FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 90

[PR Docket No. 89–552, GN Docket No. 93–252, and PP Docket No. 92–253; FCC 98–93]

Reconsideration of the Rules and Policies for the 220–222 MHz Radio Service

AGENCY: Federal Communications Commission.

ACTION: Final rule; petitions for reconsideration.

SUMMARY: The Federal Communications Commission has adopted a *Memorandum Opinion and Order on Reconsideration (MO&O)* concerning rules and policies for the 220–222 MHz radio service (220 service). The *MO&O* responds to petitions for reconsideration or clarification of the *220 MHz Second Report and Order (Second R&O)* and the *220 MHz Third Report and Order (Third R&O)* in this proceeding. This *MO&O* reaffirms the decision in the *Second R&O* with one clarification. The *MO&O* also generally reaffirms the rules adopted in the *Third R&O*, but adopts some changes and clarifications. The intended effect of this action is to clarify and resolve issues pertaining to the 220 service prior to the Commission's auction of remaining spectrum within that service.

EFFECTIVE DATE: August 11, 1998.

Written comments by the public on the new information collections are due on or before July 13, 1998.

ADDRESSES: A copy of any comments on the information collections contained in the *MO&O* should be submitted Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, D.C. 20503, or via the internet to jboley@fcc.gov, and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725–17th Street, N.W., Washington, D.C. 20503, or via the internet to fain__t@al.eop.gov.

FOR FURTHER INFORMATION CONTACT: For Non-Auction Information: Marty Liebman, Mary Woytek, or Jon Reel, 202–418–1310. For Auction Information: Frank Stilwell, 202–418–0660.

SUPPLEMENTARY INFORMATION: This is a synopsis of the *Memorandum Opinion and Order on Reconsideration* in PR Docket No. 89–552, GN Docket 93–252, and PP Docket 93–253, FCC 98–93, adopted on May 14, 1998, and released on May 21, 1998. The complete text of this decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C., and may be purchased from the Commission's copy contractor, International Transcription Service, (202) 857–3800, 1231 20th Street, N.W., Washington, DC 20036. The complete text is also available under the file name fcc98093.wp on the Commission's internet site at http://www.fcc.gov/Bureaus/Wireless/Orders/1998/index.html. Written comments must be submitted by OMB on the new information collections on or before July 27, 1998.

Paperwork Reduction Act

This *MO&O* contains new information collections that have been submitted to the Office of Management and Budget (OMB) for Emergency Clearance under the Paperwork Reduction Act, Public Law No. 104–13. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the OMB to comment on these information collections. Comments should address: (a) whether the new collections of information are necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

OMB Approval Number: 3060–XXXX.

Title: Private Land Mobile Radio Services Part 90.

Form No.: N/A.

Type of Review: New collection.

Respondents: Licensees in the 220–222 MHz band.

Number of Responses: 18,400.

Estimated Time Per Response: 30 minutes to 12 hours. These estimates are for various burdens including coordinating actions with other licensees, submitting certifications with applications for modifications of authorizations, and seeking a waiver of section 90.729(b).

Frequency of Response: On occasion.

Total Annual Burden: Approximately 44,850 hours.

Needs and Uses: The information collected will be used by the Commission to verify licensee compliance with Commission rules and regulations, to ensure the integrity of the 220 MHz service, and to ensure that licensees continue to fulfill their statutory responsibilities in accordance with the Communications Act of 1934.

Synopsis of Memorandum Opinion and Order on Reconsideration

1. The Commission adopts a *Memorandum Opinion and Order on Reconsideration (MO&O)* which responds to petitions for reconsideration or clarification of two Orders previously adopted in this proceeding concerning the 220–222 MHz radio service (220 MHz service). The *220 MHz Second Report and Order (Second R&O)* (61 FR 03841, February 2, 1996) enabled existing 220 MHz licensees to modify their licenses to relocate their authorized base stations within Commission specified parameters. The *220 MHz Third Report and Order (Third R&O)* (62 FR 16004, April 3, 1997) established rules to govern the future operation and licensing of the 220 MHz service. In response to petitions for reconsideration or clarification of the *Second R&O*, the *MO&O* reaffirms the earlier decision with one clarification, stating the Commission's continuing belief that the modification procedures the Commission has adopted provide existing 220 MHz licensees flexibility to complete construction of their systems and provide service without unreasonably impairing the opportunity of potential competitors to obtain licenses in the 220 MHz service. In general, the *MO&O* affirms the rules for the 220 MHz service adopted in the *Third R&O*, but adopts some changes and clarifications.

2. The *MO&O* first considers issues raised on reconsideration of the *Third R&O*. The Commission denies the petitions which seek to modify the Commission's rule that specifies the co-channel protection that must be provided to Phase I licensees by Phase II licensees.[1] In the *Third R&O*, the Commission decided that Phase II Economic Area (EA) and Regional licensees would be required to locate their base stations at least 120 km from the base stations of co-channel Phase I licensees, except that Phase II licensees would be permitted to locate their base stations less than 120 km from the base stations of co-channel Phase I licensees if they provide 10 dB protection to the predicted 38 dBuV/m (dBu) service contour of the base stations of the Phase I licensees.

3. Petitioners seek reconsideration of this decision, arguing that Phase II

[1] Licensees granted authorizations from among applications filed on or before May 24, 1991, are hereinafter referred to as Phase I licensees. On August 28, 1995, the Commission released the *220 MHz Third Notice of New Rulemaking (Third Notice)* (60 FR 46564, September 7, 1995), which proposed market area licensing and more flexible technical rules for the next phase (Phase II) of licensing of the 220 MHz band.

licensees should be required, in locating their base stations, to afford greater protection to co-channel Phase I licensees by providing 10 dB protection to the predicted *28* dBu service contour of all co-channel Phase I base stations. Other petitioners do not oppose continued protection of the 38 dBu service contour, but assert that the Commission should afford greater than 10 dB protection to that contour.

4. Petitioners argue that the decision made by the Commission in the *Third R&O* to provide 10 dB protection to the 38 dBu contour of Phase I stations does not provide adequate protection between Phase I and Phase II licensees. Petitioners contend that 220 MHz systems significantly outperform the Commission's original coverage estimation, and that 220 MHz customers operate throughout the 28 dBu areas. Petitioners add that failure to adopt protection criteria based on a 28 dBu contour denies Phase I 220 MHz licensees a quality of service comparable to that of competitive wireless systems.

5. Based on its detailed analysis of the technical information and arguments provided by petitioners (*see* paragraphs 28–67 of the full text of the *MO&O)*, the Commission concludes that petitioners failed to adequately support their claims, and that retention of the rule that provides for 10 dB protection to the 38 dBu contour of Phase I stations will not adversely affect operations in the 220 MHz service. The Commission indicates, too, that it is confident that the existing 220 MHz protection criteria will enable Phase I licensees and future Phase II licensees to operate in harmony.

6. The Commission denies petitions requesting a change to the way a Phase I license service contour is calculated. In the *Third R&O*, the Commission decided that Phase II EA and Regional licensees could locate their base stations less than 120 km from the base stations of co-channel Phase I licensees if they provide 10 dB protection to the predicted 38 dBu service contour of the base stations of such licensees. The Commission also decided in the *Third R&O* that the predicted 38 dBu contour of Phase I licensees would be calculated based on the licensee's authorized effective radiated power (ERP) and height above average terrain (HAAT)—not on the maximum allowable ERP and HAAT provided in the Commission's rules for the 220–222 MHz band. The Commission further determined that licensees operating at power levels lower than their initially authorized ERP would be required to seek modification of their authorization to reflect the lower ERP.

7. Petitioners disagree with the Commission's decision to require Phase I licensees to modify their authorizations to reflect the system's actual ERP, and to define the service area based upon actual ERP. Petitioners contend that this is a departure from previous Commission policy for Part 90, and argue that these requirements will result in a significant reduction in the protection afforded to Phase I licensees. Several parties contend that a Phase I licensee's service area should be defined based on maximum authorized power and height levels.

8. The Commission disagrees with petitioners. It indicates that in developing rules for authorizing Phase II licensees to serve a particular geographic area, it sought to allow them to serve any portion of that area, except for portions of the area already being served by co-channel Phase I licensees. The Commission states that the area ''already being served'' by co-channel Phase I licensees is the area the licensee was serving at the time the decisions adopted in the *Third R&O* became effective, and must therefore be calculated based on the licensee's ERP and HAAT at that time. The Commission also indicates that, as discussed in paragraphs 175–184 of the full text of the *MO&O*, the area being served by a Phase I licensee that relocated its base station in accordance with the provisions of the *Second R&O* is calculated based on the HAAT and the ERP of the relocated base station.

9. The Commission states that if it were to assume that all 220 MHz Phase I licensees are operating at the maximum power and antenna height for the 220 MHz service when many are not operating at such parameters and may never operate at such parameters, it could force Phase II licensees to provide considerably greater protection to co-channel Phase I licensees than necessary, and thereby potentially deny service to the public in areas beyond the Phase I licensee's actual 38 dBu service contour. The Commission also indicates that to protect a Phase I licensee's base station in accordance with a power level that the licensee might employ at some time in the future could also deny service to the public.

10. The Commission therefore denies requests for the adoption of alternative methods for calculating a Phase I licensees service contour made by petitioners. As indicated in the *MO&O*, the Wireless Telecommunications Bureau will issue a Public Notice following the adoption of the *MO&O* 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 *Third R&O* became effective.

11. The Commission grants in part the petitions that request 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 contour, and also will be permitted to convert their site-by-site licenses to a single license. Otherwise such petitions are denied.

12. The Commission recognizes that licensed sites may become unusable for a variety of reasons and agrees with petitioners 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 (*e.g.*, to relocate their base station, to change the ERP or HAAT of their base station) as long as doing so does not expand their service contour, as that contour has been defined in this proceeding. Such licensees will therefore be permitted to make those modifications to their authorizations that do not expand their 38 dBu service contour. Phase I licensees will also be able to add additional transmitters within their 38 dBu service contour without prior authorization from the Commission, *e.g.*, to fill in ''dead spots'' in coverage or to reconfigure their systems to increase capacity within their service area, so long as signals from such transmitters do not expand their 38 dBu service contour.

13. The *MO&O* notes that a Phase I licensee who relocates under the criteria set forth in the *Second R&O* (and as further considered in this *MO&O*) must first establish its 38 dBu service contour at its new base station site in accordance with the Commission's rules for relocation before it can take advantage of the flexibility provided in this section. In addition, Phase I licensees will be required to notify the Commission of any changes in technical parameters or additional stations constructed through a minor modification of their license. These modification applications will not be subject to public notice and petition to deny provisions in the Commission's rules, or mutually exclusive applications.

14. The Commission's rules require geographic separation between Phase I

base stations transmitting on the upper 40 channels in the 220–221 MHz band (*i.e.*, channels 161–200, referred to in the Commission's rules as ''Sub-band B'') and Phase I base stations receiving on the lower 40 channels in the 221–222 MHz band (*i.e.*, channels 1–40, referred to in the Commission's rules as ''Sub-band A''). Also, as indicated in the *Third R&O*, the Commission's rules require Phase II licensees transmitting on Sub-band B channels to provide geographic protection to Phase I licensees operating on Sub-band A channels; and require Phase II licensees operating on Sub-band B and Sub-band A channels to coordinate the location of their base stations with one another to avoid interference. The Commission's decision in this *MO&O* to permit Phase I, non-nationwide licensees to modify their authorizations to add additional transmitter sites or change the operating parameters or location of their base station, however, raises interference concerns if such stations are authorized to licensees operating in Sub-bands A and B.

15. First, with respect to potential interference among Phase I licensees, the Commission believes that Phase I licensees authorized on Sub-band A or Sub-band B channels that may seek to add additional transmitter sites or change the operating parameters or location of their base stations should be required to coordinate such actions in a manner similar to the way that Phase II licensees authorized on Sub-band A and Sub-band B channels must coordinate the location of their base stations under § 90.723(f) of the Commission's rules. Thus, to ensure that appropriate geographic separations are maintained if licensees authorized on Sub-band A or Sub-band B channels seek modifications to add additional transmitter sites or change the operating parameters or location of their base station, the Commission will require licensees authorized on Sub-band A or Sub-band B channels to coordinate such actions with one another to avoid interference. These licensees must include with their application for a minor modification of their authorization, a certification that the station has been appropriately coordinated.

16. Second, § 90.723(e) currently requires Phase II licensees authorized on Sub-band B channels, in locating their base stations, to provide geographic protection to the base stations of Phase I licensees authorized on Sub-band A channels. However, the Commission does not believe that it would be appropriate to require a Phase II licensee authorized on Sub-band B, as it constructs its EA or Regional system, to have to protect receivers associated with additional transmitter sites that a Phase I licensee authorized on Sub-band A might add within its service contour at any time in the future. The Commission thus concludes, that a Phase II licensee authorized on Sub-band B channels should continue to provide geographic protection to Phase I licensees authorized on Sub-band A, but only to the base station of such licensees, as authorized at the time the Phase II, Sub-band B licensee seeks to construct its station.

17. Third, under the Commission's existing rules, there are no protection or coordination requirements among Phase I licensees authorized on Sub-band B and Phase II licensees authorized on Sub-band A. However, if Phase I, Sub-band B licensees are permitted to add additional transmitter sites or modify the operating parameters or location of their base station at any time in the future, such actions could cause unforeseen interference to the base stations of Phase II, Sub-band A licensees. The Commission will therefore require Phase I, Sub-band B licensees, in adding additional transmitter sites or modifying the operating parameters or location of their base station, to coordinate such actions with Phase II licensees authorized on Sub-band A. Phase I, Sub-band B licensees must include with their application for a minor modification of their authorization, a certification that the station has been appropriately coordinated.

18. In addition, the Commission 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. Phase I licensees seeking such reissued licenses must make a one-time filing of specific information for each of their external base station sites to assist the Commission staff in updating the Commission's database. The Commission also will require evidence that such facilities are constructed and placed in operation and that, by operation of the Commission's rules, no other licensee would be able to use these channels within this geographic area. The Commission notes that facilities added or modified that do not extend the 38 dBu service contour will not require prior approval under this procedure.

19. The Commission believes this decision strikes a fair balance between the interests of incumbents and Phase II licensees. A Phase I licensee will be free to maintain full operational flexibility in providing service within its own service contour, while ensuring that the licensee's use of the spectrum does not negatively impact other 220 MHz operations.

20. In response to a petition seeking clarification of the decision in the *Third R&O* that the emission limits provided in § 90.212(f) of the Commission's rules must be met only at the outermost edges of contiguous channels, the Commission indicates that such emission limits must be met only at the outermost edges of contiguous channels, including those cases in which licensees combine multiple authorizations that result in contiguous channels. The Commission also clarifies that, so long as licensees combining multiple authorizations to create a contiguous channel block maintain the required co-channel protection on all of the channels that comprise the channel block, such licensees will be permitted to eliminate the emission mask on all ''inside channels.''

21. The Commission grants a petition to modify § 90.729(b) of its rules to provide that the antenna height limitation for stations operating on 221–222 MHz frequencies be associated with HAAT of the station's transmitting antenna, rather than the antenna's height above ground. The Commission indicates that by requiring licensees operating on these frequencies to limit the height of their transmitting antenna to 7 meters HAAT, it will eliminate instances of licensees inadvertently causing interference to adjacent channel operations by transmitting at an antenna height of 7 meters above ground at a particularly high elevation. The Commission also modifies § 90.729(c) to indicate that the height restriction of base stations operating on channels 196–200 must be associated with such station's transmitting antenna HAAT, rather than the antenna's height above ground.

22. The Commission denies petitions requesting that the power limit for fixed stations operating on mobile channels (*i.e.*, channels in the 221–222 MHz band) be raised from 50 watts ERP to 500 watts ERP. The Commission indicates that if 220 MHz licensees were to be permitted, as petitioners propose, to operate fixed stations in the 221–222 MHz band at a power level of 500 watts ERP—ten times higher than the current limit—it would be concerned about the possibility of interference to adjacent channel 220 MHz land mobile operations. The Commission therefore rejects the adoption of a rule that would allow for such transmissions.

23. The Commission concludes that the only manner in which a licensee

could operate a fixed station in the 221–222 MHz band at a power level of 500 watts ERP without disrupting the operations of other 220 MHz licensees would be for that licensee to gain the consent of all affected 220 MHz licensees to operate such a station. It will therefore permit a licensee seeking to operate fixed stations in the 221–222 MHz band at a power level of 500 watts ERP to seek a waiver of § 90.729(b) of the Commission's rules if the licensee obtains the consent for such operation from the following licensees authorized on channels up to 200 kHz removed from the channels of the licensee: (1) All nationwide licensees; (2) all Phase II non-nationwide licensees that are authorized in an EA or Region that is located within 6 km of the licensee's proposed fixed station; (3) all Government nationwide users; and (4) all Phase I non-nationwide licensees with a base station that is located within 6 km of the licensee's proposed fixed station. As discussed in paragraphs 95–106 of the full text of the *MO&O*, Phase I non-nationwide licensees may modify their authorizations to add additional transmitters within their existing service area, or change the operating parameters or location of their base station. The Commission concludes that such a licensee seeking the consent of a Phase I non-nationwide licensee to operate at 500 watts ERP will not be required to obtain the consent of that licensee with regard to any additional transmitters for which the licensee obtains authorization. The licensee will only be required to obtain the consent with regard to the licensee's base station, as authorized at the time the licensee seeks the consent.

24. The Commission dismisses on procedural grounds petitions requesting that the Commission raise the allowable power limit for the base stations of nationwide licensees from 500 watts ERP to 1400 watts ERP. The Commission finds that, because in the *Third Notice*, the Commission did not seek comment with regard to the appropriateness its rule that provides the height-power restrictions for stations operating in the 220 MHz band, and because commenters, in response to the *Third Notice*, did not seek modification of the rule with regard to height-power limitations for stations operating in the 220–221 MHz band, and because the Commission did not address or modify the 220–221 MHz band height-power limitations in the *Third R&O*, this matter is beyond the scope of this reconsideration proceeding. The Commission does, however, believe that an increase in the allowable power for nationwide licensees would be acceptable provided that appropriate technical criteria are established to ensure that interference does not occur to adjacent channel systems. The Commission therefore invites those parties seeking modification of the Commission's rules regarding this matter to submit a petition for rulemaking in order to change the allowable power limit and to develop such criteria.

25. The *MO&O* declines requests to specify the criteria used to determine whether licensees have provided substantial service as alternative means of meeting their construction requirements. The *MO&O* instead refers parties seeking clarification of the standard beyond the definition in the Commission's rules to the Commission's stated purpose in applying the standard to 220 MHz, and to previous examples the Commission has given of substantial service. The *MO&O* maintains that any further elaboration of the standard at this time would only limit its flexibility and usefulness to licensees and their customers.

26. The *MO&O* removes the 220 MHz service spectrum efficiency standard and thus grants petitions seeking elimination of the efficiency standard as applied to paging operations. In the *Third R&O*, the Commission concluded that Phase I and Phase II licensees combining contiguous 5 kHz channels in order to operate on channels wider than 5 kHz would be required to meet the following spectrum efficiency standard: for voice communications, a licensee was required to employ equipment that provides at least one voice channel per 5 kHz of channel bandwidth; for data communications, a licensee was required to employ equipment that operates at a data rate of at least 4,800 bits per second per 5 kHz of channel bandwidth. The standard was implemented through the Commission's equipment type acceptance process.

27. The Commission agrees with petitioners who argue that the goal of making the 220 MHz service rules more flexible by permitting paging on a primary basis, and by permitting the aggregation of contiguous channels, is threatened because paging equipment is not presently capable of meeting the efficiency standard for the band. The Commission also believes that, since adoption of the *Third R&O*, circumstances have developed in a manner that suggests that 220 MHz spectrum will be used efficiently by service providers regardless of whether any spectrum efficiency standard is imposed.

28. Although the Commission is convinced by the showings in the record that carriers seeking to offer one-way paging services would be impaired in their ability to take advantage of the licensing flexibility introduced in the *Third R&O* because of the requirements of the spectrum efficiency standard, the Commission is not persuaded by the claim of some petitioners that the best solution to this problem is to exempt paging carriers from the standard. The Commission explains that singling out paging services for special treatment while leaving the standard in place would have the potential effect of impeding the introduction and deployment of other services demanded by consumers that use available equipment that does not comply with the strictures of the efficiency standard.

29. The Commission further notes that elimination of the efficiency standard, while avoiding the policy deficiencies that are inherent in an exemption limited to one class of carriers, grants the relief sought by the petitioners. The Commission concludes that there is not a rational basis for avoiding this problem for carriers choosing to offer one type of service while permitting the problem to stand as a barrier to carriers offering other services. Although the Commission notes that no party has petitioned directly for this result, the Commission does not believe that any 220 MHz licensee or applicant will be harmed by this grant of additional flexibility.

30. Elimination of the standard preserves the Commission policy of maximizing flexible use of spectrum. This policy is particularly important for 220 MHz spectrum because small businesses may be prominent players in developing this spectrum, and these businesses would directly benefit from a flexible spectrum use policy that enables them to respond efficiently to marketplace demand. The Commission further observes that, in services where the Commission has used competitive bidding to award licenses, there is evidence that licensees are using spectrally efficient technologies, despite the decision of the Commission not to impose spectrum efficiency standards.

31. The Commission states that eliminating the spectrum efficiency standard for combined contiguous channels should not be construed as a lessening of its commitment to using this band to stimulate innovative narrowband technology. Because the efficiency standard applies only to those licensees who may combine contiguous 5 kHz channels to form larger channels, it has only limited effect on the majority of 220 MHz service licensees whose

channels are not contiguous. The Commission therefore believes the market for efficient narrowband 5 kHz equipment will remain strong. The Commission also notes that, subsequent to its adoption of the *Third R&O*, its decision in the *220 MHz Fourth Report and Order* in this proceeding (62 FR 46211, September 2, 1997) (*Fourth R&O*) has stimulated deployment of spectrally efficient 5 kHz equipment.

32. Although most of the debate in the record focused on the standard for data, the Commission also removes the spectrum efficiency standard for voice communications. The Commission discerns no reasonable legal or policy basis to make a distinction with respect to the application of a spectrum efficiency standard. Elimination of the standard will grant licensees seeking to provide voice services comparable flexibility to employ the type of technology that best meets their needs. As with 220 MHz licensees that provide data services, the Commission is confident that licensees providing voice services will seek to ensure the success of their business plans by using the most spectrally efficient technologies to serve the maximum number of customers.

33. The Commission rejects one petitioner's suggestion that it adopt a lenient efficiency standard that would become stricter over time. The Commission explains that if a stricter standard were phased in, and operators were permitted to continue using equipment they had acquired under the early, more lenient standard, the later standard would probably have little effect. The Commission also rejects petitioners' proposal that the efficiency standard of the Refarming proceeding be applied to the 220 MHz band. The Commission notes that the 220 MHz band—a small sector of the radio spectrum, clear of incumbents using older, inefficient technology, in which the Commission has attempted to foster technological innovation—presents quite different circumstances and concerns. The Commission is not persuaded that conformance of the two standards would significantly promote the goals of either docket, and notes that nothing in the Refarming proceeding would preclude the use of 5 kHz equipment in refarmed bands.

34. The Commission notes that its decision renders moot the question of whether waiver requests regarding the spectrum efficiency standard should be subject to public comment, as a petitioner requested. In the *MO&O*, the removal of the spectrum efficiency standard is discussed in paragraphs 111–149.

35. The *MO&O* next clarifies construction requirements contained in § 90.769 of the Commission's rules by stipulating that § 90.769 applies only to Phase II nationwide licensees and not to Phase I nationwide licensees. The title of § 90.769 is amended accordingly to avoid confusion.

36. The *MO&O* grants a petition requesting that the Commission reconsider or clarify language regarding the return of pending nationwide 220 MHz applications, by clarifying that the language ordering the return of pending nationwide applications does not apply to pending, commercial, nationwide 220 MHz applications. The Commission notes, however, that the applications for nationwide, commercial 220 MHz licenses have since been dismissed.

37. Regarding acquisition of multiple nationwide licenses, the *MO&O* dismisses as moot a petition asking that the Commission amend its rules to permit entities to obtain more than one Phase I authorization in a geographic area. The *Fourth R&O* in this proceeding, which was adopted after the petition for reconsideration was filed, repealed § 90.739(a) of the Commission's rules which restricted the circumstances under which a Phase I licensee could obtain an additional license. Section 90.739 was revised to provide that there would be no limit on the number of licenses that may be authorized to a single 220 MHz service licensee. Thus, no additional action is required by the Commission at this time.

38. Consistent with the conclusions reached in the *Part I Third R&O*, (63 FR 2315, January 15, 1998) the Commission eliminates installment payment plans for small and very small businesses participating in the 220 MHz service auction, and increases the level of bidding credits for such entities. Small businesses with gross revenues not to exceed $15 million will receive a 25 percent bidding credit and very small businesses with gross revenues not to exceed $3 million will receive a 35 percent bidding credit. The *MO&O* also amends § 90.1015 of the Commission's rules to permit auction winners to make their final payments within ten (10) business days after the applicable deadline, provided that they also pay a late fee of five (5) percent of the amount due. This change will conform the 220 MHz rules with the generally-applicable part 1 rules. Applicants that do not submit the required final payment and 5 percent late fee within the 10-day late payment period will be declared in default and will be subject to the default payment specified in § 1.2104(g) of the Commission's rules. The Commission emphasizes that the decision to permit late payments is limited to payments owed by winning bidders that have submitted timely initial down payments. Finally, regarding installment payments, the Commission reiterates that the procedures set forth in part 1, Subpart Q of the Commission's rules apply to the Phase II 220 MHz service unless otherwise indicated in part 90 of the Commission's rules. The Commission thus clarifies that applicants at the short- and long-form application stages are subject to the reporting requirements contained in the newly adopted part 1 ownership disclosure rule.

39. Finally, regarding the *Third R&O*, the *MO&O* denies on procedural grounds petitions to reconsider the construction requirements for Phase I licensees, particularly the requirement that nationwide, Phase I licensees construct all five channels at a minimum number of base stations at certain urban sites. The *MO&O* also dismisses on procedural grounds petitions to cease requiring nationwide, Phase I licensees to obtain specific licenses for each base station.

40. The *MO&O* also considers petitions for reconsideration and clarification filed in response to the *Second R&O* which adopted a one-time modification procedure that allows licensees to modify their licenses to relocate their authorized base stations to previously unauthorized locations. Under this procedure, licensees with base stations authorized inside any Designated Filing Area (DFA) were 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. Licensees with base stations authorized outside the boundaries of any DFA were 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, so long as they did not locate their base station more than 8 km inside the boundaries of any DFA.

41. The Commission finds that the *Second R&O* set out a clear and unambiguous framework governing the maximum distance licensees are permitted to move under the modification procedure. Under this framework, contrary to the assertions of the petitioners, 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.

42. The Commission denies petitions requesting that licensees be permitted moves up to a maximum distance of 25

km, rather than the 8 km authorized in the *Second R&O*, if the licensees is moving from a location within a DFA to a location outside that DFA. In ruling against the petitions, the *MO&O* states that the purpose of the modification procedure 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 Commission's intention for the modification procedure to serve as an opportunity for a licensee to abandon its original plan to serve a particular area in favor of a more attractive or different service area. The Commission maintains that 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.

43. 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. Therefore, the Commission reaffirms its 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. The Commission also denies a petition asking for clarification of its position to indicate that a licensee whose initially authorized site is located inside a DFA within 8 km of the perimeter and who seeks to modify its authorization in order to move to a location outside the DFA be permitted to move its site up to one-half the distance over 120 km toward any co-channel licensee's initially authorized base station, to a maximum distance of 25 km.

44. The *MO&O* grants, in part, petitions requesting that the Commission accept modifications of operating parameters other than relocation modifications to the extent that the Commission clarifies that licensees who seek to relocate may modify their antenna HAAT. Otherwise these petitions are denied with respect to this issue. The Commission states that the *Second R&O* sought to accommodate Phase I licensees that for various unforeseen reasons were unable to construct at their authorized locations and so provided such licensees with the opportunity to seek modification of their licenses to relocate their base stations. The *Second R&O* did not provide for licensees to modify their authorizations for any other reason, such as to change their power or antenna height.

45. The Commission continues to believe that the modification procedure set out in the *Second R&O* appropriately accommodates the needs of licensees who were unable to construct at their authorized locations. The intention of the Commission in the *Second R&O* 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 allowed these licensees to file modification applications without providing an opportunity for other potential applicants to file competing initial applications. Thus, the *MO&O* finds 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. The Commission notes that if a licensee who did not seek to relocate believed it was impossible to remain at the same HAAT at the original location, there is nothing in the *Second R&O* that would prevent such a licensee from applying for a waiver of the Commission's rules. The Commission also notes, however, that licensees who decided not to relocate under the procedures announced in the *Second R&O* will be permitted to make changes to their technical parameters, as provided elsewhere in the *MO&O* as long as such modifications do not expand their 38 dBu service contour.

46. In addition, because it is highly unlikely that a licensee who relocates its base station will be able to install its antenna at the identical HAAT specified in its existing authorization, the Commission clarifies that licensees seeking to relocate are also permitted to modify their HAAT. 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 *Second R&O* does not allow a licensees who relocates to change its power level.

47. 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 § 90.729 of the Commission's rules, 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 *Second R&O* does not establish any authorization pursuant to which the applicant may alter operating power levels. The Commission notes that after a licensee relocates in accordance with the Commission's modification procedures and establishes its 38 dBu service contour, the licensee 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.

48. As for licensees who were granted Special Temporary Authority (STA) 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.

49. Finally, the Commission notes 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. Petitioners further assert that such protection is likely to be based on maximum allowable height and power. In fact, the protection afforded Phase I licensees by future Phase II licensees has been addressed by the Commission in the *Third R&O*, 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. This decision was affirmed in this *MO&O*.

50. In the *Second R&O* 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 *Second R&O*. The Commission believed that it 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. The *Second R&O* 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 *Second R&O*. 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.

51. The *MO&O* denies petitions requesting that the Commission reconsider or clarify that if a licensee had taken delivery of its base station transceiver on or before January 26, 1996, and had filed an application for STA on or before January 26, 1996, the licensee need not have been granted an STA by January 26, 1996, in order to be allowed to seek permanent authorizations at its STA site. The *MO&O* concludes that it was the Commission's intent in the *Second R&O* 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.

52. The Commission finds 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 be 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. 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.

53. 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, the Commission notes that an STA does not guarantee any right to obtain permanent authorization at the STA site. While pre-grant construction may not be an uncommon practice, the Commission's rules provide that licensees who construct prior to receiving an authorization do so at their own risk. Licensees were able to apply for STAs at any time during the planning or construction of their base stations and had no reason to delay filing their STA applications. At the time the *Second R&O* 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. 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.

54. For these reasons, the Commission concludes 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. The Commission notes 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 §§ 90.753(a) and 90.753(b) of the Commission's rules.

55. The *MO&O* denies petitions seeking clarification of the *Second R&O* to allow waiver requests to be accompanied by an alternative site proposal. The *Second R&O* 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. In these cases, the Commission contemplated that licensees would seek a waiver of the modification procedures the Commission adopted in the *Second R&O*. Petitioners express concern that the *Second R&O* did not provide for a protection mechanism or for a tolling of the construction period for licensees filing such waiver requests. They argue that if a waiver request is ultimately denied, a licensee would lose its authorization for failure to construct by March 11, 1996.

56. 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. 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.'' [2] 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.

57. 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 *Second R&O*, 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. The Commission believes that it 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 the Commission to do, would risk an adverse impact on the competitive development of the 220 MHz service.

58. The Commission concludes that the *Second R&O* posed a clear and reasonable choice for 220 MHz licensee, 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 *Second R&O*, it could chose to do so. The *Second R&O* 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.

59. The Commission provided licensees with a reasonable framework for modifying their base station locations, and petitioners, in the Commission's 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 the Commission is affirming that licensees may not file alternative locations proposals with a waiver request, the Commission does not need to reach the question of whether to allow licensees whose waiver requests are denied a reasonable period of time to construct their facilities at an alternative site. The

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

Commission notes, however, that the *Second R&O* 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. Therefore, a licensee who is granted a waiver after June 1, 1996, will have an adequate period of time to construct its station.

60. Finally, the *MO&O* denies petitions asking for clarification that the Commission will accept waiver requests other than the specific type of waiver request discussed in the *Second R&O* because such clarification is unnecessary under the Commission's rules. The Commission notes that there is nothing in the *Second R&O* 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.

Supplemental Final Regulatory Flexibility Analysis

61. As required by the Regulatory Flexibility Act (RFA),[3] a Final Regulatory Flexibility Analysis (FRFA) was incorporated in Appendix B of the *220 MHz Second Report and Order (Second R&O)* and in Appendix A of the *220 MHz Third Report and Order (Third R&O)* in this proceeding. The Commission's Supplemental Final Regulatory Flexibility Analysis (Supplemental FRFA) in this *Memorandum Opinion and Order on Reconsideration (MO&O)* reflects revised or additional information to that contained in those FRFAs. This Supplemental FRFA is thus limited to matters raised in response to the *Second R&O* or the *Third R&O* that are granted on reconsideration in the *MO&O*. 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

62. The actions taken in this *MO&O* are in response to petitions for reconsideration or clarification of the service rules adopted in the *Third R&O* 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 *Second R&O*. The petitions are denied, with the following exceptions. The rule changes adopted in the *MO&O* 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. The Commission's 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.

63. The Commission also grants 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. The Commission's objective is to eliminate instances of licensees inadvertently causing interference to adjacent channel operations.

64. The *MO&O* removes the 220 MHz service spectrum efficiency standard, and thus grants the petition that the Commission 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, the Commission now believes that imposition of the standard could inadvertently deny the provision of certain services in the 220–222 MHz band, contrary to the intent of the *Third R&O*. The Commission's objective in removing the standard is to facilitate the provision of a wide range of services in the 220 MHz band.

65. In addition, the Commission addresses certain issues that the *Part I Third R&O* directs be resolved in this proceeding. Consistent with the conclusions reached in the *Part I Third R&O*, the Commission eliminates installment payment plans for small and very small businesses participating in the 220 MHz service auction, and increases the level of bidding credits for such entities. The Commission will also amend its 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

66. 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. The actions taken in this *MO&O* 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 Phase I licensees' authorizations which do not expand their 38 dBu service contour will therefore be permitted.

67. 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, the Commission 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. The Commission believes this decision strikes a fair balance between the interests of incumbents and Phase II licensees.

68. The *MO&O*, as provided in the *Part I Third R&O*, 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

69. As in the FRFAs, the service regulations the Commission adopts 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,

[3] *See* 5 U.S.C. 603.

[4] Public Law 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).

a majority of 220 MHz service entities may be small businesses.

70. The Commission had not developed a more refined definition of small entities applicable to the 220 MHz service, prior to the *Third R&O,* because the Phase II 220 MHz service is a new service. The RFA amendments were not in effect until after release of the *Third Notice,* therefore no data was received establishing the number of small businesses associated with the Phase II 220 MHz service. In the *Third R&O,* the Commission 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. The SBA has approved these definitions for Phase II licensees. The Commission will use the definitions in estimating the potential number of small entities applying for auctionable spectrum.

71. The Commission 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.

72. No parties submitting or commenting on the petitions for reconsideration giving rise to this *MO&O* commented on the potential number of entities that would be small businesses or very small businesses, and the Commission is 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.

73. 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 *Third R&O.*

74. 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 made available for authorization in the 220 MHz service auction. Given that 128 qualified applications were received in the 900 MHz SMR auction, the Commission 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, the Commission 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.

75. Because the elimination of installment payments is counterbalanced by the Commission's decision to elevate the size of bidding credits, the Commission anticipates that the figures it has presented regarding the estimated number of small entities participating in the 220 MHz service auction will remain unchanged. The Commission therefore anticipates 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

76. 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 *Third Notice* and the *220 MHz Fourth Notice of Proposed Rulemaking* (60 FR 46566, September 7, 1995) was closed, the Commission did not request information regarding the number of small businesses that are associated with the 220 MHz service.

77. To estimate the number of Phase I licensees and the number of 220 MHz equipment manufacturers that are small businesses the Commission shall use the relevant definitions provided by SBA.

78. 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, the Commission applies 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. According to the Bureau of the Census, only 12 radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees. 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

79. The Commission anticipates that at least six radio equipment manufacturers will be affected by the 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. 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. The Commission does 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, the Commission concludes that these manufacturers would not qualify as small business.

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

80. Phase I non-nationwide licensees who modify their authorizations as outlined in this *MO&O* 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 *Third R&O*

became effective. The FCC Form 600 is currently in use and has already received OMB clearance.

81. Phase I licensees authorized on Channels 161–200 and Channels 1–40 will be required to coordinate the addition, removal, or modification of station sites among themselves to avoid interference. Such licensees will also be required to include, in their application for minor modification of their authorization to add, remove, or modify a station site, a certification that the station has been appropriately coordinated. Phase I licensees authorized on Channels 161–200 will be required to coordinate the addition, removal, or modification of station sites with Phase II licensees authorized on Channels 1–40. Such Phase I licensees will also be required to include, in their application for minor modification of their authorization to add, remove, or modify a station site, a certification that the station has been appropriately coordinated. Licensees seeking a waiver of § 90.729(b) of the Commission's rules to operate fixed stations in the 221–222 MHz band at a power level of 500 watts ERP will be required to gain the consent for such operation from all affected 220 MHz licensees.

V. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

82. The actions taken in this *MO&O* are in response to petitions for reconsideration including, the Commission believes, several filed by small businesses. The changes minimize any possible significant economic impact on small entities, while remaining consistent with the objectives of this proceeding.

83. The *MO&O* grants the petitions of Phase I licensees to the extent of permitting, upon application, modifications to Phase I licensees' authorizations which do not expand their 38 dBu service contour. Phase I licensees also will be permitted to convert their site-by-site licenses to a single license. The deregulatory nature of these steps helps minimize the economic impact of telecommunications regulation on small entities.

84. By removing the 220 MHz service spectrum efficiency standard, the *MO&O* grants the petition that the Commission eliminate the efficiency standard as applied to paging operations. The deregulatory nature of this step helps to minimize the economic impact of telecommunications regulation on small entities. We considered retaining the standard and exempting paging only, but rejected this course as potentially discouraging the provision of innovative services. The Commission also considered replacing the standard with a more lenient standard that would be made stricter over time, but rejected this course because the Commission believes operators would continue using equipment acquired under the more lenient standard, in which case the later standard would have little effect. The Commission also considered conforming the 220 MHz band spectrum efficiency standard to the standard used in the Refarming proceeding. The Commission concluded, however, that because it applies only to aggregated, contiguous channels, and expires in 2001, the 220 MHz standard touches too few licensees for too short a time to significantly increase equipment development for the refarmed bands.

85. The Commission also believes that small businesses may be prominent players in developing this spectrum, and these businesses would directly benefit from a flexible spectrum use policy that enables them to respond efficiently to marketplace demand. Given the relatively small amount of spectrum assigned in a 220 MHz license, the Commission thinks it is reasonable to expect that acquisition of the 220 MHz Phase II licenses may be relatively affordable and therefore this service may be particularly attractive to small businesses.

86. Consistent with the conclusions reached in the Part 1 *Third R&O*, the *MO&O* eliminates 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. The Commission will also amend its 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.

87. While installment payment plans for small entities in the 220 MHz service are eliminated in the *MO&O*, the Commission found that better alternatives to assist small businesses as well as ensure provision of new services to the public are to raise bidding credits for existing categories of small entities. The Commission believes that bidding credits of sufficient size will enable small businesses to secure private financing. This suggestion is consistent with the Commission's experience in other auctions in which installment payments were not offered and small entities nevertheless have been successful (e.g., the auction of Wireless Communications Service licenses, for which bidding credits were heightened to accommodate the lack of installment payments). Prior to the *MO&O*, bidding credits of 10 percent were offered to small businesses and 25 percent to very small businesses. The Commission now offers bidding credits of 25 percent to small businesses and 35 percent to very small businesses. The levels of bidding credits adopted offer a reasonable accommodation for the elimination of installment payments.

VI. Report to Congress

88. The Commission will send a copy of this Supplementary Final Regulatory Flexibility Analysis, along with the *MO&O*, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.[5] In addition, the Commission will send a copy of the *MO&O*, including this Supplemental FRFA to the Chief Counsel for Advocacy for SBA.

Ordering Clauses

89. 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.

90. 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

[5] *See* 5 U.S.C. 801(a)(1)(A).

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.

91. It is further ordered that the Commission's rules are amended as indicated. It is further ordered that the provisions of this Order and the Commission's rules, as amended in this decision, shall become effective August 11, 1998.

92. 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.

93. 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.

List of Subjects in 47 CFR Part 90

Radio.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

Rule Changes

For the reasons stated in the preamble part 90 of title 47 of the Code of Federal Regulations is amended as follows:

PART 90—PRIVATE LAND MOBILE SERVICES

1. The authority citation for Part 90 continues to read as follows:

Authority: 47 U.S.C. 154, 251–2, 303, 309, and 332, unless otherwise noted.

2. Section 90.203 is amended by revising paragraph (k) to read as follows:

§ 90.203 Type acceptance required.

* * * * *

(k) For transmitters operating on frequencies in the 220–222 MHz band, type acceptance will only be granted for equipment with channel bandwidths up to 5 kHz, except that type acceptance will be granted for equipment operating on 220–222 MHz band Channels 1 through 160 (220.0025 through 220.7975/221.0025 through 221.7975), 171 through 180 (220.8525 through 220.8975/221.8525 through 221.8975), and 186 through 200 (220.9275 through 220.9975/221.9275 through 221.9975) with channel bandwidths greater than 5 kHz.

3. Section 90.711 is amended by revising paragraph (a) introductory text to read as follows:

§ 90.711 Processing of Phase II applications.

(a) Phase II applications for authorizations on Channels 166 through 170 and Channels 181 through 185 will be processed on a first-come, first-served basis. When multiple applications are filed on the same day for these frequencies in the same geographic area, and insufficient frequencies are available to grant all applications (*i.e.*, if all applications were granted, violation of the station separation provisions of § 90.723(k) would result), these applications will be considered mutually exclusive and will be subject to random selection procedures pursuant to § 1.972 of this chapter.

* * * * *

4. Section 90.723 is amended by revising paragraphs (e) and (f), redesignating paragraphs (g), (h), and (i) as paragraphs (i), (j), and (k), respectively, and by adding paragraphs (g) and (h) to read as follows:

§ 90.723 Selection and assignment of frequencies.

* * * * *

(e) Phase II licensees authorized on 220–221 MHz frequencies assigned from Sub-band B will be required to geographically separate their base station or fixed station transmitters from the base station or fixed station receivers of Phase I licensees authorized on 221–222 MHz frequencies 200 kHz removed or less in Sub-band A in accordance with the Table in paragraph (d) of this section. Such Phase II licensees will not be required to geographically separate their base station or fixed station transmitters from receivers associated with additional transmitter sites that are added by such Phase I licensees in accordance with the provisions of § 90.745(a).

(f) Phase II licensees with base or fixed stations transmitting on 220–221 MHz frequencies assigned from Sub-band B and Phase II licensees with base or fixed stations receiving on Sub-band A 221–222 MHz frequencies, if such transmitting and receiving frequencies are 200 kHz or less removed from one another, will be required to coordinate the location of their base stations or fixed stations to avoid interference and to cooperate to resolve any instances of interference in accordance with the provisions of § 90.173(b).

(g) Phase I licensees with base or fixed stations transmitting on 220–221 MHz frequencies assigned from Sub-band B and Phase I licensees with base or fixed stations receiving on Sub-band A 221–222 MHz frequencies (if such transmitting and receiving frequencies are 200 kHz or less removed from one another) that add, remove, or modify station sites in accordance with the provisions of § 90.745(a) will be required to coordinate such actions with one another to avoid interference and to cooperate to resolve any instances of interference in accordance with the provisions of § 90.173(b).

(h) Phase I licensees with base or fixed stations transmitting on 220–221 MHz frequencies assigned from Sub-band B that add, remove, or modify station sites in accordance with the provisions of § 90.745(a) will be required to coordinate such actions with Phase II licensees with base or fixed stations receiving on Sub-band A 221–222 MHz frequencies 200 kHz or less removed.

* * * * *

5. Section 90.729 is amended by revising paragraphs (b) and (c) introductory text to read as follows:

§ 90.729 Limitations on power and antenna height.

* * * * *

(b) The maximum permissible ERP for mobile units is 50 watts. Portable units are considered as mobile units. Licensees operating fixed stations or paging base stations transmitting on frequencies in the 221–222 MHz band may not operate such fixed stations or paging base stations at power levels greater than 50 watts ERP, and may not transmit from antennas that are higher than 7 meters above average terrain, except that transmissions from antennas that are higher than 7 meters above average terrain will be permitted if the effective radiated power of such transmissions is reduced below 50 watts ERP by 20 $\log_{10}(h/7)$ dB, where h is the height above average terrain (HAAT), in meters.

(c) Base station and fixed station transmissions on base station transmit Channels 196–200 are limited to 2 watts ERP and a maximum antenna HAAT of 6.1 meters (20 ft). Licensees authorized on these channels may operate at power levels above 2 watts ERP or with a maximum antenna HAAT greater than 6.1 meters (20 ft) if:

* * * * *

6. Section 90.733 is amended by revising paragraphs (d), (e), and (g) to read as follows:

§ 90.733 Permissible operations.

* * * * *

(d) Licensees, except for licensees authorized on Channels 161 through 170 and 181 through 185, may combine any number of their authorized, contiguous channels (including channels derived from multiple authorizations) to form channels wider than 5 kHz.

(e) In combining authorized, contiguous channels (including channels derived from multiple authorizations) to form channels wider than 5 kHz, the emission limits in § 90.210(f) must be met only at the outermost edges of the contiguous channels. Transmitters shall be tested to confirm compliance with this requirement with the transmission located as close to the band edges as permitted by the design of the transmitter. The frequency stability requirements in § 90.213 shall apply only to the outermost of the contiguous channels authorized to the licensee. However, the frequency stability employed for transmissions operating inside the outermost contiguous channels must be such that the emission limits in § 90.210(f) are met over the temperature and voltage variations prescribed in § 2.995 of this chapter.

* * * * *

(g) The transmissions of a Phase I non-nationwide licensee's paging base station, or fixed station transmitting on frequencies in the 220–221 MHz band, must meet the requirements of §§ 90.723(d), (g), (h), and (k), and 90.729, and such a station must operate at the effective radiated power and antenna height-above-average-terrain prescribed in the licensee's land mobile base station authorization.

* * * * *

7. Section 90.745 is added to read as follows:

§ 90.745 Phase I licensee service areas.

(a) A Phase I licensee's service area shall be defined by the predicted 38 dBu service contour of its authorized base station or fixed station transmitting on frequencies in the 220–221 MHz band at its initially authorized location or at the location authorized in accordance with §§ 90.751, 90.753, 90.755 and 90.757 if the licensee has sought modification of its license to relocate its initially authorized base station. The Phase I licensee's predicted 38 dBu service contour is calculated using the F(50,50) field strength chart for Channels 7–13 in § 73.699 (Fig. 10) of this chapter, with a 9 dB correction factor for antenna height differential, and is based on the authorized effective radiated power (ERP) and antenna height-above-average-terrain of the licensee's base station or fixed station. Phase I licensees are permitted to add, remove, or modify transmitter sites within their existing service area without prior notification to the Commission so long as their predicted 38 dBu service contour is not expanded. The incumbent licensee must, however, notify the Commission within 30 days of the completion of any changes in technical parameters or additional stations constructed through a minor modification of its license. Such notification must be made by submitting the appropriate FCC form and must include the appropriate filing fee, if any. These minor modification applications are not subject to public notice and petition to deny requirements or mutually exclusive applications.

(b) Phase I licensees holding authorizations for service areas that are contiguous and overlapping may exchange these authorizations for a single license, authorizing operations throughout the contiguous and overlapping service areas. Phase I licensees exercising this license exchange option must submit specific information for each of their external base station sites.

8. The section heading of § 90.769 is revised to read as follows:

§ 90.769 Construction and implementation of Phase II nationwide licenses.

* * * * *

9. Section 90.1011 is revised to read as follows:

§ 90.1011 Submission of upfront payments and down payments.

(a) The Commission will require applicants to submit an upfront payment prior to the start of a 220 MHz Service auction. The amount of the upfront payment for each geographic area license auctioned and the procedures for submitting it will be set forth by the Wireless Telecommunications Bureau in a public notice in accordance with § 1.2106 of this chapter.

(b) Each winning bidder in a 220 MHz Service auction must submit a down payment to the Commission in an amount sufficient to bring its total deposits up to 20 percent of its winning bid within ten (10) business days following the release of a Public Notice announcing the close of bidding.

10. Section 90.1013 is revised to read as follows:

§ 90.1013 Long-form application (FCC Form 601).

Each successful bidder for a 220 MHz geographic area license must submit a long-form application (FCC Form 601) within ten (10) business days after being notified by Public Notice that it is the winning bidder. Applications for 220 MHz geographic area licenses on FCC Form 601 must be submitted in accordance with § 1.2107 of this chapter, all applicable procedures set forth in the rules in this part, and any applicable Public Notices that the Commission may issue in connection with an auction. After an auction, the Commission will not accept long-form applications for 220 MHz geographic area licenses from anyone other than the auction winners and parties seeking partitioned licenses pursuant to agreements with auction winners under § 90.1019 of this chapter.

11. Section 90.1015 is revised to read as follows:

§ 90.1015 License grant, denial, default, and disqualification.

(a) Unless otherwise specified by Public Notice, auction winners are required to pay the balance of their winning bids in a lump sum within ten (10) business days following the release of a Public Notice establishing the payment deadline. If a winning bidder fails to pay the balance of its winning bids in a lump sum by the applicable deadline as specified by the Commission, it will be allowed to make payment within ten (10) business days after the payment deadline, provided that it also pays a late fee equal to five percent of the amount due. When a winning bidder fails to pay the balance of its winning bid by the late payment deadline, it is considered to be in default on its license(s) and subject to the applicable default payments. Licenses will be awarded upon the full and timely payment of winning bids and any applicable late fees.

(b) A bidder that withdraws its bid subsequent to the close of bidding, defaults on a payment due, or is disqualified, is subject to the payments specified in § 1.2104(g), § 1.2109, and § 90.1007 of this chapter, as applicable.

12. Section 90.1017 is revised to read as follows:

§ 90.1017 Bidding credits for small businesses and very small businesses.

(a) *Bidding credits.* A winning bidder that qualifies as a small business or a consortium of small businesses as defined in § 90.1021(b)(1) or § 90.1021(b)(4) may use a bidding credit of 25 percent to lower the cost of its winning bid. A winning bidder that qualifies as a very small business or a consortium of very small businesses as defined in § 90.1021(b)(2) or § 90.1021(b)(4) may use a bidding credit

of 35 percent to lower the cost of its winning bid.

(b) *Unjust enrichment—Bidding credits.* (1) If a small business or very small business (as defined in §§ 90.1021(b)(1) and 90.1021(b)(2), respectively) that utilizes a bidding credit under this section seeks to transfer control or assign an authorization to an entity that is not a small business or a very small business, or seeks to make any other change in ownership that would result in the licensee losing eligibility as a small business or very small business, the small business or very small business must seek Commission approval and reimburse the U.S. government for the amount of the bidding credit, plus interest based on the rate for ten year U.S. Treasury obligations applicable on the date the license was granted, as a condition of approval of the assignment, transfer, or other ownership change.

(2) If a very small business (as defined in § 90.1021(b)(2)) that utilizes a bidding credit under this section seeks to transfer control or assign an authorization to a small business meeting the eligibility standards for a lower bidding credit, or seeks to make any other change in ownership that would result in the licensee qualifying for a lower bidding credit under this section, the licensee must seek Commission approval and reimburse the U.S. government for the difference between the amount of the bidding credit obtained by the licensee and the bidding credit for which the assignee, transferee, or licensee is eligible under this section, plus interest based on the rate for ten year U.S. Treasury obligations applicable on the date the license was granted, as a condition of the approval of such assignment, transfer, or other ownership change.

(3) The amount of payments made pursuant to paragraphs (b)(1) and (b)(2) of this section will be reduced over time as follows: A transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit (or the difference between the bidding credit obtained by the original licensee and the bidding credit for which the post-transfer licensee is eligible); in year 3 of the license term the payment will be 75 percent; in year 4 the payment will be 50 percent; and in year 5 the payment will be 25 percent, after which there will be no assessment.

[FR Doc. 98–15710 Filed 6–11–98; 8:45 am]

BILLING CODE 6712–01–P