

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

FOURTH REPORT AND ORDER

Adopted: June 23, 1997

Released: August 25, 1997

By the Commission:

I. INTRODUCTION

1. By this action, we repeal the "40-mile rule" contained in Section 90.739(a) of the Commission's Rules for all nationwide and non-nationwide Phase I 220 MHz Service licensees. The 40-mile rule currently provides that no Phase I 220 MHz licensee may be authorized to operate a station in a particular service category (e.g., the 5-channel trunked, non-nationwide category) within 40 miles of an existing system authorized to that licensee in the same category unless the licensee can demonstrate that the additional system is justified on the basis of its communications requirements.

2. We find that, in light of the changes to the 220 MHz Service adopted in the 220 MHz Third Report and Order, the 40-mile rule is unnecessary and no longer serves its original purpose. We believe that our action in repealing the rule promotes competition not only between Phase I

1 Section 90.739(a) of the Commission's Rules, 47 C.F.R. § 90.739(a). In the 220 MHz Third Report and Order, the Commission established a new framework for the issuance of 220 MHz licenses. 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, 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, FCC 97-57, released Mar. 12, 1997 (220 MHz Third Report and Order). Licensees who acquired their licenses under the prior rules are referred to as Phase I licensees and licensees who will acquire their licenses under the new rules are referred to as Phase II licensees.

2 Section 90.739(a) of the Commission's Rules, 47 C.F.R. § 90.739(a).

and Phase II licensees in the 220 MHz Service, but among all commercial mobile radio service (CMRS) providers. As a result, we believe that consumers are likely to benefit from increased competition in price and in the use of new and different types of technologies.

II. BACKGROUND

3. The Commission adopted the 40-mile rule for the 220 MHz Service in the *220 MHz Report and Order*.³ In that Order, the Commission established service and licensing rules for nationwide and non-nationwide 220 MHz licensees.⁴ In the *220 MHz Report and Order*, the Commission stated that a non-nationwide licensee could not hold more than one channel or channel group within a 64-kilometer (40-mile) area unless that licensee could demonstrate that its communications needs warranted additional channels or channel groups.⁵ The Commission noted that an applicant could meet this standard by submitting facts that included "loading on assigned channels, explanation of the geographic coverage required, and documentation of the additional number of mobiles/portables needed, including, for commercial systems, the number of outstanding requests for communications service."⁶ The Commission stated that if an applicant could meet this standard for each additional channel or channel group there was no restriction on the number of channels a licensee could hold in any given geographic area.⁷ The Commission cautioned, however, that an applicant that sought to make such a showing prior to construction of its first system in a geographic area would face a heavy burden of proof.⁸

4. The rule adopted by the Commission in the *220 MHz Report and Order* provides that no Phase I 220 MHz licensee may be authorized at any location less than 40 miles from another on channels in the same category without "demonstrating that the additional system is justified on the basis of its communications requirements."⁹ The 40-mile rule was adopted in an era in which 220 MHz licenses were awarded on a first-come, first-served basis with mutually exclusive appli-

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 Services, PR Docket No. 89-552, Report and Order, 6 FCC Rcd 2356 (1991) (*220 MHz Report and Order*).

⁴ In the *220 MHz Report and Order*, the Commission adopted service rules for the assignment of 200 five kilohertz channel pairs in the 220-222 MHz band, with 60 of the channel pairs assigned for nationwide licensing and the remaining 140 channel pairs allocated for non-nationwide use.

⁵ *220 MHz Report and Order*, 6 FCC Rcd at 2364 (para. 59). While the text of the *220 MHz Report and Order* refers to "non-nationwide" licensees, the rule refers to nationwide licensees as well as non-nationwide licensees.

⁶ *Id.* at 2364 n. 126 (para. 59 n. 126).

⁷ *Id.* at 2364 (para. 59).

⁸ *Id.*

⁹ Section 90.739(a) of the Commission's Rules, 47 C.F.R. § 90.739(a).

cations filed on the same day assigned through a random selection process.¹⁰ The Commission's intention in adopting the 40-mile rule was to prevent licensees from acquiring more spectrum than they needed within a particular geographic area and then warehousing that spectrum. Thus, the 40-mile rule requires that Phase I licensees using 220 MHz spectrum for their internal communications needs demonstrate that their current spectrum is insufficient to meet their needs, and that Phase I licensees using the spectrum for commercial purposes demonstrate that they have more demand for service (*i.e.*, customers) than can be accommodated on their authorized spectrum.¹¹ The Commission has been cautious about waiving the rule.¹²

5. During the period that the Commission was reaffirming the 40-mile rule for 220 MHz Service, the Commission began examining the need for certain loading and performance requirements in light of the CMRS regulatory framework and the Commission's authority to use competitive bidding to choose from among mutually exclusive applications.¹³ Both of these developments were the result of the 1993 Budget Act.¹⁴ In the *CMRS Third Report and Order*, the Commission opted to eliminate the comparable 40-mile rule for 800 MHz and 900 MHz Specialized Mobile Radio (SMR) services.¹⁵ The Commission noted that the 40-mile rule with respect to these ser-

¹⁰ *220 MHz Report and Order*, 6 FCC Rcd at 2364, 2365 (paras. 59, 61).

¹¹ 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, 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, 278 (para. 185) (1995) (*220 MHz Second Memorandum Opinion and Order*).

¹² Specifically, the Commission denied a request for a declaratory ruling by SunCom Mobile & Data, Inc., that it could aggregate constructed channels to form a regional network without violating the 40-mile rule because the Commission found that the licensee had not made the required showing of outstanding service requests. Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Amendment of Part 90 of the Commission's Rules To Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, Amendment of Parts 2 and 90 of the Commission's Rules To Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allocated to the Specialized Mobile Radio Pool, PR Docket No. 89-533, 9 FCC Rcd 7988, 8056 (para. 129) (1994) (*CMRS Third Report and Order*); *petition for reconsideration denied*, *220 MHz Second Memorandum Opinion and Order*, 11 FCC Rcd at 276-79 (paras. 183-186); *aff'd*, *SunCom Mobile & Data v. FCC*, 87 F.3d 1386 (D.C. Cir. 1996). In addition, the Commission denied on the same grounds a request for a waiver of the 40-mile rule by Wireless Plus, Inc., in which it was seeking to consolidate two networks of licenses that it was managing in Northern and Southern California. *220 MHz Second Memorandum Opinion and Order*, 11 FCC Rcd at 279-80 (paras. 187-188). *But see* Letter from M. Regiec, Deputy Chief, Land Mobile Branch, Wireless Telecom. Bur., FCC, to D. Kaufman, Sept. 17, 1996 (granting petition for reconsideration of decision that applicant had failed to meet separation requirements of Section 90.739 of the Commission's Rules with regard to station WPCY265).

¹³ Loading requirements are one of the mechanisms the Commission has used to ensure that mobile service licensees make efficient use of spectrum and offer service to customers within their service area. *See CMRS Third Report and Order*, 9 FCC Rcd at 8078-84 (paras. 185-195).

¹⁴ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993).

¹⁵ *CMRS Third Report and Order*, 9 FCC Rcd 7988, 8082 (para. 192); *see also* 47 C.F.R. § 90.627(b).

vices served a significant regulatory purpose during the initial development of the SMR industry by preventing strategic manipulation of the Commission's licensing procedures to warehouse spectrum. In the future, however, the Commission observed that SMR licensing would largely be based on auctions of channel blocks in Commission-defined service areas. The Commission also found that even though some 800 MHz SMR systems might continue to be licensed on a station-by-station basis, the 40-mile rule no longer served its intended purpose, and could in fact hamper the industry's continued growth and competitive position with other CMRS licensees.¹⁶

6. By contrast, in the *CMRS Third Report and Order*, the Commission chose not to eliminate the 40-mile rule for the 220 MHz Service.¹⁷ The Commission recognized that for purposes of establishing comparable technical and operational rules it had identified the 220 MHz Service as potentially competitive with and, therefore, substantially similar to other CMRS services, such as the 800 MHz and 900 MHz SMR services. The Commission stated, however, that the 220 MHz Service was "still in its infancy and its competitive potential largely unknown."¹⁸ In addition, the Commission stated that a more comprehensive record was needed before it could consider implementing a new licensing scheme for the 220 MHz Service based on different sized channel blocks or service areas. The Commission concluded that no change to the 220 MHz rules was required in the CMRS proceeding to ensure regulatory symmetry and stated that it intended to initiate a separate proceeding to address future licensing and service rules for the 220 MHz Service.¹⁹

7. On August 28, 1995, the Commission initiated that proceeding by releasing the *220 MHz Third Notice of Proposed Rulemaking*.²⁰ The Commission recently adopted Phase II service and licensing rules in the *220 MHz Third Report and Order*. With respect to Phase II licenses, the Commission has not limited the number of licenses that may be acquired by one entity, and the Commission allows licensees to place stations anywhere within a licensee's geographically licensed area.

III. PLEADINGS

¹⁶ *Id.*

¹⁷ *CMRS Third Report and Order*, 9 FCC Rcd at 8055 (para. 127).

¹⁸ *Id.* (footnote omitted).

¹⁹ *Id.* at 8055 (para. 127) (footnote omitted).

²⁰ 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, 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 of Proposed Rulemaking*).

8. On April 5, 1996, the SMR Advisory Group, L.C. (SMR Group) filed *ex parte* comments in the 220 MHz proceeding, urging the Commission to eliminate the 40-mile rule with respect to all existing and future 220 MHz licensees. SMR Group manages 220 MHz systems for independently owned non-nationwide licensees. SMR Group indicates it intends to establish a company that would acquire existing 220 MHz licenses in exchange for an ownership share in the company. According to SMR Group, approximately one-third of the licensees who wish to consummate the acquisition of their licenses by a consolidated company cannot do so because their systems are located within 40 miles of one or more systems contemplated to be part of this network. SMR Group asserts that, under the current rule, the consolidated entity is forced to add each of these licenses on an individual basis only as the first system within a given 40-mile area achieves capacity loading.²¹

9. In support of its position, SMR Group argues that the 40-mile rule is not needed to meet the rule's original purpose of preventing the warehousing of spectrum. According to SMR Group, the current economics of the 220 MHz licensing environment adequately protect against this danger.²² SMR Group also argues that elimination of the 40-mile rule is necessary in order to realize the full competitive potential of the 220 MHz Service. SMR Group states that the 40-mile rule forces 220 MHz licensees to be reactive rather than proactive because a 220 MHz licensee cannot acquire and place additional capacity in service in anticipation of demand by relying on projected growth, but instead must plan its system on the basis of current demand and show a need for expansion through outstanding service orders. SMR Group contends that continued enforcement of the 40-mile rule prevents 220 MHz Service licensees from taking advantage of the numerous economic and administrative efficiencies associated with consolidated ownership of multiple licenses within a single 40-mile area. SMR Group asserts that these benefits include the pooling of revenues and costs, centralized billing, and consolidated tax filings.²³

10. In addition, SMR Group argues that the 40-mile rule does not anticipate that two or more 220 MHz systems in a particular 40-mile area may be serving entirely different segments of the market. For instance, SMR Group states that one 220 MHz system within 40 miles of another might be designed to serve subscribers using dash-mounted units, while the other might be designed for portable, hand-held units. Lastly, SMR Group argues that enforcement of the 40-mile rule seriously undermines the Commission's goal of regulatory parity between substantially similar mobile radio services. In support of this argument, SMR Group states that the Commission eliminated a comparable 40-mile rule in the 800 MHz and 900 MHz SMR services on grounds that the rule no longer served its original purpose, and that it hindered the ability of licensees in those services to compete with other CMRS providers. SMR Group also indicates that, with re-

²¹ Ex Parte Comments of SMR Advisory Group, L.C. at 7 n. 19.

²² *Id.* at 14.

²³ *Id.* at 10.

spect to the 40-mile rule, fundamental fairness requires the Commission to treat Phase I and Phase II 220 MHz Service licensees similarly.

11. The Commission placed the SMR Group *ex parte* comments on Public Notice and solicited comment on the request.²⁴ In the Public Notice, the Commission stated that it had tentatively concluded that the 40-mile rule should be repealed. The Commission received seven comments addressing the SMR Group request.²⁵ All the comments support elimination of the 40-mile rule.

IV. DISCUSSION

12. We agree with SMR Group that we should eliminate the 40-mile rule for all Phase I 220 MHz Service licensees. In the *220 MHz Third Report and Order*, the Commission adopted a new licensing scheme for the 220-222 MHz band. Instead of being assigned on a first-come, first-served basis, licenses will be initially awarded through competitive bidding based on Commission designated channel blocks and geographical areas. The only way to acquire a 220 MHz Service license, therefore, will be to purchase it through an auction or to acquire it through transfer or assignment from another licensee.²⁶ In either case, 220 MHz Service licenses will be assigned to entities that have shown their willingness to pay market value for the licenses.

13. We conclude that, as applicable to Phase I licensees, the 40-mile rule represents an unnecessary regulatory burden. The original purpose of the 40-mile rule was to prevent the warehousing of spectrum and to ensure that licensed spectrum was put to use. We believe that effective use of spectrum can be achieved by relying on market conditions to control whether a licensee acquires a 220 MHz Service license because of current demand for more spectrum or an anticipated need for additional spectrum. In light of our new Phase II licensing scheme that relies on market forces to achieve an effective use of spectrum in the 220 MHz band, we have concluded that the 40-mile rule is no longer necessary to achieve the original purposes of the rule. We thus believe that three factors have converged to support our conclusion that the 40-mile rule is no longer necessary to ensure a competitive and robust environment -- first, our service rules will foster efficient spectrum use and discourage uneconomic warehousing by providing licensees with the opportunity to provide a variety of fixed, mobile, and paging services in response to changing market conditions; second, our construction and license renewal rules will work toward the same objective of encouraging efficient spectrum use; and third, the current level of competition for services which may be provided by the use of 220 MHz spectrum is sufficiently high to

²⁴ Public Notice, PR Docket No. 89-552, Commission Seeks Supplemental Comment on Request To Eliminate 40-Mile Rule for 220 MHz Service, FCC 96-448, released Nov. 19, 1996.

²⁵ See Appendix C.

²⁶ Public safety and Emergency Medical Radio Service channels will not be auctioned. *220 MHz Third Report and Order* at paras. 61-63, 67-72.

ensure that competitive forces will adequately meet marketplace demands and promote efficient spectrum use in the absence of the 40-mile rule.

14. Under the existing 40-mile rule, a Phase I licensee would have to forego the pursuit of additional customer markets until its initial system was fully loaded, even if the additional channels themselves were partially or fully loaded. Removing the 40-mile rule will allow Phase I licensees to acquire additional licenses with which to implement future service plans. Keeping the 40-mile rule with respect to Phase I licensees could unnecessarily interfere with the ability of licensees possessing both Phase I and Phase II licenses to utilize their licenses in a unified fashion.

15. Our decision to repeal the 40-mile rule applies to all Phase I 220 MHz licensees, including non-commercial entities and licensees providing commercial services. We recognize that in the *CMRS Third Report and Order* we eliminated the 40-mile rule only for 800 MHz and 900 MHz SMR licensees because we anticipated such licensees would meet the definition of CMRS. We did not eliminate the 40-mile rule for non-SMR licensees at 800 MHz and 900 MHz, who are likely to be private mobile radio service operators. With respect to comparable Phase I 220 MHz licensees, *i.e.*, 220 MHz licensees that are non-commercial entities, however, the only way they can acquire additional spectrum is through auctions or by acquiring a license from another licensee. Therefore, the same reasoning for eliminating the 40-mile rule for "commercial" Phase I 220 MHz licensees applies to "non-commercial" Phase I 220 MHz licensees. Market conditions, in combination with other regulatory safeguards, will act to ensure that non-commercial Phase I 220 MHz licensees use their spectrum effectively.

16. With respect to 220 MHz public safety licensees, the Commission in the *220 MHz Third Report and Order* revised the licensing scheme for these types of licenses. Under the previous approach, ten 220 MHz channel pairs were assigned on an exclusive basis to public safety eligibles. Under the new approach, five of these channel pairs will be licensed on a shared basis among all public safety eligibles.²⁷ As a result, for these types of licenses the 40-mile rule is no longer necessary because the revised licensing scheme will ensure that no single public safety licensee will have exclusive access to all of the public safety channels in a given area. Similarly, licensees eligible for authorization on the five exclusively assigned 220 MHz channel pairs reserved for the Emergency Medical Radio Service (EMRS) are *also* eligible for authorization on the ten public safety channels, including the five shared public safety channels. Thus, we conclude that the 40-mile rule should be eliminated for licensees authorized on both the public safety and the EMRS channels.

V. FINAL REGULATORY FLEXIBILITY ACT ANALYSIS

²⁷ *220 MHz Third Report and Order* at para. 63.

17. As required by the Regulatory Flexibility Act of 1980,²⁸ as amended by the Contract with America Advancement Act of 1996,²⁹ the Commission has prepared a Final Regulatory Flexibility Analysis of the expected impact of the rule change in this Fourth Report and Order on small entities. The Final Regulatory Flexibility Analysis is set forth in Appendix B.

18. In addition, in accordance with Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603, an Initial Regulatory Flexibility Analysis (IRFA) was contained in the *Third Notice of Proposed Rulemaking* that considered the expected impact on small entities of the general rule changes being contemplated for the 220 MHz Service. The Commission sought written public comments on the proposals contained in that Notice of Proposed Rulemaking, including on the IRFA. The Secretary sent a copy of that Notice of Proposed Rulemaking, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act.

VI. ORDERING CLAUSES

19. Authority for issuance of this Fourth Report and Order is contained in Sections 4(i), 303(r), 309(j), and 332 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 303(r), 309(j), 332.

20. Accordingly, IT IS ORDERED that Section 90.739 of the Commission's Rules, 47 C.F.R. § 90.739, IS AMENDED as set forth in Appendix A, effective 30 days after publication of this Fourth Report and Order in the Federal Register.

21. IT IS FURTHER ORDERED that the Secretary shall send a copy of this Fourth Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1980).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

²⁸ Pub. L. No. 96-354, 94 Stat. 1164.

²⁹ Pub. L. No. 104-121, 110 Stat. 847, 5 U.S.C. §§ 601 *et seq.*

APPENDIX A

REVISION TO COMMISSION RULES

Part 90 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 90 - PRIVATE LAND MOBILE RADIO SERVICES

1. Section 90.739 is revised to read as follows:

Section 90.739 Number of systems authorized in a geographical area.

There is no limit on the number of licenses that may be authorized to a single licensee.

APPENDIX B**FINAL REGULATORY FLEXIBILITY ANALYSIS**

As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603 (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Third Notice of Proposed Rulemaking* in this proceeding that considers the impact on small entities of the proposed changes being contemplated for the 220 MHz Service.¹ The Commission sought written public comments on the proposals contained in that Notice of Proposed Rulemaking, including the IRFA. The Commission's Final Regulatory Flexibility Analysis (FRFA) in this Fourth Report and Order conforms to the RFA, as amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA).²

I. Purpose of Rule Change:

Repeal of the 40-mile rule for Phase I 220 MHz licensees will allow for a more efficient use of the 220 MHz Service. It also eliminates unnecessary regulatory burdens on existing 220 MHz licensees, enhances the competitive potential of 220 MHz Service in the mobile marketplace, and the development of spectrally efficient technologies. This decision will promote economic opportunity and ensure that new and innovative technologies are readily accessible to the American people.

II. Summary of Issues Raised by the Public Comments in Response to the IRFA:

The commenters did not raise any issues specifically with respect to the IRFA. We have, however, considered the economic impact of our decision to repeal the 40-mile rule for Phase I licensees who are small entities by considering the comments that were submitted by small businesses on the Commission's proposal. Eliminating the 40-mile rule for Phase I licensees reduces regulatory burden for all Phase I licensees, including small businesses. This conclusion is supported by the fact that all of the comments that were received on the Commission's proposal supported repeal of the rule.

III. Description and Estimate of the Small Entities Involved:

For the purposes of this Fourth Report and Order, the RFA defines a "small business" to be the same as a "small business concern" under the Small Business Act, 15 U.S.C. § 632, unless

¹ 220 MHz *Second Memorandum Opinion and Order*, 11 FCC Red at 287.

² Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), codified at 5 U.S.C. §§ 601 *et seq.*

the Commission has developed one or more definitions that are appropriate to its activities.³ Under the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA).⁴

There are approximately 2,800 Phase I 220 MHz licensees, many of whom may be small entities, and at least six equipment manufacturers, three of whom may be small businesses, that are subject to the elimination of the 40-mile rule for 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 FRFA, and since the RFA amendments were not in effect until the record in this proceeding was closed, the Commission did not request information regarding the number of small businesses that are associated with the 220 MHz Service. 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 the Small Business Administration (SBA).

There are approximately 2,800 non-nationwide Phase I licensees and 4 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 fewer than 1,500 persons.⁵ However, the size data provided by the SBA do not allow us to make a meaningful estimate of the number of 220 MHz providers that are small entities because they combine all radiotelephone companies with 500 or more employees.⁶ We therefore use the 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, which is the most recent information available. Data from the Bureau of the Census' 1992 study indicate that only 12 out of a total 1,178 radiotelephone firms which operated during 1992 had 1,000 or more employees -- and these may or may not be small entities, depending on whether they employed more or less than 1,500 employees.⁷ But 1,166 radiotelephone firms had fewer than 1,000 employees and therefore, under the SBA definition, are

³ See 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 5 U.S.C. § 632).

⁴ 15 U.S.C. § 632.

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

⁶ U.S. Small Business Administration 1992 Economic Census Employment Report, Bureau of the Census, U.S. Department of Commerce, Table 3, SIC Code 4812 (radiotelephone communications industry data adopted by the SBA Office of Advocacy).

⁷ 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).

small entities. However, we do not know how many of these 1,166 firms are likely to be involved in the 220 MHz Service.

We anticipate that at least six radio equipment manufacturers will be affected by our decision in this proceeding. According to the SBA's 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.⁸ 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 fewer than 750 employees and would therefore be classified as small entities.⁹ 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. Summary of the Projected Reporting, Recordkeeping, and Other Compliance Requirements:

By repealing the 40-mile rule for all Phase I 220 MHz licensees, the Commission reduces reporting, recordkeeping and compliance requirements. These licensees will no longer have to file a waiver request with the Commission in order to operate two systems in the same service category that are less than 40 miles apart. The Commission has found the 40-mile rule to no longer serve the public interest and by repealing this rule the Commission reduces unnecessary regulatory burden.

V. Significant Alternatives and Steps Taken by Agency to Minimize the Significant Economic Impact on a Substantial Number of Small Entities Consistent With Stated Objects:

The Commission's chief objectives in adopting the Fourth Report and Order are to ensure a regulatory plan for the 220 MHz Service that will allow for the efficient licensing and use of the service, to eliminate unnecessary regulatory burdens, to enhance the competitive potential of the 220 MHz Service in the mobile services marketplace, to provide a wide variety of radio services to the public, and to continue to provide a home for the development of spectrally efficient technologies. The action taken in the Fourth Report and Order achieves these objectives by repealing a Commission regulation that had previously been adopted. The elimination of the 40-mile rule for Phase I licensees demonstrates the Commission's commitment to continually review its regulations and eliminate rules that are outdated.

⁸ 13 C.F.R. § 121.201, (SIC) Code 3663.

⁹ U.S. Dept. of Commerce, *1992 Census of Transportation, Communications and Utilities* (issued May 1995), SIC category 3663.

The Commission received seven sets of comments on its tentative conclusion to repeal the 40-mile rule for Phase I licensees. All the comments support the elimination of the 40-mile rule for Phase I licensees. Five of the comments were submitted by what are mostly likely small businesses.

In its comments, ComTech Communications, Inc. urges the Commission to repeal the 40-mile rule. ComTech argues that the rule is inconsistent with the Commission's 45 MHz CMRS spectrum cap, that regulatory parity requires the elimination of the rule and elimination of the rule will reduce administrative costs for Phase I licensees.

Likewise, Securicor Radiocom Ltd. urges the Commission to eliminate the 40-mile rule. Securicor argues that by eliminating the rule Phase I 220 MHz licensees can expand the availability and the diversity of their service offerings. In addition, Securicor states that elimination of the rule will permit Phase I 220 MHz licensees to realize the benefits of economies of scale and will enhance the ability of 220 MHz licensees to expand and participate in Phase II auctions. Securicor also argues that the 40-mile rule has outlived its usefulness.

Incom Communications Corporation and Narrowband Network Systems argue that the 40-mile rule no longer serves a legitimate purpose and regulatory parity requires the elimination of the rule. Roamer One, Inc. concurs that the 40-mile rule no longer serves a valid regulatory purpose and requests that the Commission eliminate the rule on an expedited basis. E.F. Johnson Company, Inc. fully supports the elimination of the rule.

American Mobile Telecommunications Association, Inc (AMTA) states that it strongly supports the Commission's conclusion to eliminate the 40-mile rule. AMTA argues that retaining the 40-mile rule is inconsistent with the Commission's rules governing other CMRS services and is inconsistent with the Commission's move toward flexible regulation.

The Commission's decision to repeal the 40-mile rule for all Phase I 220 MHz licensees, therefore, is supported by the comments it received on its proposal.

VI. Report to Congress:

The Commission shall send a copy of this FRFA, along with this Fourth Report and Order, in a report to Congress pursuant to 5 U.S.C. § 801(a)(1)(A). A copy of this FRFA will also be published in the *Federal Register*.

APPENDIX C

LIST OF PARTIES FILING COMMENTS

The following is the list of parties filing comments in this proceeding:

American Mobile Telecommunications Association, Inc.
ComTech Communications, Inc.
E.F. Johnson Company, Inc.
Incom Communications Corporation and Narrowband Network Systems
Roamer One, Inc.
Securicor Radiocoms Ltd.
SMR Advisory Group, L.C.