

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 90

[WT Docket No. 96-199; FCC 98-182]

Finder's Preference Rule

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This action amends the rules to eliminate the finder's preference program in the 220-222 MHz band and in the 470-512 Mhz, 800 MHz and 900 MHz Private Land Mobile Radio (PLMR) bands. This action is taken to facilitate geographic licensing in the 220-222 MHz band and to permit Commission resources presently devoted to the finder's preference program to be redirected to other, more efficient channel recovery methods. No further finder's preference requests will be accepted after the adoption date of the *Report and Order*, July 29, 1998, an action which is procedural in nature and which is taken for good cause stated. Finder's preference requests pending as of the adoption date will be processed.

EFFECTIVE DATE: September 21, 1998.

FOR FURTHER INFORMATION CONTACT: Michael J. Wilhelm of the Public Safety and Private Wireless Division, Wireless Telecommunications Bureau at 202-418-0680 or via e-mail at mwilhelm@fcc.gov.

SUPPLEMENTARY INFORMATION:

1. This is a summary of the Commission's *Report and Order* (Report and Order) discontinuing the finder's preference program.

2. Previously, the Commission adopted a *Report and Order*, 56 FR 65857, December 19, 1991, wherein it established a finder's preference program that gave a dispositive licensing preference to persons who identified licensees who were not in compliance with the Commission's construction and operation rules.

3. In the *Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking* in PR Docket No. 89-552, 60 FR 46564 (September 7, 1995), the Commission proposed a new licensing plan for the 220-222 MHz service. That licensing plan provided for geographical, rather than site-specific licensing in the 220-222 MHz band.

4. In the *Notice of Proposed Rule Making* in WT Docket No. 96-199 (NPRM), 61 FR 51877 (October 4, 1996) the Commission proposed elimination of the finder's preference program in the 220-222 MHz band because it appeared

inconsistent with the geographical licensing plan for that band. The NPRM also solicited comment on whether or not the finder's preference program should be maintained in the 470-512 Mhz, 800 MHz and 900 MHz bands.

5. Based on review of the record developed in response to the NPRM, the Commission concluded that the finder's preference program should be discontinued for the 220-222 MHz band and the 470-512 Mhz, 800 MHz and 900 MHz bands. With respect to the 220-222 MHz band, the Commission found its decision to discontinue the finder's preference program was consistent with earlier actions it had taken in discontinuing the program in other bands. See *First Report and Order*, *Eighth Report and Order* and *Second Notice of Proposed Rule Making* in PR Docket No. 93-144, PP Docket No. 93-253, 61 FR 6138 (February 16, 1996); *Second Order on Reconsideration and Seventh Report and Order* in PR Docket No. 89-553, PP Docket No. 93-252, GN Docket No. 93-252, 60 FR 48913 (September 21, 1995). Moreover, no commenting party opposed retention of the finder's preference program for the 220-222 MHz band. With respect to the 470-512 Mhz, 800 MHz and 900 MHz bands, after review of the record and internal Commission data regarding the finder's preference program, the Commission decided the program should be eliminated. The Commission did not find persuasive, comments filed by parties urging retention of the program notwithstanding its conceded problems, among them several protracted adversarial contests for "found" spectrum. The Commission determined that its own compliance review efforts had been more effective than the finder's preference program in yielding spectrum recovery. Finally, the Commission declined to assign the processing of finder's preference requests to frequency coordinators because the processing of such requests was outside the frequency coordinators' expertise and, in any event, appeals from frequency coordinators' decisions would require resolution by the Commission.

6. Several commenting parties urged the Commission to process pending finder's preference requests rather than dismissing them, as the Commission had reserved the discretion to do in the NPRM. In light of the relatively few finder's preference requests still pending, the Commission determined that processing of those requests would not impose an undue burden on Commission resources and therefore agreed to process pending requests. However, to forestall an influx of

speculative finder's preference requests before the rule eliminating the finder's preference program became effective, the Commission decided not to accept new finder's preference requests after the adoption date of the *Order*. The Commission determined that the avoidance of such an influx of new requests constituted good cause for not accepting further finder's preference requests and that, in any event, its action in declining to accept new requests was procedural in nature.

Ordering Clauses

7. In view of the foregoing and pursuant to the authority contained in sections 4, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 303 and 307 it is ordered that part 90 of the Commission's Rules is amended and becomes effective September 21, 1998. It is further ordered that effective upon adoption of this *Report and Order*, no additional finder's preference requests for the 220-222 MHz band or the 470-512 MHz, 800 MHz, and 900 MHz PLMR bands will be accepted for filing.

Procedural Matters

8. The Final Regulatory Flexibility Analysis pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 604, is contained in the attachment at the end of this document.

List of Subjects in 47 CFR Part 90

Communications equipment, Radio.

Federal Communications Commission.

Magalie Roman Salas,
Secretary.

Rule Changes

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

PART 90—PRIVATE LAND MOBILE RADIO SERVICES

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

Authority: Secs. 4, 251-2, 303, 309, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 251-2, 303, 309, and 332, unless otherwise noted.

2. Revise paragraph (k) of § 90.173 to read as follows:

§ 90.173 Policies governing the assignment of frequencies.

* * * * *

(k) This paragraph is only applicable to entities with Finder's Preference requests pending before the Commission as of July 29, 1998. Notwithstanding any other provisions of this part, any eligible person shall be given a dispositive

preference for a channel assignment on an exclusive basis in the 220–222 MHz, 470–512 MHz, and 800/900 MHz (except on frequencies designated exclusively for SMR service) bands by submitting information that leads to the recovery of channels in these bands. Recovery of such channels must result from information provided regarding the failure of existing licensees to comply with the provisions of §§ 90.155, 90.157, 90.629, 90.631 (e) or (f), or 90.633 (c) or (d).

* * * * *

§ 90.175 [Amended]

3. Remove paragraph (i)(15) of § 90.175.

Attachment—Final Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act, 5 U.S.C. § 603 (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rule Making* in WT Docket No. 96–199.¹ The Commission sought written public comments on the proposals in the *NPRM*, including comments on the IRFA. The Commission's Final Regulatory Flexibility Analysis (FRFA) in this Report and Order conforms to the RFA, as amended by the Contract With America Advancement Act of 1996.²

I. Need For and Objective of the Proposed Rule

In the *NPRM*, as our objectives, we proposed to amend Part 90 of our Rules to eliminate the finder's preference program in the 220–222 MHz band because we had proposed competitive bidding and geographic licensing for this band. The *NPRM* also sought comment on (1) whether the finder's preference program should be continued for Private Land Mobile Radio (PLMR) services in the 470–512 MHz, 800 MHz, and 900 MHz bands because these bands had few, if any, finder's preference requests, (2) whether the Commission should delay processing finder's preference requests in the 220–222 MHz band, (3) whether the Commission should retain the discretion to dismiss pending finder's preference requests in any frequency band in which the finder's preference is eliminated, and (4) whether ongoing oversight and compliance review programs are adequate enforcement mechanisms so as to justify the elimination of the finder's preference program.

In this *Report and Order*, we find that elimination of the finder's preference program in the 220–222 MHz, 470–512 MHz, 800 MHz, and 900 MHz bands is appropriate. Pending finder's preference requests will be processed in accordance with Commission's rules.

II. Summary of Significant Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis

No comments were submitted in direct response to the IRFA. We have, however, reviewed general comments that may impact small businesses.

The only impact on small business from this *Report and Order* is the elimination of the finder's preference program and filings related thereto in the 220–222 MHz, 470–512 MHz, 800 MHz, and 900 MHz bands. To date, only one finder's preference request has been filed in the 220–222 MHz band. The elimination of the finder's preference program in the 220–222 MHz band is predicated on the fact that geographic area licensing and competitive bidding have been adopted for this band.³ The competitive bidding and geographic area licensing framework has been designed to implement Congress's goal of giving small business and others the opportunity to participate in the provision of spectrum-based services in accordance with 47 U.S.C. § 309(j)(4)(D). We eliminated the finder's preference program in the 800 MHz and 900 MHz bands when we adopted geographic area licensing and competitive bidding in those bands.⁴ Therefore, this *Report and Order*—which eliminates the finder's preference program in the 220–222 MHz band—is consistent with our objective to promote efficient licensing and enhance the competitive potential of the 220–222 MHz band and is in accordance with the statutory directives of Section 309(j)(4)(D) of the Communications Act. We believe that the Commission's ongoing oversight and compliance programs are adequate and that the few number of finder's preference requests filed overall justify the elimination of the finder's preference program not only in the 220–222 MHz band, but also in the 470–512 MHz, 800 MHz, and 900 MHz bands.

III. Description and Estimate of the Number of Small Entities Affected by the Subject Rules

The rules adopted in this *Report and Order* will require small businesses that desire

³ See Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220–222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89–522, Implementation of Sections 3(n) and 332 of the Communications Act—Regulatory Treatment of Mobile Services, GN Docket No. 93–252, and Implementation of Section 309(j) of the Communications Act—Competitive Bidding, 220–222 MHz, *Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking*, PP Docket No. 93–253, 11 FCC Rcd 188 (1995).

⁴ Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels in the Designated Filing Areas in the 896–901 MHz Bands Allotted to the Specialized Mobile Radio Pool, *Second Order on Reconsideration and Seventh Report and Order*, 11 FCC Rcd 2639 (1995); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Implementation of Sections 3(n) and 322 of the Communications Act Regulatory Treatment of Mobile Services, Implementation of Section 309(j) of the Communications Act—Competitive Bidding, *First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking*, 11 FCC Rcd 1463 (1995).

spectrum in the 220–222 MHz band to participate in the geographic area licensing and competitive bidding process, with the exception of certain channels allocated to Public Safety and Special Emergency Radio Services (SERS) that are not subject to geographic area licensing. The process has been designed to enable small businesses to compete for spectrum. In the 470–512 MHz, 800 MHz, and 900 MHz PLMR band services, as well as on those 220–222 MHz channels allocated to Public Safety and SERS, small businesses may obtain channels in accordance with the Commission's licensing rules for those bands.

The PLMR service plays an essential role in a vast range of industrial, business, land transportation, and public safety activities. PLMR systems are used by companies of all sizes operating in all U.S. business categories. Because of the vast array of PLMR users, the Commission has not developed nor would it be possible to develop a definition of small entities specifically applicable to PLMR users. For the purpose of determining whether a licensee is a small business as defined by the Small Business Administration (SBA), each licensee would need to be evaluated within its own business area.

The *NPRM* requested comment on the number of small entities that use PLMR for their internal communications needs in the 220–222 MHz, 470–512 MHz, 800 MHz, and 900 MHz bands and on the number of small entities that are likely to file finder's preference requests to obtain spectrum for their own internal communications needs. No comments were received. Therefore, the Commission is unable at this time to determine the number of small businesses which could be impacted by the amended rules. However, the Commission's fiscal year 1994 annual report indicates that at the end of fiscal year 1994, there were 1,101,711 licensees operating 12,882,623 transmitters in the PLMR bands below 512 MHz. There are also significant numbers of licensees in PLMR above 512 MHz.

The RFA also includes small governmental entities as part of the regulatory flexibility analysis.⁵ The definition of small governmental entity is one with a population of less than 50,000.⁶ There are over 85,006 governmental entities in the nation.⁷ This number includes such entities as states, counties, cities, utility districts, and school districts. There are no figures available on what portion of this number has populations fewer than 50,000. This number, however, includes 38,978 counties, cities, and towns, and of those 37,566, or 96 percent, have populations fewer than 50,000.⁸ The Census Bureau estimates that this ratio is approximately accurate for all governmental entities.⁹ Thus, of the 85,006 governmental entities, we estimate that 96 percent, or

⁵ See 5 U.S.C. § 601(5) (including cities, counties, towns, townships, villages, school districts, or special districts).

⁶ Id.

⁷ 1992 Census of Governments, U.S. Bureau of the Census, U.S. Department of Commerce.

⁸ Id.

⁹ Id.

¹ Amendment of Part 90 Concerning the Commission's Finder's Preference Rules, *Notice of Proposed Rule Making*, WT Docket No. 96–199, 11 FCC Rcd 13016 (1996) (*NPRM*).

² Pub. L. No. 104–121, 110 Stat. 847 (1996) (CWAAA). 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.*

81,600 are small entities that may be affected by our rules.

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

This *Report and Order* eliminates the finder's preference program in the 220–222 MHz, 470–512 MHz, 800 MHz, and 900 MHz PLMR bands. The administrative requirements and related costs for filing such finder's preference requests are eliminated. Therefore, no new requirements are imposed by this action.

V. Steps Taken by Agency To Minimize Significant Economic Impact on Small Entities Consistent With Stated Objectives

This *Report and Order* eliminates the finder's preference program in the 220–222 MHz band because we have adopted geographic area licensing and competitive bidding in this band. The competitive bidding and geographic area licensing framework has been designed to implement Congress' goal of providing small businesses and others the opportunity to participate in the provision of spectrum-based services in accordance with 47 U.S.C. 309(j)(4)(D). We eliminated the finder's preference program in the 800 MHz and 900 MHz SMR bands when we adopted geographic area licensing and competitive bidding. Therefore, the *Report and Order* is consistent with our objective to promote efficient licensing and enhancement of the competitive potential of the 220–222 MHz band and is in accordance with the statutory directives of Section 309(j)(4)(D) of the Communications Act. The elimination of the finder's preference program in the 470–512 MHz, 800 MHz, and 900 MHz PLMR bands should not affect small businesses because the Commission's ongoing oversight and compliance programs are adequate to ensure that unused spectrum is returned and re-assigned efficiently. Additionally, any returned channels in these bands may be applied for by PLMR providers, which are primarily small businesses.

VI. Report to Congress

The Commission will send a copy of this Final Regulatory Flexibility Analysis along with the Report and Order, in a report to Congress pursuant to the SBREFA.¹⁰

Note: This attachment will not appear in the Code of Federal Regulations.

[FR Doc. 98–22401 Filed 8–19–98; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AC09

Endangered and Threatened Wildlife and Plants; Final Rule To Determine the Plant *Pediocactus winkleri* (Winkler Cactus) To Be a Threatened Species

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The Fish and Wildlife Service (Service) determines the plant species *Pediocactus winkleri* (Winkler cactus), to be a threatened species. *P. winkleri* is endemic to lower elevations of the Colorado Plateau in south-central Utah. Four populations of *P. winkleri* are known. These populations total about 20,000 plants that grow on widely separated parcels of habitat between 1 (2.4 acres (ac)) and 20 (48 ac) hectares (ha) in size. This species is threatened by collection and by habitat disturbances due to mining, recreation, and livestock. This determination, that *P. winkleri* is a threatened species, implements protection under the Endangered Species Act of 1973, as amended.

DATES: This rule is effective September 21, 1998.

ADDRESSES: The complete file for this rule is available for inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Lincoln Plaza, Suite 404, 145 East 1300 South, Salt Lake City, Utah 84115.

FOR FURTHER INFORMATION CONTACT: John L. England at the above address (telephone 801/524–5001).

SUPPLEMENTARY INFORMATION:

Background

Pediocactus winkleri was discovered in the early 1960's and described in scientific literature by Heil (1979). The plant genus *Pediocactus* contains eight species, seven of these are rare endemics of the Colorado Plateau region of Utah, Colorado, New Mexico, and Arizona (Heil et al. 1981).

Pediocactus winkleri is a small globose (globular) cactus with stems 2.5 to 6.5 centimeters (cm) (1 to 2.5 inches (in)) tall and up to 5 cm (2 in) in diameter. It has clusters of 9 to 11 small radial spines with dense fine woolly hairs at their base; erect central spines are lacking. The flowers of *P. winkleri* are urn shaped, 1.8 to 2.5 cm (0.7 to 1 in) long and 1.8 to 3.8 cm (0.7 to 1.5 in)

in diameter, and have a peach-to-pink color. The fruit is barrel shaped, 0.7 to 1.0 cm (.3 to .4 in) high and 0.8 to 1.1 cm (.31 to .43 in) wide, dehiscent (process of opening) by a vertical slit along the ovary wall. The seeds are shiny black, 3 millimeters (mm) (.12 in) long and 2 mm (.08 in) wide (Heil 1979, Heil et al. 1981; Welsh et al. 1993).

Based on the most recent surveys, the Service has determined that *Pediocactus winkleri* occurs in four populations that total about 20,000 plants (Kass 1997; Fish and Wildlife Service 1994, 1997; D. Clark, Torrey, Utah, personal communication 1998). The October 6, 1993, proposed rule to list *P. winkleri* as endangered (58 FR 52059) stated that *P. winkleri* occurred in 6 populations of about 3,500 plants. The abundance estimate of 3,500 plants given in the proposed rule was obtained from Heil (1984). Surveys through 1998, however, have documented about 5,800 individual *P. winkleri* plants (Fish and Wildlife Service 1997, Kass 1997, D. Clark, per. comm. 1998). Recent surveys in 1994 (Fish and Wildlife Service 1994), 1996 (T. Clark, Capitol Reef National Park, pers. comm. 1996), 1997 (Fish and Wildlife Service 1997, Kass 1997), and 1998 (D. Clark, per. comm. 1998) indicate that the species total population could reasonably be estimated to be as many as 20,000 plants based on the amount of available habitat. Each of the four populations contain a number of widely separated sites from 1 ha (2.4 ac) to 20 ha (48 ac) in size. Since the proposed rule was published, a survey conducted by the Bureau of Land Management (BLM) discovered an additional population near the town of Ferron in southwest Emery County, Utah (Fish and Wildlife Service 1994). The Service and BLM conducted additional surveys of the species' entire potential habitat on silty soils derived from the Dakota, Mancos, and Morrison geologic formations. Additional sites were discovered within existing population areas (Fish and Wildlife Service 1997; D. Clark 1998, pers. comm.). The Park Service also reports larger numbers of the cactus within Capitol Reef National Park (K. Heil, pers. comm. 1993; Tom Clark, Capitol Reef National Park, pers. comm. 1996, 1997; D. Clark, pers. comm. 1998). The BLM reports larger numbers of the species from the Last Chance Desert population (Wayne Luddington, Bureau of Land Management, Price, Utah, pers. comm. 1997; Fish and Wildlife Service 1997). Service biologists visited these sites and subsequently reviewed the status of all extant populations of *P. winkleri* (Fish and Wildlife Service

¹⁰ See 5 U.S.C. § 801(a)(1)(A).