proposed modification which crosses a DFA boundary would be the ultimate location of the station.[320]

170. The *220 MHz Second Report and Order* sets out a clear and unambiguous framework governing the maximum distance licensees will be permitted to move under the modification procedure. Under this framework, contrary to the assertions in the record, the defining element of a proposed modification is *not* the ultimate location of the base station — the defining element is based on the *initially authorized location*. Under the modification procedure the Commission adopted, licensees with base stations authorized *inside* any DFA are permitted to relocate their base stations up to one-half the distance over 120 km toward any authorized co-channel base station, to a maximum distance of 8 km.[321] Licensees with base stations authorized *outside* the boundaries of any DFA are permitted to relocate their base stations up to one-half the distance over 120 km toward any authorized co-channel base station, to a maximum distance of 25 km.[322]

171. The *220 MHz Second Report and Order* provided for only one qualification to these two rules — if a licensee moves from a site outside a DFA to a site within a DFA, the licensee may relocate only 8 km inside a DFA boundary line.[323] The reason for this qualification is that the Commission concluded that a licensee seeking to relocate from outside a DFA to within a DFA would not require a 25 km radius to locate an available site. Moreover, the 8 km restriction was designed to prevent a licensee who chose to relocate from outside a DFA to within a DFA from having a greater geographic area within which to locate a new site than a licensee that is authorized within the DFA.

172. The Commission found that this modification procedure would enable 220 MHz licensees to provide service in the geographic area they are authorized to serve pursuant to their initial applications, while accommodating their need to relocate their base stations for technical or other legitimate factors.[324] The Commission reasoned that a licensee situated in a DFA should be able to find an alternative base station site within an 8 km radius due to the multiplicity of base station sites in urban areas.[325] On the other hand, the Commission

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[320] Incom Second Order Petition at 16.

[321] *220 MHz Second Report and Order*, 11 FCC Rcd at 3670 (para. 9).

[322] *Id.*

[323] *Id.*

[324] *Id.* at 3671 (para. 10).

[325] *Id.* at 3670-71 (paras. 8-9).

concluded in the *220 MHz Second Report and Order* that the availability of sites in areas outside a DFA might be less numerous and, therefore, a licensee should be given a 25 km radius within which to find an alternative site.[326]

173. The petitioners are asking that we reconsider the Commission's decision allowing moves up to a maximum distance of 8 km if the licensee is moving from a location within a DFA, and instead permit such a licensee to move to a location outside that DFA up to a maximum distance of 25 km. We conclude, however, that the purpose of the modification procedure established by the Commission was to enable 220 MHz licensees to carry out their initial business plans by finding a useable site within their planned area of service. It was not the intent of the Commission for the modification procedure to serve as an opportunity for the licensee to abandon its original plan to serve a particular area in favor of a more attractive or different service area. In our view, a licensee, who is presently authorized within a DFA, would have available to it the same multiplicity of base station sites within an 8 km radius as a licensee who is moving from a location within a DFA to another location within a DFA. There is no basis in the record for a different conclusion.

174. The fact that a licensee initially authorized in a DFA *chooses* to seek a new base station site outside its DFA should not entitle that licensee to be treated in the same manner as a licensee that was initially *authorized* outside a DFA, and therefore, presumably *requires* a larger area, *i.e.*, 25 km, within which to find a new base station site. Petitioners have not presented us with any compelling evidence as to why we should make an exception for this class of licensees. Therefore, we affirm the Commission's determination that a licensee with an authorized base station located in a DFA will be permitted to relocate its base station up to one-half the distance over 120 km toward any co-channel licensee's initially authorized base station, to a maximum distance of 8 km, regardless of whether the relocated base station site is inside or outside the boundaries of the DFA.

2. Non-Relocation Modifications

175. AMTA, SMR, and USMC generally comment favorably upon the Commission's decision in the *220 MHz Second Report and Order* to adopt relocation procedures which provide 220 MHz licensees with flexibility to relocate from sites that are no longer available.[327] Petitioners, however, ask that the Commission reconsider or clarify its decision to exclude modifications, other than site relocation modifications, from the procedures adopted in the *220 MHz Second Report and Order* and permit licensees to file modifications of

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[326] *Id.*

[327] *See* AMTA Second Order Petition at 6; SMR Second Order Petition at 4; USMC Comments at 3.

operating parameters for their original or relocated facilities, including increases in their antenna height and power specifications up to maximum permitted values.[328]

176. AMTA, SMR, and USMC have various interpretations regarding what the *220 MHz Second Report and Order* actually provides regarding this issue. USMC interprets the *Order* as permitting a licensee who files a relocation modification to also apply for any other changes to its operating parameters at the new location, provided that it does not exceed the height and power limits set out in the Commission's rules.[329] USMC contends that the *220 MHz Second Report and Order* does not grant similar flexibility to a licensee that does not relocate.[330] Thus, USMC argues that the Commission's rules lead to an unintended and "absurd" result, forcing licensees to relocate if they were at otherwise sufficient locations but wanted to make changes to their height and power operating parameters in order to be able to provide better service.[331] SMR argues similarly that the *220 MHz Second Report and Order* unfairly discriminates against those licensees prepared to remain at their original locations but who need to modify certain specifications at their original site.[332] AMTA, on the other hand, seems to assume that the *220 MHz Second Report and Order* does not allow such changes even if the licensee is seeking to relocate.[333]

177. USMC argues that because co-channel separation distances are based on the maximum permissible height and power limits, any change within the limits will not cause harmful interference to other co-channel licensees and thus should be allowed.[334] AMTA and SMR assume that existing stations are likely to be protected under new rules based on the service contour that would result from a licensee operating at the maximum antenna height and power.[335] They argue that allowing such "minor" modifications will therefore have no

[328] AMTA Second Order Petition at 6-7; SMR Second Order Petition at 6.

[329] USMC Second Order Comments at 3.

[330] *Id.*

[331] *Id.*

[332] SMR Second Order Petition at 3-4.

[333] *See* AMTA Second Order Petition at 6-7.

[334] USMC Second Order Comments at 3.

[335] AMTA Second Order Petition at 7; SMR Second Order Petition at 6, citing *Third Notice*, 11 FCC Rcd at 237 (para. 99).

effect on the amount of service area available to future auction participants.[336] SMR further argues that licensees cannot be expected to have foreseen that they would be restricted to the specifications on their original licenses and, therefore, to prevent licensees from modifying their licenses would be unfair and contrary to the public interest.[337]

178. SMR also claims that many of the licensees seeking such modifications already are providing service to the public pursuant to STA grants which have authorized these changes.[338] SMR contends that the Commission's rationale that it was not appropriate to force licensees who have constructed their systems at relocated sites pursuant to STAs to discontinue such service applies equally to licensees who have constructed at their original sites and obtained STAs to operate with different technical parameters.[339] SMR further contends that forcing existing licensees to either change existing operations or settle for inferior technical specifications at original sites would be contrary to the goal to enhance the competitive potential of 220 MHz services in the CMRS marketplace because 220 MHz licensees would be less able to compete with the providers of other commercial mobile services.[340]

179. In the *220 MHz Second Report and Order*, the Commission sought to accommodate Phase I licensees that "for various unforeseen reasons, . . . are unable to construct at their authorized locations" and therefore provided such licensees with the opportunity to seek modification of their licenses to relocate their base stations.[341] The *220 MHz Second Report and Order* did not provide for licensees to modify their authorizations for any other reason, such as to change their power or antenna height, since, as explained more fully below,[342] such a ruling would have gone beyond the specific purpose for which the *220 MHz Second Report and Order* was adopted. Furthermore, we disagree with USMC's interpretation that the *220 MHz Second Report and Order* allows licensees who seek to relocate also to make changes in these parameters.

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[336] AMTA Second Order Petition at 7. *See also* SMR Second Order Petition at 6.

[337] SMR Second Order Petition at 4. *See also* AMTA Second Order Petition at 6-7.

[338] SMR Second Order Petition at 5.

[339] *Id.*

[340] *Id.* at 5-6.

[341] *220 MHz Second Report and Order*, 11 FCC Rcd at 3669 (para. 4).

[342] *See* para. 180, *infra*.

180. We continue to believe that the modification procedure set out in the *220 MHz Second Report and Order* appropriately accommodates the needs of licensees who were unable to construct at their authorized locations. The intention of the Commission in the *220 MHz Second Report and Order* was to craft carefully and narrowly drawn relocation parameters to provide relief to existing licensees but not to allow them to enhance their position in the marketplace. The interest of the Commission in establishing precise and narrow criteria was heightened by the fact that the Commission also had decided to take the unusual step of allowing these licensees to file modification applications without providing an opportunity for other potential applicants to file competing initial applications.[343] In light of these considerations, we find no basis for any general extension of the modification parameters to include changes to antenna height and power at a licensee's originally authorized location. We note, however, that, as discussed above,[344] licensees who decided not to relocate under the procedures announced in the *220 MHz Second Report and Order* will be permitted to make changes to their technical parameters as long as such modifications do not expand their 38 dBu service contour.

181. In addition, as a practical matter, because it is highly unlikely that a licensee who relocates its base station will be able to install its antenna at the identical height above average terrain specified in its existing authorization, we clarify that licensees seeking to relocate are also permitted to modify their antenna height above average terrain. On the other hand, it would not be necessary for a licensee who relocates to operate at the new site at a different power level, and thus the *220 MHz Second Report and Order* does not allow a licensee who relocates to change its power level.[345]

182. If, however, as a result of raising the antenna height, the height and power combination exceeds the provisions of the ERP vs. Antenna Height Table in Section 90.729 of the Commission's Rules,[346] the rules require that the licensee's authorized power shall be reduced accordingly so that the operations of the licensee remain in compliance with the provisions of that section. Any applicant seeking to relocate and to alter operating power levels is permitted to relocate (if the application is in conformance with applicable rules), but the *220 MHz Second Report and Order* does not establish any authorization pursuant to which the applicant may alter operating power levels. We note that after a licensee relocates in

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[343] *See 220 MHz Second Report and Order*, 11 FCC Rcd at 3669 (para. 4).

[344] *See* paras. 97-98, *supra*.

[345] We note that if a licensee who did not seek to relocate believed it was impossible to remain at the same antenna height above average terrain at the original location there is nothing in the *220 MHz Second Report and Order* that would prevent such a licensee from applying for a waiver of the Commission's rules.

[346] 47 C.F.R. § 90.729.

accordance with the Commission's modification procedures and establishes its 38 dBu service contour, the licensee, as outlined in paras. 95-106, *supra*, will be able to make changes to its authorization, including its power level, provided that doing so does not expand its 38 dBu service contour.

183. As for licensees who were granted STAs at their original locations but at increased height or power, those STAs were granted only on a temporary basis, and they conferred no guarantee that the licensee would be able to obtain a permanent authorization in accordance with those changes. In addition, a licensee with an STA to operate at different height or power parameters would not be precluded from offering service if the licensee is not granted permanent authorization at those parameters. Only the coverage area would be altered.

184. Finally, we note that petitioners base their arguments in part on the assumption that existing stations are likely to be protected under new Phase II rules based on a service contour.[347] AMTA cites the 800 MHz and 900 MHz SMR bands as cases in which the Commission has chosen to protect incumbent licensees to their 22 dBu or 40 dBu contours.[348] Petitioners further assert that such protection is likely to be based on maximum allowable height and power.[349] In fact, the protection afforded Phase I licensees by future Phase II licensees has been addressed by the Commission in the *220 Mhz Third Report and Order*,[350] where the Commission determined that Phase I licensees would be protected to their 38 dBu service contour based on *actual*, as opposed to maximum, height and power. We have affirmed that decision in this Order.[351]

3. Special Temporary Authority

185. In the *220 MHz Second Report and Order* the Commission recognized that a number of licensees had obtained STAs to operate base stations at alternative locations and that some of these locations would not meet the permissible modification requirements established in the *220 MHz Second Report and Order*.[352] The Commission believed that it

[347] AMTA Second Order Petition at 7; SMR Second Order Petition at 6.

[348] AMTA Second Order Petition at 7 n.4.

[349] *Id.* at 7; SMR Second Order Petition at 6.

[350] *220 MHz Third Report and Order*, 12 FCC Rcd at 11026 (para. 174)

[351] *See* paras. 97-98, *supra*.

[352] *220 MHz Second Report and Order*, 11 FCC Rcd at 3673 (para. 15).

would not be appropriate to require licensees to discontinue operations if they had obtained STAs to operate at alternate locations and were currently operating or planning to operate at such locations.[353]

186. The *220 MHz Second Report and Order* therefore provided that a licensee who had been granted an STA to operate at an alternative site would be permitted to seek permanent authorization at the STA site if the licensee certified that it had (1) constructed its base station and placed the base station in operation, or commenced service at that site; or (2) taken delivery of its base station transceiver on or before the adoption date of the *220 MHz Second Report and Order*.[354] The Commission provided that such licensees were permitted to seek permanent authorization at the STA site regardless of whether locating at the STA site would be in strict conformance with the relocation distance limitations prescribed in the modification procedure.[355]

187. The petitioners ask the Commission to reconsider or clarify that licensees who filed STA requests not later than the adoption date of the *220 MHz Second Report and Order* and were granted STAs after January 26, 1996 (the adoption date of the *220 MHz Second Report and Order*), and who otherwise meet the relocation requirements of Section 90.753(c)(2) of the Commission's Rules, will be allowed to seek permanent authorization at their STA sites.[356] Incom concludes that a licensee who had constructed its base station and had placed it in operation or commenced service as of January 26, 1996, must have been granted an STA by January 26, 1996 — otherwise operation at that site would be in contravention of the Commission's Rules.[357] Petitioners claim, however, that it is not clear whether licensees who had only taken delivery of base station transceivers by January 26, 1996, must also have been granted STAs by that date.[358]

188. Petitioners argue that the Commission's speed in processing one STA compared to another is out of the licensee's control and provides no basis for distinguishing among

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[353] *Id.*

[354] *Id.* at 3673 (paras. 15-16).

[355] *Id.*

[356] AMTA Second Order Petition at 8; Incom Second Order Petition at 6, 9-10; PERS Second Order Petition at 6-7; SMR Second Order Petition at 8.

[357] Incom Second Order Petition at 7.

[358] *See* AMTA Second Order Petition at 8; Incom Second Order Petition at 7; PERS Second Order Petition at 2-3; SMR Second Order Petition at 7.

licensees.[359] PERS contends that it is long-standing Commission policy that similarly situated applicants must be treated similarly under the rules.[360] Petitioners also claim that by imposing a cut-off based solely on the grant of an STA request, two similarly situated applicants for modification based on STA requests filed on the same day could be treated dissimilarly, determined only by the timing of the Commission's review of the STA request.[361] Petitioners contend that such disparate treatment could be construed as arbitrary and capricious, and argue that the Commission has typically triggered a moratorium on acceptance of applications, or instituted cut-offs, based upon a deadline for filing applications.[362]

189. Incom also contends that since STAs are generally processed expeditiously, under industry practice it is common for preparatory construction work to be done prior to submitting an STA request.[363] Thus, according to Incom, licensees who took delivery of equipment prior to January 26 and whose STAs were pending at the Commission but not granted by that date have frequently devoted the same time and effort to the construction process as licensees whose STAs were granted by January 26, 1996.[364] Furthermore, PERS states that all of the licensees whose systems are managed by PERS have already constructed or are in the process of constructing their base station facilities and are able to begin

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[359] *See* AMTA Second Order Petition at 8; Incom Second Order Petition at 8; PERS Second Order Petition at 3-4; SMR Second Order Petition at 8.

[360] PERS Second Order Petition at 4.

[361] *See* AMTA Second Order Petition at 8; Incom Second Order Petition at 8; PERS Second Order Petition at 4; SMR Second Order Petition at 8.

[362] *See* Incom Second Order Petition at 9-10. Incom cites the 900 MHz service, in which the Commission granted primary site status to all pending 900 MHz applications filed as of August 9, 1994, rather than restricting such relief to those applications granted as of that date. Incom also references the Commission's moratorium on the acceptance for filing of 929 MHz and 930 MHz applications, based on the filing date. *See also* PERS Second Order Petition at 4 n.6. PERS cites (1) the setting of a filing cut-off for 220 MHz applications as of the date filed; (2) the freezing of acceptance of applications in the 800 MHz specialized mobile radio services as of August 9, 1994; (3) granting 900 MHz licensees primary status for their secondary sites as of the date the applications were filed rather that the date granted; (4) the *Part 22 Rewrite Order*, in which the Commission provided for the reconsideration of dismissed applications in light of new application procedures taking effect while petitions for reconsideration or applications for review are still pending. *See* Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, CC Docket No. 92-115, Report and Order, 9 FCC Rcd 6513 (1994) (*Part 22 Rewrite Order*).

[363] Incom Second Order Petition at 9.

[364] *Id.*

providing service to the public.[365] PERS claims that if these licensees are not allowed to file for permanent authorizations at their STA sites and begin providing service to the public, it would undermine the Commission's goal of providing valuable service to the public in the most efficient manner.[366]

190. We conclude, notwithstanding the claims made in the record, that it was the Commission's intent in the *220 MHz Second Report and Order* that the relief provided for licensees operating under STAs be restricted to those licensees who had been granted STAs on or before January 26, 1996. The Commission made this clear, for example, in the provisions of the *220 MHz Second Report and Order* dealing with STAs, by referring to licensees who "have obtained" STAs.[367] In addition, the *220 MHz Second Report and Order* provides that "any licensee that *has been granted* an STA to operate at an alternative site" will be permitted to seek permanent authorization at that site in accordance with the procedures for filing modification applications established in the *Order* if the licensee has constructed its base station and has placed it in operation, or commenced service at that site,[368] or has taken delivery of its base station transceiver on or before the adoption date of the *220 MHz Second Report and Order*.[369]

191. We find no basis to conclude that the January 26, 1996, deadline is arbitrary or capricious. The Commission grants STAs to licensees upon a showing of need. Prior to January 26, 1996, the Commission granted STAs because 220 MHz licensees would have been unable to operate at base station sites other than their initially authorized locations, because the Commission had not yet announced final modification rules for the 220 MHz service. As of January 26, 1996, the final modification and relocation procedures had been announced and thus there no longer was any need for an STA.[370] After that date it would have only been necessary to issue an STA in order to meet a licensee's needs in an emergency situation.

192. Petitioners speculate that two similarly situated applicants who filed for STAs on the same date could be treated dissimilarly if one was granted an STA on or before January

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[365] PERS Second Order Petition at 5.

[366] *Id.*

[367] *220 MHz Second Report and Order*, 11 FCC Rcd at 3672-73 (paras. 13, 15).

[368] *Id.* at 3673 (para. 15) (emphasis added).

[369] *Id.* at 3673 (para. 16).

[370] STAs are always available to meet a licensee's needs in emergency situations.

26, 1996, and the other was granted an STA after January 26.[371] None of the petitioners, however, presents evidence of a situation in which this actually occurred. Furthermore, as the Commission has previously pointed out, when this issue was first raised in the United States Court of Appeals for the District of Columbia, in an Opposition to an Emergency Motion for Stay, "[t]he Land Mobile Branch quickly approved petitioners' [STA] applications (and every other application received by it on January 26 or filed on January 25) on the next business day, January 29."[372] None of these applications was granted on or before January 26.

193. Petitioners cite several cases in which the Commission established a cut-off date based on the filing of an application rather than on the grant of the application.[373] Incom cites the 900 MHz service, in which the Commission granted primary site status to all pending 900 MHz applications filed as of August 9, 1994, rather than restricting such relief to those applications granted as of that date.[374] Incom also references the Commission's moratorium on the acceptance for filing of 929 MHz and 930 MHz applications, based on the filing date.[375] All of the cases cited by petitioners, however, are distinguishable from the situation presented here. None of the cases cited involved STAs. STAs are issued in circumstances in which there is a need for special action and are always limited to a temporary authorization. All of the cited cases involved either license applications or applications for secondary authorizations. Furthermore, none of these cases involved the special circumstances present in this case, namely, that once the final modification and relocation procedures had been announced on January 26, 1996, licensees no longer had a need to obtain an STA.

194. As to those licensees who took delivery of their equipment and expended time and resources preparing their STA site for construction, but who waited to apply for an STA until late January, we note that an STA does not guarantee any right to obtain permanent authorization at the STA site. Further, there was no guarantee in the *Fourth Notice* that licensees who had been granted STAs would be able to relocate at their STA sites. While pre-grant construction may not be an uncommon practice, the Commission's rules provide that

[371] *See* AMTA Second Order Petition at 8; Incom Second Order Petition at 8; PERS Second Order Petition at 4; SMR Second Order Petition at 8.

[372] Opposition of the FCC to Petitioner's Emergency Motion for Stay, Case No. 96-1133, Motion filed Apr. 24, 1996, Opposition filed Apr 29, 1996, at 18.

[373] *See* Incom Second Order Petition at 9-10. *See also* PERS Second Order Petition at 4 n.6.

[374] Incom Second Order Petition at 10 n.3.

[375] *Id.* at 10.

licensees who construct prior to receiving an authorization do so at their own risk.[376] Licensees were able to apply for STAs at any time during the planning or construction of their base stations. They had no reason to delay filing their STA applications. At the time the *220 MHz Second Report and Order* was released the construction deadline was February 2, 1996. The Commission's regulations caution applicants to file STA applications at least 10 days prior to the date of proposed operation.[377] Therefore, a licensee who filed an STA application after January 23, 1996, could not reasonably have expected to receive an STA prior to the construction deadline.

195. For these reasons, we conclude that a licensee who had taken delivery of its base station transceiver on or before January 26, 1996, must have been granted an STA on or before January 26, 1996, in order to be allowed to seek permanent authorization at its STA site. We note that licensees who were not granted STAs on or before January 26, 1996, were permitted to modify their base station locations in accordance with the relocation rules set forth in Sections 90.753(a) and 90.753(b) of the Commission's Rules.[378]

4. Alternative Site Proposals

196. While the *220 MHz Second Report and Order* acknowledged that the modification procedure outlined in the *220 MHz Second Report and Order* would accommodate most 220 MHz licensees needing to relocate their base stations, the *220 MHz Second Report and Order* also recognized that in certain areas of the Nation it is possible that the technical characteristics of base station sites available under the relocation procedure may be considerably inferior to the technical characteristics of currently licensed sites and sites that may exist at nearby, more elevated locations.[379] In these cases, the Commission contemplated that licensees would seek a waiver of the modification procedures the Commission adopted in the *220 MHz Second Report and Order*.[380] AMTA and Incom express concern that the *220 MHz Second Report and Order* did not provide for a protection mechanism or for a tolling of the construction period for licensees filing such waiver requests.[381] They argue that if a

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[376] *See* Section 90.169(c) of the Commission's Rules, 47 C.F.R. § 90.169(c).

[377] *See* Section 90.145 of the Commission's Rules, 47 C.F.R. § 90.145.

[378] 47 C.F.R. §§ 90.753(a), 90.753(b).

[379] *220 MHz Second Report and Order*, 11 FCC Rcd at 3671 (para. 11).

[380] *Id.*

[381] AMTA Second Order Petition at 9; Incom Second Order Petition at 11-12.

waiver request is ultimately denied, a licensee would lose its authorization for failure to construct by March 11, 1996.[382]

197. Incom claims that such a result would deter licensees from seeking a waiver.[383] Petitioners therefore request that the Commission permit waiver applications to include an alternative site proposal which complies with the Commission's rules, and that the Commission give licensees additional time to construct at the alternative site if the waiver request is denied.[384] Petitioners argue that allowing such an alternative showing would be consistent with the recognition in the *220 MHz Second Report and Order* that alternative, albeit inferior sites may exist.[385] Petitioners also assert that such an alternative showing procedure is utilized for all public mobile services governed by Part 22,[386] and Incom argues that the Budget Act of 1993[387] would appear to require the Commission to extend the Part 22 waiver standard to the 220 MHz service since they are substantially similar services.[388]

198. Section 1.958 of the Commission's Rules provides that "[r]equests for waiver must . . . set forth reasons in support thereof including a showing that unique circumstances are involved and that there is no reasonable alternative solution within existing rules."[389] The *220 MHz Second Report and Order* provided that if a licensee believed that, due to unique terrain features, it wanted to apply for a waiver of the modification procedures established in the *220 MHz Second Report and Order*, it could choose to do so.[390] In the *220 MHz Second Report and Order* the Commission posed a clear and reasonable choice for 220 MHz licensees. The Commission did not provide licensees with the option of applying for a waiver while at the same time allowing them to attempt to retain their option to construct at an alternate, although inferior, site which complies with the rules.

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[382] AMTA Second Order Petition at 9; Incom Second Order Petition at 13.

[383] Incom Second Order Petition at 14.

[384] AMTA Second Order Petition at 9-10; Incom Second Order Petition at 12-15.

[385] AMTA Second Order Petition at 9-10; Incom Second Order Petition at 13.

[386] AMTA Second Order Petition at 9 n.5; Incom Second Order Petition at 12.

[387] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(d)(3)(B), 107 Stat. 312, 397 (1993) (Budget Act).

[388] Incom Second Order Petition at 12 n.5.

[389] 47 C.F.R. § 1.958.

[390] *220 MHz Second Report and Order*, 11 FCC Rcd at 3671 (para. 11).

199. Petitioners note that licensees may utilize an alternative showing procedure when applying for a waiver of the rules contained in Part 22.[391] Such a procedure is specifically provided for in Section 22.119 of the Commission's Rules, which also specifies the showing required for a waiver of Part 22 Rules.[392] We note, however, that there is *no* parallel provision for alternative showing procedures for services licensed under Part 90 of the Commission's Rules. Under the Commission's general waiver rule for services licensed under Part 90, a waiver applicant must show that no reasonable alternative exists within existing rules.[393] Furthermore, the standard for granting waiver requests, as set forth in *Wait Radio*, is that "the very essence of waiver is the assumed validity of the general rule, and also the applicant's violation unless waiver is granted."[394] Thus, a licensee seeking a waiver of the Commission's rules to locate its base station at a site not permitted under the modification procedure must, in order to apply for a waiver, have no alternative available under the rules. If a licensee is able to offer an alternative relocation site, then, it could be argued that there is no reasonable basis for a waiver.

200. Therefore, a 220 MHz licensee seeking a waiver would need to show that site alternatives within the parameters of the Commission's relocation rules would be so inferior that they would preclude a viable system. To decide otherwise and permit licensees to make alternative site showings would not be consistent with this rule and also would impair one of the policy objectives set forth in the *220 MHz Second Report and Order*, *i.e.*, to provide existing licensees flexibility to complete construction of their systems and provide service while not unreasonably impairing the opportunity of potential competitors to obtain licenses in the 220 MHz service.[395] We believe that we provided sufficient flexibility to incumbent licensees by permitting them to relocate their base stations while at the same time insulating them from any competing filings by new applicants. To go further, as petitioners urge us to do, would risk an adverse impact on the competitive development of the 220 MHz service.

201. The Commission provided licensees with a reasonable framework for modifying their base station locations, and petitioners, in our view, have not presented persuasive arguments that the Commission should now change that framework to allow for alternative site proposals to accompany waiver requests. Furthermore, since we are affirming that licensees may not file alternative location proposals with a waiver request, we do not need to reach the

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[391] AMTA Second Order Petition at 9 n.5; Incom Second Order Petition at 12.

[392] 47 C.F.R. § 22.119.

[393] Section 1.958 of the Commission's Rules, 47 C.F.R. § 1.958.

[394] Wait Radio v. FCC, 418 F.2d 1153, 1158 (D.C. Cir. 1969).

[395] *220 MHz Second Report and Order*, 11 FCC Rcd at 3668 (para. 2).

question of whether we will allow licensees whose waiver requests are denied a reasonable period of time to construct their facilities at an alternative site. We note, however, that in the *220 MHz Second Report and Order* The Commission stated that the Commission will extend the deadline for a licensee to construct its station and place it in operation, or commence service, beyond August 15, 1996, by the number of days after June 1, 1996, that pass before a licensee's timely filed modification application is actually granted.[396] Therefore, a licensee who is granted a waiver after June 1, 1996, will have an adequate period of time to construct its station.

5. Other Waiver Issues

202. As we have discussed,[397] in the *220 MHz Second Report and Order* the Commission acknowledged that the modification procedure adopted therein would accommodate most 220 MHz licensees who need to relocate their base stations.[398] The *220 MHz Second Report and Order*, however, also recognized that in certain areas it may be possible that the technical characteristics of base station sites available under the modification procedure may be considerably inferior to the technical characteristics of currently licensed sites and sites that may exist at nearby, more elevated locations.[399] The Commission pointed out that such a scenario could exist, for example, in the Los Angeles or Seattle areas.[400] Therefore, the Commission stated that it would be appropriate to entertain waiver requests by licensees authorized in the Los Angeles and Seattle areas, as well as any other urban areas with comparable terrain features.[401]

203. In Touch expresses concern that the *220 MHz Second Report and* Order mentions only those waiver requests based on elevation differentials unique to certain DFAs, such as Los Angeles and Seattle.[402] In Touch asks that the Commission clarify that waiver requests of the 8 km limitation based on unique DFA terrain issues other than simple

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[396] *Id.* at 3674 (para. 23).

[397] *See* para. 172, *supra*.

[398] *220 MHz Second Report and Order*, 11 FCC Rcd at 3671 (para. 11)

[399] *Id.*

[400] *Id.*

[401] *Id.*

[402] In Touch Second Order Petition at 2.

elevation differentials of the site location will be accepted.[403] In support of its request In Touch asserts that in Atlanta, Stone Mountain is situated in the middle of one side of the original service area for a number of Atlanta licensees, and therefore relocation outside the 8 km limitation is required.[404]

204. In Touch also contends that inside the Atlanta DFA there are substantial rural areas where the licensee's original site is not available and no other available sites exist within 8 km.[405] In Touch therefore requests that the Commission reconsider or clarify that waiver requests of the 8 km relocation limitation will also be permitted to include situations where the licensee can demonstrate that there are no existing antenna sites available to it within the 8 km limitation.[406]

205. In Touch correctly points out that the *220 MHz Second Report and* Order does specifically mention one particular type of waiver request that the Commission will consider. There is nothing in the *220 MHz Second Report and Order*, however, that would prevent a licensee from seeking an appropriate and timely waiver of the Commission's rules if the licensee believes it has met the Commission's standard for waiver.[407] By mentioning one type of situation in the *220 MHz Second Report and* Order that the Commission believes may be appropriate for a waiver, the Commission did nothing to preclude other types of waiver situations. Therefore, we believe that no additional clarification is required on this point.

IV. PROCEDURAL MATTERS

A. Regulatory Flexibility Act

206. As required by the Regulatory Flexibility Act, the Commission has prepared a Supplemental Final Regulatory Flexibility Analysis (Supplemental FRFA) of the possible impact on small entities of the rules adopted in this Memorandum Opinion and Order on Reconsideration.[408] The Supplemental FRFA is set forth as Appendix C. The Office of Public Affairs, Reference Operations Division, will send a copy of the Memorandum Opinion

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[403] *Id.*

[404] *Id.*

[405] *Id.*

[406] *Id.* at 2-3.

[407] *See* Section 90.151 of the Commission's Rules, 47 C.F.R. § 90.151.

[408] 5 U.S.C. § 604.

and Order on Reconsideration, including the Supplemental FRFA, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with the Regulatory Flexibility Act.

B. Paperwork Reduction Act

207. This Order contains new information collection requirements that the Commission is submitting to the Office of Management and Budget requesting emergency clearance under the Paperwork Reduction Act.

C. Further Information

208. For further information concerning this rulemaking proceeding contact Marty Liebman, Mary Woytek, or Jon Reel, Policy Division at (202) 418-1310, or Frank Stilwell, Auctions and Industry Analysis Division, at (202) 418-0660, Wireless Telecommunications Bureau, Federal Communications Commission, Washington, D.C 20554.

V. ORDERING CLAUSES

209. Accordingly, IT IS ORDERED, that the petitions for reconsideration or clarification filed by American Mobile Telecommunications Association; Incom Communications Corporation, SEA, Inc., In Touch Services, Inc., Philip Adler dba Communications Management Company, and Aircom Communications, Inc.; In Touch Services, Inc.; Police Emergency Services, Inc. and Bostom and Associates Company; and SMR Advisory Group, L.C. with respect to the *220 MHz Second Report and Order* in PR Docket No. 89-552 and GN Docket No. 93-252, ARE GRANTED to the extent provided herein and otherwise ARE DENIED. This action is taken pursuant to Sections 4(i), 4(j), 303(d), 303(r), 309(j), 332, and 405 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 154(j), 303(d), 303(r), 309(j), 332, 405.

210. IT IS FURTHER ORDERED, that the petitions for reconsideration or clarification filed by American Mobile Telecommunications Association, Inc.; Comtech Communications, Inc.; Glenayre Technologies, Inc.; Global Cellular Communications, Inc., INTEK Diversified Corp.; Metricom, Inc.; National Communications Group, Capital Communications Group, Columbia Communications Group, Lonesome Dove Communications, All-American Communications Partners, and Shiner Bock Group; Personal Communications Industry Association; SEA Inc.; Rush Network Corp.; and SMR Advisory Group L.C. with respect to the *220 MHz Third Report and Order* in PR Docket No. 89-552 and GN Docket No. 93-252, ARE GRANTED to the extent provided herein and otherwise ARE DENIED. This action is taken pursuant to Sections 4(i), 4(j), 303(d), 303(r), 309(j), 332, and 405 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 154(j), 303(d), 303(r), 309(j), 332, 405.

211. IT IS FURTHER ORDERED that the Commission's Rules ARE AMENDED as set forth in Appendix D. IT IS FURTHER ORDERED that the provisions of this Order and the Commission's Rules, as amended in Appendix D, SHALL BECOME EFFECTIVE 60 days after publication of this Order in the Federal Register

212. IT IS FURTHER ORDERED that a Public Notice will be issued by the Wireless Telecommunications Bureau following the adoption of this Order announcing when applications must be filed by Phase I, non-nationwide licensees in order to enable such licensees to comply with the requirement that they modify their authorization to reflect the ERP at which they were operating at the time the decisions adopted in the *220 MHz Third Report and Order* became effective.

213. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this Order, including the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

APPENDIX A

List of Parties Filing Petitions for Reconsideration or Clarification and Comments Concerning Second Report and Order

Petitions

American Mobile Telecommunications Association (AMTA)
Incom Communications Corporation, SEA, Inc., In Touch Services, Inc., Philip Adler dba Communications Management Company, and Aircom Communications, Inc. (Incom)
In Touch Services, Inc. (In Touch)
Police Emergency Services, Inc. and Bostom and Associates Company (PERS)
SMR Advisory Group, L.C. (SMR)

Comments

US MobilComm, Inc. (USMC)

APPENDIX B

List of Parties Filing Petitions, Comments, and Reply Comments Concerning Third Report and Order

Petitions

American Mobile Telecommunications Association, Inc. (AMTA)
Comtech Communications, Inc. (Comtech)
Glenayre Technologies, Inc. (Glenayre)
Global Cellular Communications, Inc. (Global)
INTEK Diversified Corp. (INTEK)
Metricom, Inc. (Metricom)
National Communications Group, Capital Communications Group, Columbia Communications Group, Lonesome Dove Communications, All-American Communications Partners, and Shiner Bock Group (National)
Personal Communications Industry Association (PCIA)
SEA Inc. (SEA)
Rush Network Corp. (Rush)
SMR Advisory Group L.C. (SMR)

Comments

Arch Communications Group, Inc. (Arch)
INTEK
Metricom
Police Emergency Radio Services, Inc. (PERS)
SEA
SMR
USMC

Reply Comments

AMTA
Arch
Comtech
INTEK
PCIA
Small Businesses in Telecommunications (SBT)
SMR

APPENDIX C

Supplemental Final Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act (RFA),[1] a Final Regulatory Flexibility Analysis (FRFA) was incorporated in Appendix B of the *220 MHz Second Report and Order*[2] in and Appendix A of the *220 MHz Third Report and Order*[3] in this proceeding. The Commission's Supplemental Final Regulatory Flexibility Analysis (Supplemental FRFA) in this Memorandum Opinion and Order on Reconsideration reflects revised or additional information to that contained in those FRFAs. This Supplemental FRFA is thus limited to matters raised in response to the *220 MHz Second Report and Order* or the *220 MHz Third Report and Order* that are granted on reconsideration in the Memorandum Opinion and Order on Reconsideration. This Supplemental FRFA conforms to the RFA, as amended by the Contract with America Advancement Act of 1996 (CWAAA).[4]

I. Need For and Objectives of the Action

The actions taken in this Memorandum Opinion and Order on Reconsideration are in response to petitions for reconsideration or clarification of the service rules adopted in the *220 MHz Third Report and Order* to implement service in the 220-222 MHz frequency band (220 MHz service), and in response to petitions for reconsideration or clarification of license modification rules adopted in the *220 MHz Second Report and Order*. The petitions are denied, with the following exceptions. The rule changes adopted in the Memorandum Opinion and Order on Reconsideration grant in part the petitions that Phase I licensees be permitted to modify their authorizations to the extent that Phase I licensees will be permitted to make modifications to their authorizations which do not expand their 38 dBu service contours. Phase I licensees will also be permitted to convert their site-by-site licenses to a single license. Our objective in permitting such modifications is to provide Phase I licensees with maximum flexibility while striking a fair balance between the interests of incumbent licensees and Phase II licensees.

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[1] *See* 5 U.S.C. § 603.

[2] *220 MHz Second Report and Order*, 11 FCC Rcd 3668. Certain abbreviated references used in the Memorandum Opinion and Order on Reconsideration are also used in this Appendix.

[3] *220 MHz Third Report and Order*, 12 FCC Rcd 10943

[4] Pub. L. No. 104-121, 110 Stat. 846 (1996), codified at 5 U.S.C. §§ 601-612. Title II of the CWAAA is The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

We also grant the petition that the antenna height limitation for stations operating in the 220 MHz band be associated with the HAAT of the station's transmitting antenna, rather than the antenna's height above ground. Our objective is to eliminate instances of licensees inadvertently causing interference to adjacent channel operations.

We remove the 220 MHz service spectrum efficiency standard, and thus grant the petition that we eliminate the efficiency standard as applied to paging operations. In light of the observations of petitioners regarding the unavailability of equipment that would meet the standard, we now believe that imposition of the standard could inadvertently deny the provision of certain services in the 220-222 MHz band, contrary to our intent in the *220 MHz Third Report and Order*. Our objective in removing the standard is to facilitate the provision of a wide range of services in the 220 MHz band.

In addition, the Commission addresses certain issues that the *Part 1 Third Report and Order* directs be resolved in this proceeding.[5] Consistent with the conclusions reached in the *Part 1 Third Report and Order*, we eliminate installment payment plans for small and very small businesses participating in the 220 MHz service auction, and increase the level of bidding credits for such entities. We will also amend the Commission's rules to permit auction winners to make their final payments within 10 business days after the applicable deadline, provided that they also pay a late fee of 5 percent of the amount due.

II. Summary of Significant Issues Raised by the Public in Response to the Final Regulatory Flexibility Analyses

No comments were received in direct response to the FRFAs. Small Business in Telecommunications (SBT) commented that the Commission's position regarding license modifications appeared to express more concern for future licensees than for incumbent licensees who are currently providing service to the public.[6] The actions taken in this Memorandum Opinion and Order on Reconsideration reflect the Commission's recognition that licensed sites may become unusable for a variety of reasons. The Commission is persuaded by arguments that, in order to maintain the economic and technical viability of a licensee's 220 MHz service, Phase I incumbent licensees should be permitted to modify their authorizations as long as doing so does not expand their service contour. Modifications to

[5] The Commission, in the *Part 1 Third Report and Order*, temporarily suspended the use of installment payments and stated that it would address installment payment financing for licenses in the 220 MHz service in a manner consistent with this decision in the 220 MHz reconsideration. *See Part 1 Third Report and Order*, 13 FCC Rcd at 384 (para. 7).

[6] SBT Third Order Reply at 3-4.

Phase I licensees' authorizations which do not expand their 38 dBu service contour will therefore be permitted.

Phase I licensees will also be able to add new transmitters within their 38 dBu service contour without prior authorization from the Commission so long as signals from such transmitters do not expand the 38 dBu service contour. These modification applications will not be subject to public notice and petition to deny provisions in the Commission's rules, and will not be subject to mutually exclusive applications. In addition, we will allow Phase I 220 MHz licensees to convert their site-by-site licenses to a single license authorizing operations throughout the incumbents' contiguous and overlapping 38 dBu service contours of their constructed multiple sites. We believe this decision strikes a fair balance between the interests of incumbents and Phase II licensees.

The Memorandum Opinion and Order on Reconsideration, as provided in the *Part 1 Third Report and Order*, eliminates installment payment financing for small and very small businesses participating in the Phase II 220 MHz service auction. At the same time, in order to offer small and very small businesses a meaningful opportunity to participate in the auction, the Commission has offered higher bidding credits, consistent with those available through a loan.

III. Description and Estimate of the Number of Small Entities to Which Rules Will Apply

A. Phase II Licensees

As in the FRFAs, the service regulations we adopt to implement the Phase II 220 MHz service would apply to all entities seeking a Phase II 220 MHz license. As discussed in the FRFAs, using the Small Business Administration (SBA) definitions applicable to radiotelephone companies and to cable and pay television services, a majority of 220 MHz service entities may be small businesses.

The Commission had not developed a more refined definition of small entities applicable to the 220 MHz service, prior to the *220 MHz Third Report and Order*, because the Phase II 220 MHz service is a new service. The RFA amendments were not in effect until after release of the *220 MHz Third Notice of Proposed Rulemaking*, and therefore no data was received establishing the number of small businesses associated with the Phase II 220 MHz service. In the *220 MHz Third Report and Order* we adopted criteria for defining small businesses and very small businesses for purposes of determining their eligibility for special

provisions such as bidding credits and installment payments.[7] The SBA has approved these definitions for Phase II licensees.[8] We will use the definitions in estimating the potential number of small entities applying for auctionable spectrum.

We defined a small business as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. Additionally, bidding credits and an installment payment plan were made available to each applicant that is a very small business, defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years.[9]

No parties submitting or commenting on the petitions for reconsideration giving rise to this Memorandum Opinion and Order on Reconsideration commented on the potential number of entities that would be small businesses or very small businesses, and we are unable to predict accurately the number of applicants for the Phase II 220 MHz service that would fit the definition of a small business or a very small business for competitive bidding purposes.

In the FRFAs, the Commission estimated that it would receive approximately 2,220 total applications for the Phase II 220 MHz service, *i.e.*, 2,000 Public Safety applications (including 1,000 EMRS applications), 90 applications for Economic Area channels, 20 applications for Regional channels, 100 applications for secondary service, and 10 applications for Nationwide channels. These applicants (many of whom may be small entities), as well as Phase I 220 MHz licensees (discussed below), and at least six equipment manufacturers (three of which may be small entities), were subject to the rules adopted in the *220 MHz Third Report and Order*.[10]

The Commission justified the auctions-related estimate of participation, including an estimate of 120 small entities, by referring to its experience in the auction of the 900 MHz SMR service, a service similar to the 220 MHz service. In the 900 MHz SMR service, which utilized an identical definition for small business, 1,050 licenses were made available and a total of 128 applications were received in the auction. Of these applications, 71 qualified as very small businesses and 30 qualified as small businesses. A total of 908 licenses will be

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[7] *220 MHz Third Report and Order*, 12 FCC Rcd at 11068-70 (paras. 291-295).

[8] On January 6, 1998, the Commission received approval from SBA for its definitions of a small business and a very small business for Phase II licensees in the 220 MHz service. *See* Letter to D. Phythyon, FCC, from A. Alvarez, SBA, dated Jan. 6, 1998.

[9] *220 MHz Third Report and Order*, 12 FCC Rcd at 11068-69 (para. 291).

[10] *Id.* at 11096, Appendix A.

made available for authorization in the 220 MHz service auction. Given that 128 qualified applications were received in the 900 MHz SMR auction, we anticipated receiving slightly fewer or 120 applications in the 220 MHz service auction. Given that 71 applicants qualified as very small businesses and 30 applicants qualified as small businesses in the 900 MHz SMR auction, we estimated that proportionately fewer, or 65 applicants, would qualify as very small businesses and 27 applicants would qualify as small businesses in the 220 MHz service auction.[11]

Because, as we describe *infra*, the elimination of installment payments is counterbalanced by our decision to elevate the size of bidding credits, we anticipate that the figures we have presented regarding the estimated number of small entities participating in the 220 MHz service auction will remain unchanged. We therefore anticipate that approximately 55 percent of the 120 applicants will qualify as very small businesses and 23 percent will qualify as small businesses.

B. Phase I Licensees

The Commission has not developed a definition of small entities applicable to 220 MHz Phase I licensees, or equipment manufacturers for purposes of this Supplemental FRFA, and, since the RFA amendments were not in effect until after the release of the *220 MHz Third Notice of Proposed Rulemaking* and the *220 MHz Fourth Notice of Proposed Rulemaking* was closed, the Commission did not request information regarding the number of small businesses that are associated with the 220 MHz service.[12] To estimate the number of Phase I licensees and the number of 220 MHz equipment manufacturers that are small businesses we shall use the relevant definitions provided by SBA.

There are approximately 1,515 non-nationwide Phase I licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. To estimate the number of such entities that are small businesses, we apply the definition of a small entity under SBA rules applicable to radiotelephone companies. This definition provides that a small entity is a radiotelephone company employing no more than 1,500 persons.[13] According to the Bureau of the Census, only 12 radiotelephone firms out of a total of 1,178 such firms which operated

[11] *Id.*

[12] In this Supplemental FRFA, we continue to use the same tentative definition of small entities applicable to 220 MHz Phase I licensees that we used in the regulatory flexibility analysis that accompanied the *220 MHz Third Report and Order*.

[13] 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

during 1992 had 1,000 or more employees.[14] Therefore, even if all 12 of these firms were 220 MHz service companies, nearly all 220 MHz service companies were small businesses under the SBA's definition.

C. Radio Equipment Manufacturers

We anticipate that at least six radio equipment manufacturers will be affected by our decisions in this proceeding. According to SBA regulations, a radio and television broadcasting and communications equipment manufacturer must have 750 or fewer employees in order to qualify as a small business concern.[15] Census Bureau data indicate that there are 858 U.S. firms that manufacture radio and television broadcasting and communications equipment, and that 778 of these firms have no more than 750 employees and would therefore be classified as small entities.[16] We do not have information that indicates how many of the six radio equipment manufacturers associated with this proceeding are among these 778 firms. However, because three of these manufacturers (Motorola, Ericsson, and E.F. Johnson) are major, nationwide radio equipment manufacturers, we conclude that these manufacturers would not qualify as small business.

IV. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

Phase I non-nationwide licensees who modify their authorizations as outlined in this Memorandum Opinion and Order on Reconsideration or add new transmitters within their 38 dBu service contour will be required to file an FCC Form 600 with the Commission. Phase I non-nationwide licensees who decide to convert their site-by-site licenses to a single license authorizing operations throughout the incumbents' contiguous and overlapping 38 dBu service contours of their constructed multiple sites will also be required to file an FCC Form 600. Phase I, non-nationwide licensees will be required to file an FCC Form 600 to comply with the requirement that they modify their authorization to reflect the ERP at which they were operating at the time the decisions adopted in the *220 MHz Third Report and Order* became effective. The FCC Form 600 is currently in use and has already received OMB clearance.

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[14] U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC92-S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms: 1992, SIC Code 4812 (issued May 1995).

[15] 13 C.F.R. § 121.201, (SIC) Code 3663.

[16] U.S. Dept. of Commerce, 1992 Census of Transportation, Communications and Utilities (issued May 1995), SIC category 3663.