enable them to communicate more effectively with each other during emergencies.

- We assign channels in the PSRS and EMRS pools on a first-come, first-served basis and resolve mutually exclusive applications by random selection procedures.

C. Paging Operations; Channel Aggregation

- We allow Phase I and Phase II, nationwide and non-nationwide 220 MHz licensees to operate paging systems without the requirement that such use be on an ancillary basis to land mobile operations.

- We allow Phase I and Phase II, nationwide and non-nationwide 220 MHz licensees, to aggregate any of their contiguous 5 kHz channels and operate on channels wider than 5 kHz, so long as they comply with the prescribed spectrum efficiency standard.

D. Other Issues

1. Technical and Operational Matters

8. We modify our existing 220 MHz rules with regard to certain technical and operational matters as follows:

- We allow Phase I and Phase II, nationwide and non-nationwide, non-CMRS 220 MHz licensees to operate fixed stations without the requirement that such use be on an ancillary basis to land mobile operations.

- We allow licensees using the 220-222 MHz band for geophysical telemetry operations to operate fixed stations on a temporary basis, without the requirement that such use be ancillary to land mobile operations, and on a secondary basis to Phase I and Phase II licensees authorized to operate on 220 MHz channels on a primary basis.

2. Application Procedures

9. We adopt the following procedures and definitions for initial applications, amended applications, applications to modify authorizations, and renewal of authorizations:

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

- We adopt the same procedures for amending applications and modifying authorizations for Phase II 220 MHz licenses that are established for other Part 90 Commercial Mobile Radio Services (CMRS).

- We adopt the same procedures for obtaining grants of Special Temporary Authority (STA) for Phase II 220 MHz licenses that are established for other Part 90 CMRS services.

- We adopt for all 220 MHz licensees the renewal standards adopted in the *CMRS Third Report and Order* for Part 90 CMRS services.

E. COMPETITIVE BIDDING RULES

1. Competitive Bidding Design

10. We will award a total of three nationwide, 30 Regional, and 875 EA licenses in the Phase II 220 MHz service. We will use a single simultaneous multiple round auction to award these licenses. Both incumbents and new entrants are eligible to bid for all nationwide, Regional, and EA licenses.

11. The Wireless Telecommunications Bureau will, by Public Notice prior to the auction, announce guidelines for bid increments, *i.e.*, the amount or percentage by which the bid must be raised above the previous round's high bid in order to be accepted as a valid bid in the current bidding round. We will use a simultaneous stopping rule and the Milgrom-Wilson activity rule for this auction. The timing and duration of auction rounds will be determined by the Wireless Telecommunications Bureau and announced by Public Notice or by announcement during the auction. We will use bid withdrawal and default rules for this auction similar to those used in the broadband PCS auctions.

2. Procedural and Payment Rules

12. Applicants will apply for the Phase II 220 MHz auction by filing a short-form application (FCC Form 175), indicating the markets and spectrum blocks for which they seek to apply, and paying an upfront payment. The Wireless Telecommunications Bureau will set the amount of the upfront payment taking into account such factors as the population in each geographic license area and the value of similar spectrum.

13. At the conclusion of the auction, winning bidders must submit their down payments and file their long-form applications (FCC Form 600). The down payments required of all winning bidders will be 20 percent of their winning bids.

3. Regulatory Safeguards

14. The Phase II 220 MHz auction will be subject to regulatory safeguards to prevent applicants from colluding during the auction or obtaining unjust enrichment from subsequent transfers of their licenses.

4. Designated Entities

15. We will not establish an entrepreneurs' block for the 220 MHz band. Instead small businesses will be eligible for bidding credits and an installment payment plan. For purposes of determining small business status, we will attribute the gross revenues of all controlling principals in the small business applicant as well as the gross revenues of affiliates of the applicant. We define two categories of small businesses: (1) a small business is an entity that, together with affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years; and (2) a very small business is an entity that, together with affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years.

16. Very small businesses meeting the not more than $3 million benchmark are eligible for a 25 percent bidding credit on any Phase II 220 MHz license; small businesses meeting the not more than $15 million benchmark are eligible for a ten percent bidding credit on any Phase II 220 MHz license. Licensees who qualify as small businesses or very small businesses in 220 MHz auctions will be eligible to pay their winning bid amount in quarterly installments over the term of the license with interest charges to be fixed at the time of licensing at a rate equal to the rate for ten-year U.S. Treasury obligations plus 2.5 percent. These licensees may make interest-only payments for the first two years of the license term. We do not adopt reduced upfront payments or reduced down payments for small businesses in the Phase II 220 MHz service.

17. We will adopt unjust enrichment provisions similar to those adopted for narrowband PCS and the 900 MHz SMR service. If a licensee that qualifies for bidding credits and installment payments seeks to assign or transfer control of its license during its term to an entity that does not meet the small business or very small business definition, we will require payment of all or a portion of the bidding credit, remaining principal and any interest accrued through the date of assignment as a condition of the license assignment or transfer.

5. Partitioning and Disaggregation

18. We will permit any holder of a Phase II 220 MHz license to partition portions of its authorization and enter into contracts with eligible parties, allowing such parties to file long-form applications for the usable channels within the partitioned area. We will not at this time authorize spectrum disaggregation for the Phase II 220 MHz service.

F. Use of Spectrum for Particular Services

19. The Commission makes no warranties about the use of this spectrum for particular services. Applicants should be aware that a Commission auction represents an opportunity to become a Commission licensee in this service, subject to certain conditions and regulations. A Commission auction does not constitute an endorsement by the Commission of any particular services, technologies, or products, nor does a Commission license constitute a guarantee of business success. Applicants should perform their individual due diligence before proceeding as they would with any new business venture.

III. BACKGROUND

A. THE 220-222 MHZ SERVICE

20. In 1988, the Commission adopted the *220 MHz Allocation Order*,[7] reallocating the 220-222 MHz band from the Amateur Radio service to 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*.[8] It is regulated under Subpart T of Part 90 of our Rules.[9]

21. In the *220 MHz Report and Order*, the Commission adopted service rules for the assignment of 200 five kilohertz (kHz) 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.[10] 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

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[7] 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), *aff'd*, American Radio Relay League v. FCC, No. 89-1602, 918 F. 2d 978, 1990 WL 191636 (D.C. Cir. 1990).

[8] 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, denied in part, & 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, denied in part*, Order, 8 FCC Rcd 4161 (1993) (*220 MHz Second Reconsideration Order*), *recon. pending, appeal dismissed*, Evans v. FCC, Case No. 92-137, (D.C. Cir. Mar. 18, 1994).

[9] Subpart T of Part 90 of the Commission's Rules, 47 C.F.R. §§ 90.701-90.757.

[10] 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.

that all applications 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.[11]

22. 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 Private Radio Bureau imposed a freeze on the filing of all applications, which included initial and modification applications, for the 220 MHz service.[12] In 1992[13] and 1993[14] we conducted random selection proceedings to resolve mutually exclusive non-nationwide and nationwide applications, respectively, and issued nearly 3,800 authorizations for non-nationwide stations and four licenses for nationwide, commercial systems. On July 30, 1992, certain aspects of the Commission's procedures for the filing and acceptance of 220 MHz license applications were appealed to the United States Court of Appeals for the District of Columbia.[15] In light of that appeal, the Private Radio Bureau announced that the construction deadline for all non-nationwide 220 MHz stations would be 120 days after the disposition of the *Evans v. FCC* case.[16] Following the settlement of the case in March 1994, the deadline for licensees to construct their systems and place them in operation has been extended on five separate occasions to allow licensees sufficient time to construct their systems.[17] In addition, as a consequence of the freeze, licensees

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[11] *220 MHz Report and Order*, 6 FCC Rcd at 2364-65 (paras. 59, 62).

[12] Acceptance of 220-222 MHz Private Land Mobile Applications, Order, 6 FCC Rcd 3333 (1991) (*220 MHz Freeze Order*). The Private Radio Bureau imposed the suspension on licensing processing so that it could complete the disposition of the large number of applications before accepting more applications.

[13] 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*).

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

[15] Evans v. FCC, Case No. 92-1317 (D.C. Cir., filed July 30, 1992).

[16] *Public Notice: Non-Nationwide Lottery*, 7 FCC Rcd at 6378.

[17] Specifically, the Bureau extended the construction deadline to December 2, 1994, in an Order released on March 30, 1994. *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 Services, PR Docket No. 89-552, Order, 9 FCC Rcd 1739 (1994). On August 19, 1994, the Private Radio Bureau then released a Public Notice extending the construction deadline to April 4, 1995. *See* 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). In the *CMRS Third Report and Order*, the Commission again identified April 4, 1995, as the construction deadline. *See*

wishing to relocate their authorized facilities through license modifications were unable to do so. Because of the freeze on 220 MHz applications, licensees relied on grants of Special Temporary Authority to modify their authorizations. On January 26, 1996, we adopted the *220 MHz Second Report and Order*.[18] In that proceeding, we re-opened the filing window for non-nationwide 220 MHz licensees who sought to obtain modification of the authorizations to relocate their base stations.[19]

B. LEGISLATIVE AND COMMISSION ACTIONS PURSUANT TO BUDGET ACT

23. On August 10, 1993, Congress enacted the Budget Act, in which it, *inter alia*, amended Section 332 of the Communications Act of 1934[20] to replace the existing land mobile radio regulatory scheme 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 [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."[21] PMRS is defined as "any mobile service (as defined in section 3) that is not a

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CMRS Third Report and Order, 9 FCC Rcd at 8077 (para. 184). On February 17, 1995, the Wireless Telecommunications Bureau released an Order extending the deadline to December 31, 1995. *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 Services, PR Docket 89-552, Order, 10 FCC Rcd 3356 (1995). On December 15, 1995, the Bureau released an Order providing for a further extension of the construction deadline contingent upon the closure of the Commission as a result of any furlough of Federal Government employees. The ensuing 23-day Federal furlough resulted in an extension of the construction deadline to February 2, 1996, pursuant to a formula established in the Bureau Order. *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 Services, PR Docket No. 89-552, Order, DA 95-2490 (released Dec. 15, 1995). Finally, the *220 MHz Second Report and Order* established a March 11, 1996, construction deadline, but licensees seeking modification of their authorization to relocate their base stations were granted until August 15, 1996, to construct their base station and place it in operation or commence service. *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 Services, PR Docket No. 89-552, 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, 11 FCC Rcd 3668 at 3674-5 (para. 26, 28) (1996) (*220 MHz Second Report and Order*) *recon. pending*.

[18] *220 MHz Second Report and Order*, 11 FCC Rcd 3668.

[19] *Id.*

[20] Communications Act of 1934, 47 U.S.C. §§ 151-614 (Communications Act).

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

commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission."[22]

24. 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.[23] 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.[24] 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. We also adopted a 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 continued to be regulated as private service providers for a three-year period, until August 10, 1996.[25]

25. In addition, the Budget Act granted the Commission the authority to use competitive bidding to choose among mutually exclusive applications for initial licenses.[26] Under Section 309(j)(2) of the Communications Act, the Commission may use competitive bidding if it finds that the principal use of the spectrum is reasonably likely to involve the offering of service to subscribers in return for compensation for such service. Also, Section 309(j)(2) requires the Commission to find that competitive bidding will promote the objectives described in Section 309(j)(3).

26. 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

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[22] *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(27) of the Communications Act, 47 U.S.C. § 153(27).

[23] 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), *recon. pending*.

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

[25] *Id.* at 1512-14 (paras. 278-84).

[26] Communications Act, § 309(j), 47 U.S.C. § 309(j).

CMRS services.[27] 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.[28]

27. On August 9, 1994, we adopted the *CMRS Third Report and Order*. We noted therein that a substantial 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.[29] We concluded, however, that most commenters had taken a relatively narrow view of the range and scope of CMRS competition, and that, for 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.[30]

28. After reviewing the pleadings, 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.[31] 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 the instant proceeding.[32] We also deferred any decision regarding the definition of initial applications, amendments to applications, and license modifications for the service to this proceeding.[33]

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[27] 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*).

[28] Budget Act, § 6002(d)(3).

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

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

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

[32] *Id.* at 8141 (para. 345).

[33] 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. *See CMRS Third Report and Order*, 9 FCC Rcd at 8147-48 (paras. 359-62). These concerns were addressed in the *220 MHz Second Report and Order*. *See 220 MHz Second Report and Order*, 11 FCC Rcd 3668.

C. 220 MHz Third Notice

29. On July 28, 1995, the Commission adopted the *220 MHz Third Notice*, which proposed a new framework for the operation and licensing of the 220-222 MHz band. In that proceeding, we proposed that: (1) Phase II 220 MHz spectrum be authorized through a combination of nationwide and regional licensing; (2) 220 MHz licensees be permitted to offer certain, currently unauthorized communications services on a primary basis, (*e.g.*, paging, and fixed operations); (3) we would preserve allocations of 220 MHz spectrum for eligibles in the Public Safety Radio Services and the Emergency Medical Radio Service (EMRS); and (4) mutually exclusive applications for all Phase II channels, with the exception of the channels allocated for public safety and EMRS entities, would be assigned through competitive bidding.

IV. DISCUSSION

A. Overview

30. Based on our review of the comments in the *CMRS Further Notice*, the *CMRS Third Report and Order*, and related CMRS decisions, and the status of the 220 MHz service under the current regulations, we decided, in the *220 MHz Third Notice*, to propose a revised regulatory scheme for the 220 MHz service. The proposed rules would govern all Phase II applicants and licensees in the 220 MHz service, as well as certain existing Phase I licensees. Our plan was 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. We received 33 comments and 15 reply comments, from a broad segment of interested parties, in response to the various proposals we made in the *Third Notice*. A list of commenters is found in Appendix C.

B. Channel Assignment and Service Area Rules

31. In the *Third Notice*, we indicated that by providing both nationwide and non-nationwide 220 MHz channels, we would enable a variety of services to be made available to the public. We therefore proposed that both nationwide and non-nationwide assignments continue to be made available in Phase II in the 220 MHz service. We now conclude that in Phase II licensing of the 220 MHz band, we should provide for both nationwide and non-nationwide channels. The channel assignment and service rules that we are adopting for nationwide and non-nationwide licensing of the 220 MHz band are discussed in the following sections.

1. Nationwide Licensing

a. *Background*

32. 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]

33. 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

[34] *220 MHz Report and Order*, 6 FCC Rcd at 2361 (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 (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] *220 MHz Report and Order*, 6 FCC Rcd 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 (Oct. 1, 1992).

[40] *Public Notice: Nationwide Lottery*, 58 Fed. Reg. 09174.

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.

b. *In General*

(1) Proposal

34. In the *Third Notice* we found, citing the experience in the nationwide narrowband PCS auction, that there was an apparent demand in the mobile communications marketplace for nationwide licenses. We also found nationwide licenses would increase competition among nationwide wireless communications providers and would help meet future customer demand for nationwide service. We tentatively concluded that the 30 channels originally designated for nationwide, non-commercial use should continue to be designated for nationwide operations. We sought comment on whether these channels should be so designated or whether they should be made available for some form of non-nationwide operations.[43]

(2) Comments

35. No commenters argue against a designation for nationwide channels. Metricom, in supporting a nationwide channel designation, argues that, without a nationwide designation, carriers seeking to offer nationwide services would be forced to acquire five regional licenses or more than 150 EA licenses.[44] Pagenet favors nationwide licensing because, in its view, there clearly is consumer demand for nationwide services.[45]

(3) Decision

36. We conclude that, recognizing the consumer demand for nationwide services, the 30 channels originally designated for nationwide use should continue to be allotted for

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[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).

[43] *Third Notice*, 11 FCC Rcd at 207 (para. 33).

[44] Metricom Comments at 9.

[45] Pagenet Comments at 4.

nationwide operations. Nationwide licenses will alleviate the problem of licensees having to aggregate smaller licensed service areas in order to provide their customers with nationwide service. Also, since potential competitive services have designations for nationwide service, a nationwide designation in this service will lead to increased competition among those services. Licensees authorized on these channels will be permitted to construct stations and place them in operation anywhere in the Nation so long as licensees ensure that: (1) they operate their stations in accordance with the provisions of Sections 1.1301 through 1.1319 of our Rules (Procedures Implementing the National Environmental Policy Act of 1969); (2) they operate their stations in compliance with their air safety responsibilities, as outlined in Part 17.6 of our Rules; and (3) they are in compliance with all applicable international agreements (*e.g.*, Section 90.715 relating to operation in U.S./Mexican border areas).

c. ***Non-Commercial Channel Set-Aside***

(1) Proposal

37. In the *Third Notice*, we noted that we previously did not decide to set aside 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."[46] With our Phase I authorization of 3,800 non-nationwide licenses, which will be used for both commercial and non-commercial purposes, we believed that we had taken steps to promote the development of narrowband technology, as envisioned in the *220 MHz Report and Order*. We tentatively concluded, therefore, that there should be no set-aside for non-commercial channels in Phase II licensing, and that nationwide channels should be made available equally to all applicants. We sought comment on this tentative conclusion.[47]

(2) Comments

38. Several commenters urge the Commission to maintain a non-commercial set-aside for the 220 MHz service.[48] Global, 360, and Airborne argue that the Commission originally designated a non-commercial set-aside based on perceived demand on the part of large companies to meet their internal communication needs.[49] Several commenters argue that there

[46] *220 MHz Report and Order*, 6 FCC Rcd at 2361 (para. 36).

[47] *Third Notice*, 11 FCC Rcd at 208 (para. 34).

[48] Airborne Comments at 2; Comtech Comments at 2-4; Comtech Reply at 3; Global Comments at 2-3; 360 Comments at 2; ITA Comments at 3-6; Columbia Reply at 7; AMTA Comments at 10; AMTA Reply at 7.

[49] Global Comments at 2-3; 360 Comments at 2; Airborne Comments at 2.

is a continuing demand for a non-commercial set-aside in this service.[50] Some commenters contend that the fact that there are 33 applications for the nationwide, non-commercial licenses proves this demand still exists.[51] Several commenters reason that these companies would not have spent their time and funds applying for these licenses if they had no need for them.[52] AMTA states that companies still need these non-commercial licenses to meet their critical internal communication needs.[53] Airborne, Fleet, UTC, and Columbia state in their comments that, if they are awarded one of these licenses, they will use the license to meet internal communication needs.[54]

39. Several commenters argue that, for reasons such as cost,[55] high demand for commercial services,[56] and inability to meet companies' technical requirements,[57] commercial services are not able adequately to fulfill their internal communications needs.[58] Ericsson contends that the pending applications illustrate that the primary use of these 220 MHz spectrum licenses will not be commercial.[59] ITA argues that the Commission has the authority to require additional information from the applicants to ensure that potential licensees will use the spectrum internally.[60] Furthermore, Comtech also argues that narrowband technology still needs to be promoted and that a non-commercial set aside will spur growth in this area.[61]

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[50] Airborne Comments at 2; AMTA Comments at 10; AMTA Reply at 7; Columbia Reply at 7; Comtech Reply at 3; Global Comments at 2-3; ITA Comments at 3-6; 360 Comments at 2.

[51] AMTA Comments at 10; AMTA Reply at 7; Global Comments at 2; 360 Comments at 2; Columbia Reply at 5.

[52] Global Comments at 3; 360 Comments at 2.

[53] AMTA Reply at 7.

[54] Airborne Comments at 2; Fleet Comments at 2; UTC Comments at 2-3; Columbia Reply at 7.

[55] Airborne Comments at 2; ITA Comments at 6.

[56] Airborne Comments at 2.

[57] Airborne Comments at 2; ITA Comments at 6-8.

[58] Airborne Comments at 2; ITA Comments at 6-8.

[59] Ericsson Comments at 2.

[60] ITA Comments at 8.

[61] Comtech Comments at 3-4.

40. Other commenters argue that there should not be a set-aside for non-commercial nationwide use in the 220 MHz service.[62] Pagenet contends that, with the advances that have been made in efficient use of the spectrum, it is hard to envision any business with internal communication needs which will require the total spectrum allotted for each 220 MHz authorization.[63] U.S. Mobilcomm contends that, since the Commission's rules allow for the leasing of excess capacity, there is already a *de facto* commercial allotment of this spectrum.[64] Pagenet alleges that a non-commercial set-aside will do nothing to encourage the development and efficient use of the 220 MHz band.[65] U.S. Mobilcomm and Pagenet argue that, if the spectrum is redesignated, marketplace economics will ensure that licensees will use the spectrum to the fullest possible extent.[66] Metricom contends that redesignating this spectrum for commercial use will open the nationwide spectrum to a myriad of uses that would provide a variety of services to consumers.[67] Pagenet points out that wide-area or nationwide service needs of individual companies can be met by commercial operators.[68]

41. Several commenters point out that the original reason for the non-commercial set-aside was to encourage development of 5 kHz technology, and not to satisfy perceived demand for non-commercial use.[69] Metricom argues that this goal has been achieved through the authorization of 3,800 licenses for 220 MHz services.[70] SMR and U.S. Mobilcomm state that narrowband technology has been widely developed and employed.[71]

(3) Decision

42. We find that it would be in the public interest to also allow commercial operations on the channels formerly designated solely for non-commercial operations. Our

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[62] Metricom Comments at 8-9; Pagenet Comments at 8-9; Pagenet Reply at 16-17; SMR Comments at 7-9; SMR Reply at 5-6; U.S. Mobilcomm Comments at 4.

[63] Pagenet Comments at 8.

[64] U.S. Mobilcomm Comments at 4. *See also* Pagenet Reply at 16.

[65] Pagenet Comments at 8.

[66] U.S. Mobilcomm Comments at 4; Pagenet Comments at 8-9.

[67] Metricom Comments at 9.

[68] Pagenet Comments at 8.

[69] Metricom Comments at 8; SMR Comments at 8 n.7; SMR Reply at 5 n.12; U.S. Mobilcomm Comments at 4 n.4.

[70] Metricom Comments at 8.

[71] SMR Comments at 8 n.7; SMR Reply at 5-6; U.S. Mobilcomm Comments at 4 n.4.

decision is based in part upon our conclusion that making the spectrum available for both commercial and non-commercial use is an effective means of promoting efficient use of the spectrum. First, the parties in this proceeding demonstrate apparent demand for nationwide spectrum for the provision of commercial services to the public.[72] Second, we think that allowing Phase II 220 MHz nationwide licensees to partition their licenses[73] and, in addition, proposing to permit them to disaggregate their spectrum[74] should also help to meet the needs of non-commercial users. Third, we believe that companies may be able to meet some of their internal communications needs through the purchase of service from a commercial provider.[75] Fourth, we are not precluding a nationwide licensee from using some or all of its spectrum for internal communications. Thus, an applicant that is committed to the use of spectrum for non-commercial purposes will have the opportunity to acquire a license for the spectrum at auction, just as they might purchase a license from an existing licensee in the secondary market. Also, if the highest value for this spectrum (as determined by the marketplace) is internal communications, then the auction winner will use the spectrum for that use.

d. *Assignment of Nationwide Channels*

(1) Channel Assignment Method

(a) *Proposal*

43. In deciding the assignment methodology for resolving mutually exclusive applications for the 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. In proposing to make the 30 Phase II nationwide licenses available for both commercial and non-commercial use, we indicated in the *Third Notice* that we could not determine with absolute certainty, in advance of authorization, whether the primary use of this spectrum would be for licensees' internal use or for the provision of for-profit, subscriber-based services. Based on a review of our records, we tentatively concluded that the vast majority of the 59,000 applicants for 220 MHz non-nationwide stations intended to use their authorized spectrum to provide services to subscribers on a for-profit basis.[76]

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[72] *See, e.g.,* Pagenet Reply at 16; SMR Reply Comments at 7; U.S. MobilComm Comments at 4.

[73] See para. 308, *infra.*

[74] See para. 321, *infra.*

[75] United Parcel Service, for example, is meeting its needs for a nationwide data network by obtaining cellular services from an alliance consisting of McCaw, GTE Mobile Communications, PacTel Cellular, and Southwestern Bell Mobile Systems. *Special Mobile Phone News Subscriber Supplement Mobile Data: Lead, Follow or Get Out of the Way,* Mobile Phone News, Oct. 8, 1992.

[76] *Third Notice,* 11 FCC Rcd at 209 (para. 36).

44. Although we recognized that 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 believed that the fact that most non-nationwide applicants apparently intended to use the channels for commercial use was a strong indication that this will also likely be the principal use of the spectrum by prospective nationwide licensees. We thus tentatively concluded 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, mutually exclusive applications for initial licensing of these channels should be assigned by competitive bidding.[77]

(b) ***Comments***

45. Pagenet notes that there is no doubt that once this spectrum is awarded licensees in fact will use the spectrum for commercial, for-profit activities.[78] ITA, UTC, and Ericsson argue, however, that there is no evidence to indicate that the current applicants for these channels would offer commercial services.[79] UTC also notes that even if the Commission concludes that the current applicants would be likely to offer subscriber-based service, the auction statute does not compel the Commission to use competitive bidding.[80]

(c) ***Decision***

46. Based on our analysis in the *Third Notice*, we adopt our proposal to assign mutually exclusive applications for nationwide licenses through competitive bidding. In the *Competitive Bidding Second Report and Order*, we found that the Commission must look to the service rather than the individual licenses to determine whether the principal use of the spectrum is reasonably likely to meet the criteria set forth in Section 309(j).[81] The three commenters who maintain that the use of this spectrum will be for non-commercial purposes do so on the basis of the most likely principal use by *current* 220 MHz applicants. Even if we were to agree *arguendo* with the claims made by these commenters, we do not believe it would be reasonable or prudent to base our analysis concerning the principal use of this spectrum solely on the likely principal use by current applicants. These applicants applied for non-commercial licenses; potential licensees who want to use this spectrum for commercial

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[77] *Id.*

[78] Pagenet Comments at 7; Pagenet Reply at 5.

[79] UTC Comments at 6; ITA Comments at 8; Ericsson Comments at 2.

[80] UTC Comments at 7.

[81] Implementation of Section 309(j) of the Communications Act--Competitive Bidding, PP Docket No. 93-253, Second Report and Order, 9 FCC Rcd 2348, 2354 (para. 34) (1994) (*Competitive Bidding Second Report and Order*).

purposes would not have applied for these licenses during the original filing period because the licenses were designated for non-commercial use.

47. There is no evidence in the record which contradicts our tentative conclusion in the *Third Notice* that, if the 30 Phase II nationwide channels are available to all prospective applicants, then the principal use of the spectrum is most likely to be for the transmission or reception of communications signals to subscribers for compensation. In reaching the decision that this spectrum should be auctioned, we find that assigning this spectrum through competitive bidding will promote achievement of our legislative mandate to ensure an "efficient . . . Nation-wide . . . radio communication service with adequate facilities at reasonable charges . . . ."[82] We also conclude that use of competitive bidding to assign this spectrum contributes to our statutory obligation to seek to promote the development of new technologies and service to benefit the public,[83] and to seek to promote efficient and intensive use of the spectrum.[84]

(2) Channel Block Sizes

(a) *Proposal*

48. In the *220 MHz Report and Order*, we assigned the 30 nationwide, non-commercial channels in two five-channel and two 10-channel blocks.[85] In the *Third Notice* we proposed to allow future 220 MHz licensees to offer a wider variety of communications services than are currently permitted in the 220 MHz service. We noted that, in order to provide these services, nationwide licensees may require more spectrum than would be available in an authorization consisting of only five 5 kHz channels. We therefore proposed to assign the 30 nationwide channels in Phase II in three 10-channel blocks (Channels 51-60, 81-90, and 141-150) of 5 kHz channels. We sought comment on this proposed channel assignment plan, as well as any alternative channel assignment proposals.[86]

(b) *Comments*

49. The only parties addressing this issue, Metricom and Pagenet, support the proposed channel assignment plan.[87] Metricom notes that many of the new services being

[82] Section 1 of the Communications Act, 47 U.S.C. § 151.

[83] Section 309(j)(3)(A) of the Communications Act, 47 U.S.C. § 309(j)(3)(A).

[84] Section 309(j)(3)(D) of the Communications Act, 47 U.S.C. § 3039(j)(3)(D).

[85] *220 MHz Report and Order*, 6 FCC Rcd at 2361 (paras. 35-36).

[86] *Third Notice*, 11 FCC Rcd at 209-10 (para. 37).

[87] Metricom Comments at 10; Pagenet Comments at 9-10.