

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Amendment of the Commission's) WT Docket No. 96-6
Rules to Permit Flexible)
Service Offerings in the)
Commercial Mobile Radio Services)

**SECOND REPORT AND ORDER
AND ORDER ON RECONSIDERATION**

Adopted: July 6, 2000

Released: July 20, 2000

By the Commission:

I. INTRODUCTION

1. In this proceeding the Commission has sought to provide commercial mobile radio service (CMRS) carriers with maximum flexibility in the uses of CMRS spectrum. In the *First Report and Order and Further Notice of Proposed Rulemaking*,¹ the Commission amended its rules to allow CMRS carriers to provide fixed wireless services on a co-primary basis with commercial mobile services. In this Order we determine that, because of the evolving nature of fixed wireless services, we will decide the regulatory treatment of such services on a case-by-case basis. We also amend our rules to clarify that fixed wireless services provided pursuant to section 22.901(d) of the Commission's rules² are not subject to the requirements for incidental communications services set out in section 22.323 of the Commission's rules, and eliminate the notification requirement from section 22.323.³

II. BACKGROUND

2. In this proceeding the Commission has addressed the extent to which fixed services may be provided by CMRS providers. In the *First Report and Order*, the Commission found that many CMRS

¹ Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, WT Docket No. 96-6, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8965 (1996). We shall refer to the *First Report and Order* portion of the item, 11 FCC Rcd at 8970-8982, as the *First Report and Order*. We shall refer to the *Further Notice of Proposed Rulemaking* portion of the item, 11 FCC Rcd at 8982-8989, as the *FNPRM*.

² 47 C.F.R. § 22.901(d).

³ 47 C.F.R. § 22.323.

carriers were seeking to provide a wide range of fixed wireless service offerings to consumers and that in many instances the carriers proposed to combine fixed and mobile technologies into integrated service packages. The Commission therefore concluded that CMRS providers should have the flexibility to provide fixed services on a co-primary basis with commercial mobile services.⁴ The Commission reasoned that this rule change would allow the carriers greater flexibility to provide innovative wireless services to meet consumer demands. The Commission also concluded that permitting fixed services on a co-primary basis with mobile services would stimulate wireless competition in the local exchange market.⁵

3. The Commission's decision to allow co-primary fixed use of CMRS spectrum raised the related issue of how such fixed service offerings should be classified for regulatory purposes. In the initial NPRM in this proceeding, the Commission stated that it did not want to discourage the development of integrated fixed and mobile networks by subjecting carriers to multiple layers of regulation.⁶ Therefore, the Commission initially proposed to treat fixed wireless local loop services as an integral part of the CMRS services offered by a CMRS provider, so long as the carrier otherwise offered interconnected, for-profit mobile service to the public.⁷ In the *FNPRM*, however, the Commission concluded that the regulatory issue of whether fixed services would be classified as CMRS required further development of the record and more specific analysis related to particular fixed service offerings.⁸

⁴ *First Report and Order/FNPRM*, 11 FCC Rcd at 8977, ¶ 24. By not having any thresholds or ceilings on the relative levels of fixed or mobile services associated with the term "co-primary," the Commission allowed providers to choose to provide exclusively fixed services, exclusively mobile services, or any combination of the two. *Id.*

⁵ *Id.* at 8967, ¶ 3.

⁶ Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, WT Docket No. 96-6, *Notice of Proposed Rulemaking*, 11 FCC Rcd 2445, 2448-49, ¶¶ 16-18 (1996) (*citing* Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, *Second Report and Order*, 9 FCC Rcd 1411, 1424, ¶ 36 (1994)).

⁷ *Id.*

⁸ *First Report and Order/FNPRM*, 11 FCC Rcd at 8985, ¶ 47.

4. On September 30, 1996, BellSouth Corporation (BellSouth) filed a petition for partial reconsideration or clarification of the *First Report and Order*.⁹ BellSouth argues that section 22.323 of the Commission's rules,¹⁰ which permits Part 22 (Public Mobile Services) licensees to provide incidental communications services when certain enumerated criteria are met, is inconsistent with the *First Report and Order*. BellSouth requests that the Commission (1) issue an *Erratum* eliminating the rule, (2) reconsider its decision not to eliminate the rule, or (3) issue a declaratory ruling stating that section 22.323 is inapplicable to CMRS licensees providing co-primary fixed services pursuant to section 22.901 or the *First Report and Order*.¹¹

III. DISCUSSION

A. Regulatory Treatment of Fixed Wireless Service Provided by CMRS Carriers

5. Background. In the *FNPRM*, the Commission proposed establishing a rebuttable presumption that fixed services offered over frequency bands licensed to CMRS providers would be treated for regulatory purposes as CMRS.¹² The Commission sought comment on factors to evaluate when considering a challenge to a presumption that a fixed wireless service should be treated as CMRS. In addition, the Commission sought comment on the proposal that any fixed wireless service provided by a CMRS provider be treated as CMRS until such time as the service constitutes a substitute for land line telephone exchange service in a substantial portion of a state.¹³

6. Twenty-one parties filed comments on the *FNPRM*, and nine parties filed reply comments.¹⁴ Most commenters reject a case-by-case approach and urge us to adopt a "bright-line" test of whether particular services will be treated as CMRS.¹⁵ The commenters, however, differ on the nature of

⁹ See Wireless Telecommunications Bureau Seeks Comment on Petition for Partial Reconsideration or Clarification Filed by BellSouth Corporation, WT Docket 96-6, *Public Notice*, DA 97-2083 (rel. Sep. 25, 1997).

¹⁰ 47 C.F.R. § 22.323.

¹¹ BellSouth Petition at 4.

¹² *First Report and Order/FNPRM*, 11 FCC Rcd at 8987-88, ¶¶ 53-55.

¹³ *Id.* at 8988-89, ¶ 56 (citing AT&T comments at 1-2; BellSouth comments at 4; GCI reply comments at 3).

¹⁴ Appendix A provides the full and abbreviated names of the parties filing comments and reply comments on the *FNPRM*. Metricom filed both comments and reply comments, but subsequently withdrew them. See letter from M. Tamber Christian, counsel for Metricom, to Magalie Roman Salas, FCC, filed in WT Docket 96-6, dated Oct. 13, 1998.

¹⁵ See, e.g., CommNet comments at 2; NARUC comments at 5; Nextel comments at 9; NTCA comments at 3; NYDPS comments at 2; PCIA comments at 11-12; PUCO comments at 3; AT&T reply comments at 6;

the bright-line test to be applied. Most carriers argue that we should broadly define CMRS to include virtually any fixed services that carriers provide in addition to or in conjunction with their mobile service offerings.¹⁶ Other commenters, particularly state regulatory agencies, oppose any inclusion of fixed wireless services within the definition of CMRS.¹⁷

7. Discussion. In the *First Report and Order*, we observed that CMRS spectrum has the potential to be used for a variety of fixed as well as mobile services. The potential for fixed uses of such spectrum is confirmed by the record in this proceeding. The record also underscores the potential for the development of wireless services on CMRS spectrum that combine fixed and mobile functionalities. Increasingly, CMRS providers can offer their mobile customers services such as data transmission, Internet access, and facsimile transmission, which are traditionally associated with fixed service. The deployment of third generation and other advanced wireless services is likely to expand the potential for CMRS carriers to offer new and innovative fixed and integrated fixed/mobile services. At this point, however, the development of fixed and fixed/mobile services on CMRS spectrum is at too early a stage for us to anticipate how the future evolution of fixed and mobile services will occur, how they might be integrated, or the variety of services that will develop. Thus, we believe it is inappropriate to establish a bright-line test. Any such test that we might adopt at this time would be based on assumptions and criteria that could soon be made obsolete by developments in technology and the marketplace. In that event, a bright line test could cause more regulatory uncertainty than it resolves and might even limit or discourage the development of these services. Accordingly, we conclude that for the time being it is better to use a case-by-case approach to determine whether any particular service offering is CMRS. In the event that case-by-case review proves ineffective, we are open to revisiting the possibility of establishing a bright-line test in the future.

8. We also do not adopt the rebuttable presumption proposed in the *FNPRM*. Just as we find the evolving nature of wireless services makes it inappropriate to adopt a bright-line test, we also find that the ongoing changes in technology and services make it difficult to set out in advance factors that we should consider in establishing such a presumption or otherwise determining the regulatory treatment of any particular fixed wireless or integrated fixed/mobile service. To the extent that a party requires a determination of whether or not a particular service that includes a fixed wireless component should be treated as CMRS, that party should petition the Commission for a declaratory ruling.

B. Section 22.323 of the Commission's Rules

9. Background. Section 22.323, which was adopted prior to this proceeding, states the

Omnipoint reply comments at 10; 360° reply comments at 4-5.

¹⁶ See, e.g., Motorola comments at 4; Omnipoint comments at 12; PCIA comments at 11-12; US West comments at 6; AT&T reply comments at 6.

¹⁷ See, e.g., NTCA comments at 3; NARUC comments at 5; NYDPS comments at 2; PUCO comments at 3.

general conditions under which Part 22 licensees may provide “incidental” communications services other than the mobile service for which they are primarily licensed.¹⁸ Section 22.323 permits a Public Mobile radio service licensee “to provide other communications services incidental to the primary mobile service” provided that (1) the costs of the incidental service are not borne by subscribers who do not use the service, (2) the quality of the primary service does not materially deteriorate, (3) the provision of the incidental service is not inconsistent with the Communications Act or Commission rules, and (4) the licensee notifies the Commission before providing the incidental service.¹⁹ In the *CMRS Second Report and Order*, the Commission determined that ancillary, auxiliary, and incidental services provided by CMRS providers would be regulated as CMRS.²⁰

10. In its petition, BellSouth argues that the continued application of section 22.323 is inconsistent with the *First Report and Order*.²¹ BellSouth contends that the requirements in section 22.323, particularly the notification requirement, are contrary to the increased flexibility given to CMRS carriers to provide fixed wireless services and serve no practical purpose.²² BellSouth requests that the Commission eliminate the rule or, alternatively, clarify that section 22.323 does not apply to any co-primary fixed services offered pursuant to the *First Report and Order*.²³ Most commenters support BellSouth’s request.²⁴ GTE agrees that section 22.323 should not apply to cellular licensees providing co-

¹⁸ Revision and Update of Part 22 of the Public Mobile Radio Services Rules, CC Docket No. 80-57, *Report and Order*, 95 FCC 2d 769, 816-19 (1983). The rule was originally adopted as 47 C.F.R. § 22.308. It was subsequently moved to 47 C.F.R. § 22.323. See Revision of Part 22 of the Commission’s Rules Governing the Public Mobile Services, CC Docket 92-115, *Report and Order*, 9 FCC Rcd 6513, 6556 (1994).

¹⁹ 47 C.F.R. § 22.323. Subsequent to the filing of the BellSouth petition the Commission amended the notification requirement of section 22.323 to require licensees to notify the Commission using FCC Form 601 prior to providing the incidental service. See Biennial Regulatory Review – Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97 and 101 of the Commission’s Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, WT Docket 98-20, *Report and Order*, 13 FCC Rcd 21027 (1998) (*ULS Order*); *reconsideration granted in part and denied in part*, 14 FCC Rcd 11145 (1999).

²⁰ See Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, *Second Report and Order*, 9 FCC Rcd 1411, 1424, ¶ 36 (1994), *recon dismissed in part and denied in part*, 15 FCC Rcd. 5231 (2000).

²¹ BellSouth petition at 1.

²² *Id.* at 3.

²³ *Id.* at 4.

²⁴ See AirTouch comments at 1; AT&T comments at 1; CTIA comments at 3-5. Appendix B provides the full and abbreviated names of the parties filing comments and reply comments on the BellSouth petition.

primary fixed service pursuant to section 22.901(d) of the Commission's rules,²⁵ but believes that section 22.323 should be retained for application to air-to-ground services.²⁶ RTG and St. Cloud do not oppose clarifying that section 22.323 does not apply to service offered by cellular carriers pursuant to section 22.901(d), but oppose eliminating section 22.323. They contend that even in light of the increased flexibility granted to CMRS carriers to provide fixed wireless services, section 22.323 should be maintained because there are regulatory distinctions between fixed wireless services provided on a co-primary basis and fixed services that are "incidental" to mobile services. Most significantly, according to RTG and St. Cloud, the Commission has previously determined that incidental services offered by CMRS carriers fall within the statutory definition of mobile service and are subject to CMRS regulation.²⁷ BellSouth responds that in the *First Report and Order* the Commission specifically reaffirmed that ancillary, auxiliary, and incidental services offered by CMRS carriers fall within the definition of mobile service and are subject to CMRS regulation, and thus section 22.323 is not necessary to ensure that incidental fixed services are regulated as CMRS.²⁸

11. Discussion. Prior to the initiation of this proceeding, the Commission's rules allowed certain categories of CMRS providers to offer "ancillary," "auxiliary," or "incidental" services in addition to their primary mobile service offerings.²⁹ Among these rules was section 22.323, which allowed Part 22 licensees to provide incidental services provided that they complied with certain safeguards to protect their mobile service customers. In the *First Report and Order*, the Commission revised its rules to enable CMRS providers to offer a far broader array of fixed services even if they did not fall within pre-existing definitions of ancillary, auxiliary, or incidental services.³⁰ In the case of cellular carriers, this was accomplished by amending section 22.901 of the rules to specifically allow provision of fixed services on a co-primary basis.³¹ The Commission did not, however, delete or revise section 22.323 as it applies to incidental services, nor did it seek comment on the issue in the *FNPRM*.

12. In light of BellSouth's petition for reconsideration, we conclude that there is a need to clarify the relationship between incidental services provided under section 22.323 and co-primary fixed services offered pursuant to section 22.901(d) as amended in the *First Report and Order*. Therefore, we

²⁵ 47 C.F.R. § 22.901(d).

²⁶ GTE comments at 1, 4-5.

²⁷ St. Cloud comments at 4; RTG reply comments at 6.

²⁸ BellSouth reply comments at 3 (citing *First Report and Order*, 11 FCC Rcd at 8985).

²⁹ See *First Report and Order*, 11 FCC Rcd at 8968-69.

³⁰ *Id.* at 8966.

³¹ *Id.* at 9018. See 47 C.F.R. § 22.901(d).

will amend our rules to clarify that CMRS providers who provide fixed services on a co-primary basis pursuant to section 22.901(d) are not subject to the requirements of section 22.323. In light of this clarification, we decide not to eliminate section 22.323 as it applies to incidental services at this time. In the *FNPRM*, we noted that our decision to allow CMRS licensees to offer fixed services on a co-primary basis did not alter in any way our regulatory treatment of ancillary, auxiliary, or incidental fixed services that had been provided by CMRS providers under our rules.³² Therefore, we conclude that it is not inconsistent with the *First Report and Order* to retain the rules that apply to these types of services.

13. We will, however, modify section 22.323 by eliminating the notification requirement. The predecessor of section 22.323 was adopted in 1983 to replace the Commission's previous practice of individually reviewing requests by Part 22 licensees to provide incidental services.³³ At that time, we considered whether to require prior approval of these service offerings, but determined that notification would fully protect all parties.³⁴ We now conclude that the notification requirement serves no useful purpose. Although the requirement may have been necessary under the duopoly regime to permit monitoring of the use of scarce cellular spectrum, we believe that such close monitoring is unnecessary today in light of additional allocations of spectrum and greater competition. We also find close monitoring to be inconsistent with the premises of flexibility underlying this proceeding. Furthermore, we disagree with the commenters who argue that the notification requirement is helpful in persuading state commissions that their incidental services constitute CMRS and thus are exempt from regulation.³⁵ Because the existing requirement involves only notification, and not Commission review or approval, we do not understand how the fact of notification alone is evidence that a service falls within section 22.323. Consistent with our other recent efforts to streamline regulations and reduce burdens by eliminating unnecessary notifications,³⁶ we therefore delete the notification requirement of section 22.323.³⁷

³² *FNPRM*, 11 FCC Rcd at 8985, ¶ 48

³³ Revision and Update of Part 22 of the Public Mobile Radio Services Rules, CC Docket No. 80-57, *Report and Order*, 95 FCC 2d 769, 816-819, ¶¶ 167-179 (1983).

³⁴ *Id.* at 819, ¶ 178.

³⁵ *See, e.g.*, St. Cloud comments at 6.

³⁶ *See, e.g., ULS Order*, 13 FCC Rcd at 21092, ¶ 146.

³⁷ The specific revisions to sections 22.323 and 22.901 appear in Appendix C. We note that the introductory paragraph of section 22.901 was previously amended in 1996, but that due to an apparent administrative oversight this amendment has not been reflected in the published Code of Federal Regulations. *See* Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, *Second Report and Order and Third Notice of Proposed Rulemaking*, 11 FCC Rcd 9462 (1996), *recon. pending*. The text of section 22.901 that is reproduced in Appendix C includes this 1996 amendment.

14. Finally, even with the clarification of the rules and the deletion of the notification requirement, we consider it reasonable to question whether section 22.323 remains necessary or appropriate as presently constituted. In particular, we question whether the remaining conditions on the provision of incidental services can or should be enforced in the increasingly competitive and deregulated CMRS market. As noted above, however, some commenters argue that a rule specifically authorizing incidental services in Part 22 remains necessary in at least some applications. We also find that there is not an adequate record in this proceeding to assess the potential effect of eliminating section 22.323 in its entirety or of eliminating the remaining conditions on providing incidental service while retaining the authorizing rule. In order to develop a more complete record, therefore, we will consider whether to delete, amend, or replace section 22.323 as part of our upcoming biennial review of all regulations that apply to providers of telecommunications service.³⁸

IV. CONCLUSION

15. We find that due to the evolving nature of fixed wireless services, a case-by-case determination of the regulatory treatment of a fixed wireless or integrated fixed/mobile service would best serve the public interest at this time. We also grant the BellSouth petition for partial reconsideration or clarification to the extent that we amend section 22.901(d) to clarify that fixed wireless services provided pursuant to section 22.901(d) are not subject to the requirements of section 22.323 for incidental communications services, and we amend section 22.323 to eliminate the notification requirement.

V. PROCEDURAL ISSUES

A. Regulatory Flexibility Analysis

16. The Supplemental Final Regulatory Flexibility Analysis pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 604, is contained in Appendix D.

B. Paperwork Reduction Act Analysis

17. This Order has been analyzed with respect to the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. A change notification on Form 83-I will be provided to the Office of Management and Budget upon release of this Order.

VI. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED that this Second Report and Order IS ADOPTED and WT Docket No. 96-6 IS TERMINATED.

³⁸ See 47 U.S.C. § 161.

19. IT IS FURTHER ORDERED that pursuant to sections 1, 2, 4, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, and 405, the Petition for Partial Reconsideration or Clarification filed by the BellSouth Corporation is GRANTED to the extent discussed herein and is otherwise DENIED.

20. IT IS FURTHER ORDERED that pursuant to sections 1, 2, and 4 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, and 154, sections 22.323 and 22.901 of the Commission's rules, 47 C.F.R. §§ 22.323 and 22.901, ARE AMENDED as set forth in Appendix C, effective 30 days after publication of a summary of this Second Report and Order and Order on Reconsideration in the Federal Register.

21. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this SECOND REPORT AND ORDER AND ORDER ON RECONSIDERATION, including the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A**LIST OF COMMENTERS ON FNPRM**Comments

1. AirTouch Communications, Inc. (AirTouch)
2. AT&T Corporation (AT&T)
3. Bell Atlantic Corporation, NYNEX Corporation and Bell Atlantic NYNEX Mobile, Inc. (Bell Atlantic)
4. BellSouth Corporation (BellSouth)
5. Cellular Telecommunications Industry Association (CTIA)
6. CommNet Cellular, Inc. (CommNet)
7. GTE Service Corporation (GTE)
8. Metricom, Inc. (Metricom)
9. Motorola, Inc. (Motorola)
10. National Association of Regulatory Utility Commissioners (NARUC)
11. National Telephone Cooperative Association (NTCA)
12. Nextel Communications, Inc. (Nextel)
13. State of New York Department of Public Service (NYDPS)
14. Omnipoint Corporation (Omnipoint)
15. Pacific Telesis Group (Pacific)
16. Public Utilities Commission of Ohio (PUCO)
17. Personal Communications Industry Association (PCIA)
18. Rural Cellular Association (RCA)
19. Rural Telecommunications Group (RTG)
20. Sprint Spectrum L.P. d/b/a Sprint PCS (Sprint)
21. US West, Inc. (US West)
22. Western Wireless Corporation (WWC)

Reply Comments

1. AT&T Corporation (AT&T)
2. Cellular Telecommunications Industry Association (CTIA)
3. Comcast Corporation (Comcast)
4. Metricom, Inc. (Metricom)
5. National association of Regulatory Utility Commissioners (NARUC)
6. Omnipoint Corporation (Omnipoint)
7. Pacific Telesis Group (Pacific)
8. Personal Communications Industry Association (PCIA)
9. Rural Telecommunications Group (RTG)
10. 360° Communications Company (360°)

11. Vanguard Cellular Systems, Inc. (Vanguard)

APPENDIX B

LIST OF COMMENTERS ON BELLSOUTH PETITION

Comments

1. AirTouch Communications Inc. (AirTouch)
2. AT&T Wireless Services, Inc. (AT&T)
3. Cellular Mobile Systems of St. Cloud (St Cloud)
4. Cellular Telecommunications Industry Association (CTIA)
5. GTE Service Corporation (GTE)

Reply Comments

1. BellSouth Corporation (BellSouth)
2. Cellular Telecommunications Industry Association (CTIA)
3. Rural Telecommunications Group (RTG)

APPENDIX C**FINAL RULES****AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS**

Part 22 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 22 – PUBLIC MOBILE SERVICES

1. The authority citation for part 22 continues to read as follows:

47 U.S.C. 154, 222, 303, 309, and 332.
2. Section 22.323 is revised by adding the word “and” at the end of subsection (b), deleting “; and” and adding a period at the end of subsection (c), and deleting subsection (d).
3. Section 22.901 is revised to read as follows:

Sec. 22.901 Cellular service requirements and limitations.

Cellular system licensees must provide cellular mobile radiotelephone service upon request to subscribers in good standing, including roamers, as provided in Sec. 20.12 of this chapter. A cellular system licensee may refuse or terminate service, however, subject to any applicable state or local requirements for timely notification, to any subscriber who operates a cellular telephone in an airborne aircraft in violation of Sec. 22.925 or otherwise fails to cooperate with the licensee in exercising operational control over mobile stations pursuant to Sec. 22.927.

(d) Alternative technologies and co-primary services. Licensees of cellular systems may use alternative cellular technologies and/or provide fixed services on a co-primary basis with their mobile offerings, including personal communications services (as defined in Part 24 of this chapter) on the spectrum within their assigned channel block. Cellular carriers that provide mobile services must make such service available to subscribers whose mobile equipment conforms to the cellular system compatibility specification (see Sec. 22.933).

(1) Licensees must perform or obtain an engineering analysis to ensure that interference to the service of other cellular systems will not result from the implementation of co-primary fixed services or alternative cellular technologies.

(2) Alternative technology and co-primary fixed services are exempt from requirements for incidental communications services of Sec. 22.323, the channeling requirements of Sec. 22.905, the modulation requirements of Sec. 22.915, the wave polarization requirements of Sec. 22.367, the compatibility specification in Sec. 22.933 and the emission limitations of Secs. 22.357 and 22.917, except for emission limitations that apply to emissions outside the assigned channel block.

APPENDIX D**SUPPLEMENTAL FINAL REGULATORY FLEXIBILITY ANALYSIS**

As required by Section 604 of the Regulatory Flexibility Act, 5 U.S.C. § 604 (RFA), a Final Regulatory Flexibility Analysis (FRFA) for the *First Report and Order* was incorporated in the *First Report and Order and Further Notice of Proposed Rule Making* in WT Docket No. 96-6.³⁹ The Commission's Supplemental Final Regulatory Flexibility Analysis (SFRFA) for this *Order on Reconsideration*⁴⁰ contains information additional to that contained in the FRFA and is limited to matters raised on reconsideration with regard to the *First Report and Order* and addressed in this *Order on Reconsideration*. This SFRFA conforms to the RFA, as amended by the Contract With America Advancement Act of 1996.⁴¹

A. Need for, and Objectives of, the Order on Reconsideration

The *Order on Reconsideration* modifies and clarifies aspects of the regulatory regime governing the provision of co-primary fixed services and ancillary, auxiliary, and incidental services under Part 22, as established in the *First Report and Order*. Specifically, the Commission clarifies that commercial mobile radio services (CMRS) providers who provide fixed services on a co-primary basis pursuant to section 22.901(d) of the rules are not subject to the requirements that govern provision of ancillary, auxiliary, and incidental services under section 22.323. The Commission also modifies section 22.323 by eliminating the requirement that carriers notify the Commission when providing ancillary, auxiliary, and incidental services. These actions are intended to clarify the Commission's rules and to eliminate an unnecessary notification requirement.

B. Summary of Significant Issues Raised by Public Comments in Response to the FRFA

No petitions for reconsideration were filed in direct response to the FRFA. In the petition for partial reconsideration or clarification and in responsive pleadings, however, some issues were raised that

³⁹ Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, *First Report and Order and Notice of Proposed Rule Making*, WT Docket No. 96-6, 11 FCC Rcd 8965, 9021 (1996).

⁴⁰ We note that this SFRFA addresses only the matters considered in the *Order on Reconsideration* portion of the *Second Report and Order and Order on Reconsideration*. No FRFA is necessary for the *Second Report and Order* because we have decided not to make any change to the Commission's rules.

⁴¹ The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, 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).

might affect small entities. Specifically, some commenters argued that limiting the applicability of section 22.323, and in particular the notification requirement, would eliminate regulatory burdens that could deter CMRS providers, including small entities, from providing fixed wireless services. Other commenters, however, argued that section 22.323 protects CMRS providers, including small entities, that provide ancillary, auxiliary, and incidental services from unlawful attempts to impose State regulation.⁴²

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

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by a rule. The RFA defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small business concern” under section 3 of the Small Business Act.⁴³ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).⁴⁴

The rule changes effectuated by this *Order on Reconsideration* apply to telecommunications service providers that are regulated under Part 22 of the Commission’s rules. These include providers of Cellular Radiotelephone, Paging and Radiotelephone (Common Carrier Paging), Air-Ground Radiotelephone, Offshore Radiotelephone, and Rural Radiotelephone services. In addition, pursuant to section 90.493(b) of the Commission’s rules, paging licensees on exclusive channels in the 929-930 MHz bands are subject to the licensing, construction, and operation rules set forth in Part 22.⁴⁵ Since this rulemaking proceeding applies to multiple services, we will analyze the number of small entities affected on a service-by-service basis.

1. Cellular

Since the Commission does not define a small business with respect to cellular services, we utilize the SBA’s definition applicable to radiotelephone companies – *i.e.* an entity employing fewer than 1,500 persons.⁴⁶ The size data provided by the SBA does not enable us to make a meaningful estimate of the number of cellular providers which are small entities because it combines all radiotelephone companies with 500 or more employees.⁴⁷ We therefore use the 1992 Census of Transportation, Communications, and

⁴² See *Order on Reconsideration, supra*, ¶ 10.

⁴³ 5 U.S.C. § 601(3).

⁴⁴ 5 U.S.C. § 632.

⁴⁵ See 47 C.F.R. § 90.493(b).

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

⁴⁷ U.S. Small Business Administration 1992 Economic Census Employment Report, Bureau of the Census,

Utilities, conducted by the Bureau of the Census, which is the most recent information available. Data from the Bureau of the Census' 1992 study indicates that only 12 out of a total of 1,178 radiotelephone firms that operated during 1992 had 1,000 or more employees.⁴⁸ Therefore, even if all twelve of these firms were cellular telephone companies, nearly all cellular carriers were small businesses under the SBA definition. In addition, we note that there are 1,758 cellular licenses; however, a cellular licensee may own several licenses. In addition, according to the most recent *Telecommunications Industry Revenue* data, 804 carriers reported that they were engaged in the provision of either cellular service or Personal Communications Service (PCS) services, which are placed together in the data.⁴⁹ We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of cellular service carriers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 804 small cellular service carriers that may be affected by the new rules.

2. Paging

The Commission has adopted, and the SBA has approved, a two-tier definition of small businesses in the context of auctioning licenses in the paging services. Under this definition, a small business is defined as either (1) an entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years of not more than \$3 million, or (2) an entity that, together with affiliates and controlling principals, has average gross revenues for the three preceding calendar years of not more than \$15 million. The Commission has estimated that as of January 1998, there were more than 600 paging companies in the United States.⁵⁰ We do not have data specifying the number of these carriers that are not independently owned and operated or meet the small business thresholds set forth above, or the number of these carriers that are regulated under Part 22 of the Commission's rules, and thus are unable at this time to estimate with precision the number of affected paging carriers that would qualify as small business concerns under our definition. However, we estimate that the majority of existing paging providers qualify as small entities under our definition. Consequently, we estimate that there are up to approximately 600 currently licensed small paging carriers that will be affected by the rules adopted in this *Order on Reconsideration*. In addition, high bids were recently placed at auction for 985 new geographic area

U.S. Department of Commerce, SIC Code 4812 (radiotelephone communications industry data adopted by the SBA Office of Advocacy).

⁴⁸ U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC92-S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms; 1992, SIC Code 4812 (issued May 1995).

⁴⁹ *Telecommunications Industry Revenue*, Figure 2.

⁵⁰ Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, *Third Report*, 13 FCC Rcd 19746, 19792 (1998).

paging licenses, and an additional 15,645 geographic area paging licenses are expected to be awarded following future auctions. In the recent auction, high bids were placed on paging licenses by 55 entities that qualify as small businesses under the Commission's definition. Licenses have been granted to 51 of these entities, and the applications of the other four remain pending. Thus, in addition to existing licensees, between 51 and 55 license winners in the recent auction will be affected small entities, and up to 15,645 winners of paging licenses in future auctions will be affected small entities.

3. Air-Ground Radiotelephone Service

The Commission has not adopted a definition of small business specific to the Air-Ground radiotelephone service.⁵¹ Accordingly, we use the SBA definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons. There are approximately 100 licensees in the Air-Ground radiotelephone service, and the Commission estimates that almost all of them qualify as small entities under the SBA definition.

4. Offshore Radiotelephone Service

This service operates on several ultra high frequency (UHF) TV broadcast channels that are not used for TV broadcasting in the coastal area of the states bordering the Gulf of Mexico. At present, there are approximately 55 licensees in this service. The Commission has not adopted a definition of small business specific to the Offshore radiotelephone service. Accordingly, we use the SBA definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons. The Commission is unable at this time to estimate the number of licensees that would qualify as small entities under the SBA definition for radiotelephone communications. The Commission assumes, for purposes of this SFRFA, that all of the 55 licensees are small entities, as that term is defined by the SBA.

5. Rural Radiotelephone Service

The Commission has not adopted a definition of small entity specific to the Rural Radiotelephone Service.⁵² A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio Systems (BETRS).⁵³ We therefore use the SBA definition applicable to radiotelephone companies; *i.e.*, an entity employing no more than 1,500 persons. There are approximately 1000 licensees in the Rural Radiotelephone Service, and the Commission estimates that almost all of them qualify as small entities under the SBA definition.

⁵¹ Air-ground radiotelephone service is defined in section 22.99 of the Commission's rules, 47 C.F.R. § 22.99.

⁵² Rural Radiotelephone Service is defined in section 22.99 of the Commission's rules, 47 C.F.R. § 22.99.

⁵³ BETRS is defined in sections 22.757 and 22.729 of the Commission's rules, 47 C.F.R. §§ 22.757, 22.729.

D. Description of Reporting, Recordkeeping, and Other Compliance Requirements

The *Order on Reconsideration* does not impose any additional reporting, recordkeeping, or other compliance requirements. The *Order on Reconsideration* eliminates a requirement that Part 22 licensees notify the Commission before providing incidental services. As a result, no reporting or recordkeeping requirements remain under section 22.323 of the Commission's rules.

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

The *Order on Reconsideration* modifies section 22.901(d) to clarify that fixed wireless services provided on a co-primary basis are not subject to the requirements of section 22.323 for incidental communications services. Clarifying that carriers providing fixed wireless services on a co-primary basis pursuant to section 22.901(d) need not comply with the requirements of section 22.323 will provide further flexibility to CMRS carriers, including small entities, and is consistent with the Commission's intent in the *First Report and Order*. In addition, we amend section 22.323 to delete the requirement that carriers notify the Commission when providing incidental services. This change will reduce burdens on small entities and other providers subject to Part 22 by eliminating an unnecessary notification requirement.

The Commission considered and rejected eliminating section 22.323 because it concluded that retaining section 22.323 is consistent with its decision in the *First Report and Order* not to alter the regulatory treatment of ancillary, auxiliary, and incidental fixed services that had been provided by CMRS providers under the rules. However, the Commission will consider the continued need for section 22.323 as part of its upcoming biennial review of all regulations that apply to providers of telecommunications service. The Commission also considered and rejected refining the notification requirement in section 22.323, finding that the notification requirement currently serves no useful purpose and therefore should be eliminated.

F. Report to Congress

The Commission shall send a copy of the *Order on Reconsideration*, including this Supplemental Final Regulatory Flexibility Analysis, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996. *See* 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of the *Order on Reconsideration*, including the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of this *Order on Reconsideration* and Supplemental Final Regulatory Flexibility Analysis (or summaries thereof) will also be published in the Federal Register. *See* 5 U.S.C. § 604(b).