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

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| In the Matter of | ) | |
| | ) | |
| Year 2000 Biennial Regulatory Review – | ) | WT Docket No. 01-108 |
| Amendment of Part 22 of the Commission's Rules | ) | |
| to Modify or Eliminate Outdated Rules Affecting | ) | |
| the Cellular Radiotelephone Service and other | ) | |
| Commercial Mobile Radio Services | ) | |

**SECOND REPORT AND ORDER**

**Adopted:** September 10, 2002 **Released:** September 24, 2002

**By the Commission: Commissioner Copps approving in part, dissenting in part, and issuing a separate statement; Commissioner Martin approving in part, concurring in part, and issuing a separate statement**

## I. INTRODUCTION

1. In this *Second Report and Order*, we complete our examination of Part 22 of our rules as part of our year 2000 Biennial Review of regulations, pursuant to section 11 of the Communications Act of 1934, as amended (Act).[1] Section 11 of the Act mandates that we review all of our regulations relating to providers of telecommunications service and "determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service." In the event that we determine that a rule is "no longer necessary in the public interest" as the result of meaningful economic competition, section 11 provides that we "shall repeal or modify" the subject regulation. Accordingly, in this *Second Report and Order*, we amend section 22.901 of our rules to eliminate or modify certain provisions that have become outdated or unnecessary due to technological change or increased competition in the Commercial Mobile Radio Services (CMRS).

## II. BACKGROUND

2. In January 2001, pursuant to the statutory mandate under section 11 of the Act requiring us to review our rules, Commission staff completed an evaluation of regulations affecting telecommunications service providers, and issued a report regarding recommendations made as a result of that review.[2] In its review, the staff recommended that we reexamine the cellular rules and determine whether any of the rules are no longer necessary as a result of the technological advances and growth in competition that have occurred in mobile telephony since the rules were first promulgated. In the

[1] 47 U.S.C. § 161. *See* Year 2000 Biennial Regulatory Review – Amendment of Part 22 of the Commission's Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and other Commercial Mobile Radio Services, *Report and Order*, FCC 02-229 (rel. September xx, 2002).

[2] *See* Biennial Regulatory Review, CC Docket No. 00-175, *Report*, 16 FCC Rcd 1207 (2001) (*Biennial Review Report*); Biennial Regulatory Review 2000 Updated Staff Report, rel. January 17, 2001 (*Biennial Review Staff Report*).

*Biennial Review Report*, we accepted the staff's recommendation to initiate a rulemaking to review the Part 22 cellular rules[3] to consider which rules are obsolete because of competitive or technological developments. We also followed the recommendation to review rules regulating other Part 22 services on the same basis.[4] Accordingly, in May 2001, we issued a *Notice of Proposed Rulemaking* (*NPRM*) seeking to identify and address outdated rule sections of Part 22.[5] In the *NPRM*, we noted that our rules governing the cellular service have changed little since we first initiated the service in the early 1980s.[6] Among other provisions, we proposed the elimination or modification of certain provisions of section 22.901, entitled "Service requirements and limitations," in order to more accurately reflect the current state of technology and to remove any unnecessary requirements. [7]

3. In the *NPRM*, we proposed to modify various general cellular service requirements set out in section 22.901 of the Commission's rules. First, we proposed deleting current section 22.901(d), which addresses alternative cellular technologies.[8] Because the rule is drafted as though the principal cellular technology is analog technology,[9] we therefore proposed deleting current section 22.901(d) and adding the following language to the introductory paragraph of the rule: "In providing cellular services, each cellular system may incorporate any technology that meets all applicable technical requirements in this part."[10]

4. We also proposed deleting sections 22.901(a) and 22.901(b) of our rules.[11] Section 22.901(a) requires that cellular licensees provide subscribers with information regarding the service area of the cellular provider.[12] We sought comment on whether there is any material difference between the service-area-related information provided by cellular providers in comparison with other providers of CMRS services.[13] The *NPRM* also requested comment on whether, in light of the current level of competition in the provision of CMRS services, such a requirement is still necessary to ensure that consumers have access to service-area-related information.[14] Section 22.901(b) requires the cellular licensee to notify the Commission in the event that a subscriber's request for service is denied due to lack of cellular system capacity.[15] We proposed removing this requirement, noting that the rule does not

[3] 47 C.F.R. §§ 22.900 *et seq.*

[4] *See Biennial Review Staff Report* at para. 104.

[5] Year 2000 Biennial Regulatory Review – Amendment of Part 22 of the Commission's Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and other Commercial Mobile Radio Services, *Notice of Proposed Rulemaking*, 16 FCC Rcd 11169 (2001) (*NPRM*).

[6] *NPRM* at para. 7.

[7] *Id.* at paras. 13-17.

[8] *Id*. at para. 13.

[9] *Id*.

[10] *Id*.

[11] *Id.* at paras. 14-15.

[12] Section 22.901(a) provides as follows: "*Service area information*. Licensees must inform prospective subscribers of the area in which reliable service can be expected." 47 C.F.R. § 22.901(a).

[13] *NPRM* at para. 14.

[14] *Id*.

[15] Section 22.901(b) provides as follows: "Lack of capacity. If a licensee refuses a request for cellular service because of a lack of system capacity, it must report that fact to the FCC in writing, explaining how it plans to increase capacity." 47 C.F.R. § 22.901(b).

provide any mechanism for ameliorating any instance of a lack of system capacity.[16] We also explained that, given the current level of competition, consumers who are denied service by a particular provider due to lack of capacity will be very likely to have other service options.[17]

5. Further, we also proposed deleting certain sentences in the introductory paragraph to section 22.901.[18] Specifically, we proposed deleting the first sentence of the introductory paragraph, which provides that "Cellular system licensees must provide cellular mobile radiotelephone service upon request to all cellular subscribers in *good standing* . . . ."[19] We noted that no comparable requirements are placed on other CMRS services.[20] We also proposed removing the specific reference in the introductory paragraph to section 22.901 that provides that a cellular system may terminate service when a subscriber "operates a cellular telephone in an airborne aircraft."[21] We explained that this provision appears to be both unnecessary and potentially confusing, to the extent that it could be read to imply that a cellular provider would not have the right to terminate service unless our rules provided such right explicitly and also because, by addressing only one ground for service termination, it could imply that a cellular provider would not be able to terminate service for other violations of Commission rules.[22]

## III. DISCUSSION

### A. Standard for Decision (Section 11 of the Act).

6. In 1996, Congress anticipated that the development of competition would lead market forces to reduce the need for regulation and amended the Communications Act of 1934 to permit and encourage competition in various communications markets.[23] Section 11 of the 1996 Act requires us to review biennially all of our regulations "that apply to the operations or activities of any provider of telecommunications service" and to "determine whether any such regulation is no longer necessary in the public interest as a result of meaningful economic competition between providers of such service."[24] In

[16] *NPRM* at para. 15.

[17] *Id*.

[18] *Id*. at paras. 16-17.

[19] 47 C.F.R. § 22.901. *NPRM* at para. 16.

[20] *NPRM* at para. 16.

[21] 47 C.F.R. § 22.901; *NPRM* at para. 17.

[22] *NPRM* at para. 17.

[23] *See* Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56 (1996) ("1996 Act"), introductory statement (the 1996 Act was intended "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."); Joint Managers' Statement, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 113 (1996) at 1 (stating that the 1996 Act would establish a "pro-competitive, deregulatory national policy framework").

[24] *See* 47 U.S.C. § 161. Section 11 states:

BIENNIAL REVIEW OF REGULATIONS. – In every even-numbered year (beginning with 1998), the Commission -- (1) shall review all regulations issued under this Act in effect at the time of the review that apply to the operations or activities of any provider of telecommunications service; and (2) shall determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service.

(b) EFFECT OF DETERMINATION. – The Commission shall repeal or modify any regulation it determines to be no longer necessary in the public interest.

the past, we have looked to the plain meaning of the text for guidance in exercising our obligation pursuant to section 11.[25] We have stated that "the language places an obligation on the Commission to 'determine' if the regulation in question 'is no longer necessary in the public interest as the result of meaningful economic competition.'"[26] Further, section 11 explicitly provides that "the Commission shall repeal or modify" any regulation that it determines is no longer necessary in the public interest as a result of meaningful economic competition.[27] We note that section 11 places the burden on the Commission to make the requisite determinations; no particular burden is placed on the opponents or proponents of a given rule.[28] We have previously interpreted the language of section 11 as directing us to examine why a rule originally was "necessary" and whether it continues to be necessary.[29] We have found that in making the determination whether a rule remains "necessary" in the public interest once meaningful economic competition exists, the Commission must consider whether the concerns that led to the rule or the rule's original purposes may be achieved without the rule or with a modified rule.[30]

### B. Section 22.901.

7. First, we conclude that the competitive state of the mobile telephony market renders unnecessary both section 22.901(d) to the extent it characterizes certain technologies as "primary" or "alternative" as well as the first sentence in the introductory paragraph of section 22.901 to the extent it requires licensees to "provide cellular mobile radiotelephone service upon request to all cellular subscribers in good standing." No commenters opposed these proposed changes. We delete the existing text of section 22.201(d) (which implies that analog is the principal technology in use). We add a technologically-neutral statement to section 22.901: "In providing cellular services, each cellular system may incorporate any technology that meets all applicable technical requirements of this part." Further, we find that the statement in the introductory paragraph about provision of service to "cellular subscribers in good standing" is unnecessary because, even in the absence of this rule, cellular service providers, like all common carriers, are required to comply with sections 201 and 202 of Title II of the Act. Those sections require cellular carriers to provide service upon reasonable request, to have charges, practices, classifications, and regulations that are just and reasonable, and to avoid unjust or unreasonable discrimination in their charges, practices, classifications, regulations, facilities, or services. Further, we note that there are no other comparable rule requirements placed on other CMRS licensees.

8. Second, we find that it is no longer necessary to require cellular carriers to provide subscribers with information regarding the service area of the provider and therefore delete section 22.901(a). Some commenters agree with this conclusion, stating that licensees already provide service area information in response to consumer demand.[31] Other commenters warn that a rule is necessary in

[25] *See* In the Matter Of 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services, WT Docket No. 01-14, *Report and Order*, 16 FCC Rcd 22628, para. 25 (2001) (*Spectrum Cap Order*).

[26] *Id.* (quoting 47 U.S.C. § 161(a)(2)).

[27] 47 U.S.C. § 161(b).

[28] *See Spectrum Cap Order* at 22678-79, para. 25.

[29] *Id.* at 22679, para. 25.

[30] *Id.* We note that, in the context of section 202(h) of the Communications Act, the U.S. Court of Appeals for the D.C. Circuit found that we are not limited to the original purpose of a rule when determining whether or not it remains necessary. *See Fox Television Stations, Inc. v. FCC et al.*, 280 F.3d 1027 (D.C. Cir. 2002) ("Nothing in § 202(h) suggests the grounds upon which the Commission may conclude that a rule is necessary in the public interest are limited to the grounds upon which it adopted the rule in the first place.").

[31] Verizon Comments at 15; Cingular Comments at 15.

order to guarantee that customers have sufficient information to make informed decisions about purchasing wireless products and services.[32] While we agree that consumers should have access to information about carriers' service areas prior to purchasing wireless services, as well as while using the services, we find that cellular carriers, as well as PCS and digital SMR carriers are already making this information available at retail outlets, as well as via the internet. We note that PCS and digital SMR providers are doing so without any comparable regulatory requirement, presumably because consumers demand this information. Notably, we believe the rule is no longer necessary because, even in the absence of the rule, cellular carriers will continue to make this information available while marketing their services in today's competitive marketplace.

9. Third, we find that the current level of competition renders unnecessary the provision in section 22.901(b) that carriers must notify the Commission in the event that a subscriber's request for service is denied due to lack of capacity. Some commenters note that this provision is unnecessary because consumers have the choice of obtaining service from another carrier.[33] They also point out that there is no similar requirement for PCS or SMR licensees. Other commenters argue that eliminating the rule may lead to cellular licensees providing insufficient analog capacity.[34] As a threshold matter, we are unaware of any cellular licensee having filed such a notification with the Commission. We agree that carriers must provide sufficient capacity for analog service in instances where it is required. In fact, revised section 22.901(b)(2) states in part that "[c]ellular licensees must allot sufficient system resources such that the quality of AMPS provided, in terms of geographic coverage and traffic capacity, is fully adequate to satisfy the concurrent need for AMPS availability." We believe that this rule provision, combined with the choices of wireless services available to consumers today, will ensure that consumers of analog services will continue to receive adequate service even in the absence of the notification requirement.

10. Finally, we conclude that it is unnecessary to retain the provision in the introductory paragraph to section 22.901 stating that a carrier may terminate service to a customer who operates a cellular telephone while on board an airborne aircraft. Commenters addressing this issue agree that the rule is no longer necessary.[35] Some carriers note that, in the event we retain the rule, it should be broadened to include other rule violations and apply to all CMRS providers.[36] We find, however, that there is no basis to retain this provision because our rules already explicitly prohibit operation of cellular telephones on board airborne aircraft, and a cellular licensee would be within its obligations under sections 201 and 202 of the Act in terminating the service of customers who violate the Commission's rules. Further, such a rule could be misinterpreted to limit a cellular or other CMRS licensee's ability to terminate service to customers in the case of other types of rule violations. The Commission has previously stated that a Part 22 licensee may refuse or terminate service in the event that a subscriber operates a telephone in violation of the Commission's rules.[37] Therefore, we find that an express condition regarding airborne operation is unnecessary and potentially confusing to licensees.

[32] WCA Comments at 6; AG Bell Comments at 5; NECC Reply Comments at 7.

[33] Verizon Comments at 16; Cingular Comments at 16.

[34] AG Bell Comments at 6; Sprint Reply Comments at 11.

[35] Cingular Comments at 16.

[36] Verizon Comments at 16-17.

[37] *See* Amendment of Sections of Part 21 (now Part 22) of the Commission's Rules to Modify Individual Licensing Procedures in the Domestic Public Radio Services (now Public Mobile Radio Services), CC Docket No. 79-259, *Report and Order*, 77 FCC 2d 84, 86, para. 8 (1980) ("If a subscriber fails to meet any of the responsibilities

## IV. ADMINISTRATIVE MATTERS

### A. Final Regulatory Flexibility Act Analysis.

11. The Final Regulatory Flexibility Analysis for this *Second Report and Order,* as required by section 604, of the Regulatory Flexibility Act of 1980, 5 U.S.C. § 604, is set forth in Appendix B.

### B. Paperwork Reduction Act Analysis.

12. The actions taken in this *Second Report and Order* have been analyzed with respect to the Paperwork Reduction Act of 1995, Pub. L. No. 104-13, and found to impose no new or modified recordkeeping requirements or burdens on the public.

## V. ORDERING CLAUSES.

13. IT IS ORDERED that, pursuant to the authority of sections 4(i), 7, 303(c), 303(f), 303(g), 303(r), and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(c), 303(f), 303(g), 303(r), and 332, the rule changes specified in Appendix A are adopted.

14. IT IS FURTHER ORDERED that the rule changes set forth in Appendix A WILL BECOME EFFECTIVE 60 days after publication in the *Federal Register*.

15. IT IS FURTHER ORDERED that a copy of this *Second Report and Order*, including the Final Regulatory Flexibility Analysis set forth in attached Appendix B, will be sent to the Chief Counsel

discussed above [including compliance with the Commission's rules], the carrier may refuse or suspend service until the subscriber has corrected the deficiency in question.").

for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601 et seq. (1981).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

## APPENDIX A

## RULE CHANGES

Title 47, part 22 of the Code of Federal Regulations, 47 CFR part 22, is amended as follows:

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

AUTHORITY: 47 U.S.C. 154, 222, 303, 309 and 332.

Section 22.901 is revised to read as follows:

**22.901 Cellular service requirements and limitations.**

The licensee of each cellular system is responsible for ensuring that its cellular system operates in compliance with this section.

(a) Each cellular system must provide either mobile service, fixed service, or a combination of mobile and fixed service, *subject to* the requirements, limitations and exceptions in this section. Mobile service provided may be of any type, including two-way radiotelephone, dispatch, one-way or two-way paging, and personal communications services (as defined in Part 24 of this chapter). Fixed service is considered to be primary service, as is mobile service. When both mobile and fixed service are provided, they are considered to be co-primary services. In providing cellular services, each cellular system may incorporate any technology that meets all applicable technical requirements in this part.

(b) Until [FIVE YEARS FROM THE EFFECTIVE DATE OF ORDER], each cellular system that provides two-way cellular mobile radiotelephone service must –

(1) Maintain the capability to provide compatible analog service ("AMPS") to cellular telephones designed in conformance with the specifications contained in §§ 1 and 2 of the standard document ANSI TIA/EIA-553-A-1999 Mobile Station – Base Station Compatibility Standard (approved October 14, 1999); or, the corresponding portions, applicable to mobile stations, of whichever of the predecessor standard documents was in effect at the time of the manufacture of the telephone. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of the standard may be purchased from Global Engineering Documents, 15 Inverness East, Englewood, CO 80112-5704 (or via the internet at http://global.ihs.com). Copies are available for inspection at the Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554, or the Office of the Federal Register, 800 North Capitol Street, NW, Suite 700, Washington, DC.

(2) Provide AMPS, upon request, to subscribers and roamers using such cellular telephones while such subscribers are located in any portion of the cellular system's CGSA where facilities have been constructed and service to subscribers has commenced. *See also* § 20.12 of this chapter. Cellular licensees must allot sufficient system resources such that the quality of AMPS provided, in terms of geographic coverage and traffic capacity, is fully adequate to satisfy the concurrent need for AMPS availability.

## APPENDIX B

## FINAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act (RFA),[38] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking in WT Docket No. 01-108, released May 17, 2001 (*NPRM*).[39] The Commission sought written public comment on the proposals in the Second Further Notice, including comment on the IRFA. The comments received are discussed below. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[40]

### A. Need for, and Objectives of, the Order.

In the Telecommunications Act of 1996, Congress added sections 11 and 202(h) to the Communications Act of 1934, as amended, requiring the Commission to 1) review biennially its regulations that pertain to the operations or activities of telecommunications service providers, and 2) determine whether those regulations are no longer necessary in the public interest as a result of meaningful economic competition. Following such review, the Commission is required to modify or repeal any such regulations that are no longer in the public interest.[41] Accordingly, as part of the Commission's year 2000 Biennial Review of regulations, the *Second Report and Order* amends Part 22 of the Commission's rules by modifying or eliminating provisions of section 22.901, which has become outdated due to technological change and increased competition in the Commercial Mobile Radio Services (CMRS).

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

Although we have received numerous comments in response to the *NPRM,* we received no comments in response to the IRFA. However, as described in section E. below, we have nonetheless considered potential significant economic impacts of the rules on small entities.

**General Cellular Service Requirements and Limitations**. A number of commenters agree that certain portions of section 22.901 should be removed as outdated, duplicative, and unnecessary.[42] Our action eliminates burdens on our licensees. WCA, AG Bell, and NECC, however, argued that the Commission should retain the requirement in section 22.901(a) requiring cellular licensees to provide service area a information to potential customers.[43] They argue that consumers require access to this information in order to make sound choices when purchasing wireless services. Likewise, AG Bell and Sprint urge the Commission to retain the requirement in section 22.901(b) requiring cellular licensees to

[38] *See* 5 U.S.C. § 603. 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).

[39] Year 2000 Biennial Regulatory Review – Amendment of Part 22 of the Commission's Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and other Commercial Mobile Radio Services, *Notice of Proposed Rulemaking*, 16 FCC Rcd 11169 (2001) (*NPRM*).

[40] *See* 5 U.S.C. § 604.

[41] 47 U.S.C. § 11(b); the Telecommunications Act of 1996 § 202(h).

[42] *See e.g.* Verizon Comments at 15; Cingular Comments at 15.

[43] WCA Comments at 6; AG Bell Comments at 5; NECC Reply Comments at 7.

notify the Commission in the event a consumer's request for service is denied due to lack of capacity.[44] They argue that eliminating the rule may lead to cellular carriers not providing sufficient capacity for analog services going forward.

### C. Description and Estimate of the Number of Small Entities to which the 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 the proposed rules, if adopted.[45] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[46] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[47] 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).[48]

This *Second Report and Order* results in rule changes that could affect small businesses that currently are or may become Cellular Radiotelephone Service providers that are regulated under Subpart H of Part 22 of the Commission's rules. The SBA has developed a small business size standard for small businesses in the category "Cellular and Other Wireless Telecommunications."[49] Under that SBA category, a business is small if it has 1,500 or fewer employees.[50] According to the Bureau of the Census, only twelve firms from a total of 1238 cellular and other wireless telecommunications firms operating during 1997 had 1,000 or more employees.[51] Therefore, even if all twelve of these firms were cellular telephone companies, nearly all cellular carriers were small businesses under the SBA's definition. In addition, we note that there are 1807 cellular licenses; however, a cellular licensee may own several licenses. According to the most recent *Trends in Telephone Service* data, 806 carriers reported that they were engaged in the provision of either cellular service, Personal Communications Service (PCS), or Specialized Mobile Radio telephony services, which are placed together in that data.[52] We have estimated

[44] AG Bell Comments at 6; Sprint Reply Comments at 11.

[45] 5 U.S.C. § 603(b)(3).

[46] 5 U.S.C. § 601(6).

[47] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[48] 15 U.S.C. § 632.

[49] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 513322.

[50] *Id*.

[51] U.S. Department of Commerce, U.S. Census Bureau, 1997 Economic Census, Information - Subject Series, Establishment and Firm Size, Table 5 – Employment Size of Firms Subject to Federal Income Tax at 64, NAICS code 513322 (October 2000).

[52] *See Trends in Telephone Service*, Industry Analysis Division, Common Carrier Bureau , Table 5.3 - Number of Telecommunications Service Providers that are Small Businesses (August 2001).

that 323 of these are small under the SBA small business size standard.[53] Accordingly, based on this data, we estimate that not more than 323 cellular service providers will be affected by these revised rules.

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

None.

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

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[54]

As stated earlier, the *Second Report and Order* concluded that certain provisions of section 22.901 are unnecessary in light of meaningful economic competition or technological advances. Therefore, modifying or eliminating these provisions should decrease the costs associated with regulatory compliance for cellular service providers, provide additional flexibility in manufacturing cellular equipment, and also enhance the market demand for some products.

### F. Federal Rules that May Duplicate, Overlap or Conflict with the Proposed Rules

None.

**Report to Congress**: The Commission will send a copy of the *Report and Order*, including this FRFA, 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 *Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Report and Order* and FRFA (or summaries thereof) will also be published in the Federal Register. *See* 5 U.S.C. § 604(b).

[53] *Id.* Data found in *Trends in Telephone Service* is based on information filed by service providers on FCC Form 499-A worksheets, in combination with employment information obtained from ARMIS and Securities and Exchange Commission filings as well as industry employment estimates published by the Bureau of Labor Statistics.

[54] *See* 5 U.S.C. § 603.

## APPENDIX C

### List of Commenters

**Comments**

Alexander Graham Bell Association for the Deaf and Hard of Hearing (AG Bell)
AT&T Wireless Services, Inc. (AT&T Wireless)
ATX Technologies, Inc.
Bristol Bay Cellular Partnership
CaseNewHolland Inc. (CNH)
Cellular Telecommunications & Internet Assn. (CTIA)
CenturyTel Wireless, Inc.
Cingular Wireless, LLC
Council of Organizational Representatives (COR)
Deere & Co. (Deere)
Deltec Telesystems, Inc.
Dixon, Alan
Dobson Communications Corp.
Ericsson, Inc.
Hiscock, David
Independent Cellular Services Association and MT Communications (ICSA/MT Communications)
Kosterich, Eileen
League For the Hard of Hearing
McElvogue, Ronnald E.
Missouri RSA No. 7 L.P. dba Mid-Missouri Cellular, Northwest Missouri Cellular L.P. dba Northwest Missouri Cellular, RSA 1 L.P. dba Cellular 29 Plus (Mid-Missouri Cellular et al.)
National Association of the Deaf (NAD)
OnStar Corp.
Qualcomm, Inc.
Qwest Wireless, L.L.C.
Rural Cellular Association (RCA)
Rural Telecommunications Group (RTG)
Secure Alert
Self Help For Hard of Hearing People (SHHH)
Sprint Spectrum L.P., dba Sprint PCS
Telecommunications for the Deaf, Inc.
Telecommunications Industry Association (TIA)
U.S. Cellular Corporation
Verizon Wireless, LLC (Verizon)
Vickery, Ronald H.
Western Wireless, Inc.
Wireless Consumers Alliance, Inc. (WCA)

**Reply Comments**

AT&T Wireless Services, Inc. (AT&T Wireless)
ATX Technologies, Inc.
CaseNewHolland Inc. (CNH)
Cingular Wireless, LLC

Council of Organizational Representatives (COR)
Deere & Co. (Deere)
Dobson Communications Corp.
EDS Corp.
Independent Cellular Services Association and MT Communications (ICSA/MT Communications)
Kosterich, Eileen
Leap Wireless International, Inc.
Mercedes-Benz USA, LLC. (MBUSA)
Missouri RSA No. 7 L.P. dba Mid-Missouri Cellular, Northwest Missouri Cellular L.P. dba Northwest Missouri Cellular, RSA 1 L.P. dba Cellular 29 Plus (Mid-Missouri Cellular et al.)
N.E. Colorado Cellular, Inc.
National Association of the Deaf (NAD)
Rural Cellular Association (RCA)
Rural Telecommunications Group (RTG)
Self Help For Hard of Hearing People (SHHH)
Sprint Spectrum L.P., dba Sprint PCS
Telecommunications For the Deaf, Inc.
Verizon Wireless, LLC (Verizon)

***Ex Partes* or Late Filed Comments**

A2Q, Inc.
AARP
ATX Technologies, Inc., et al.
Allen, George (The Hon.)
American Honda Motor Company (Honda)
Audi of America
Breaux, John D. (The Hon.)
Brownback, Sam (The Hon.)
Carnahan, Jean (The Hon.)
Cellular Telecommunications & Internet Assn. (CTIA)
Cingular Wireless, LLC
Cleland, Max (The Hon.)
Dorgan, Byron L. (The Hon.)
Edwards, John (The Hon.)
Hollings, Ernest F. (The Hon.)
Los Angeles County Service Authority for Freeway Emergencies
Mercedes-Benz USA, LLC
National Association of EMS Physicians (NAEMSP)
National Telecommunications and Information Administration (NTIA)
Nelson, Bill (The Hon.)
National Organization on Disability
OnStar Corporation
Rehabilitation Engineering Research Center on Telecommunications Access (RERC-TA)
Rural Cellular Association (RCA)
Rural Telecommunications Group (RTG)
San Bernardino County – Service Authority for Freeways and Expressways
Smith, Gordon (The Hon.)
Sprint Spectrum L.P., dba Sprint PCS
Toyota Motor North America, Inc.
Transportation Agency for Monterey County

Wyden, Ron (The Hon.)
Zarick, Michael (late filed)

**Comments re: Request for Waiver of the Vertical Wave Polarization Requirement filed by Cingular Wireless, LLC**

AirCell, Inc.
Allgon Telecom
Andrew Corp.
AT&T Wireless Services, Inc.
CSA Wireless
Cingular Wireless, LLC
Dobson Communications Corp.
Meyers, Lou

**STATEMENT OF COMMISSIONER MICHAEL J. COPPS**
**APPROVING IN PART, DISSENTING IN PART**

*RE:* *Year 2000 Biennial Review – Amendment of Part 22 of the Commission's Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and Other Commercial Mobile Radio Services*, Second Report and Order, WT Docket No. 108

Today's Order eliminates the rule that cellular licensees must inform potential customers of their service areas. The rule being repealed guarantees that when a consumer walks into a cellular store, he or she will see a network coverage map. I believe that understanding a carrier's service area is critical information for consumers. I also disagree with the majority's apparent belief that competition alone can obviate the need for consumer protection laws. I therefore must dissent from that portion of the Order.

Markets depend on information. Consumers with good information about products and services can "comparison shop" and determine what products and service are worth. Informed consumers will choose the best combination of quality and price. These discriminating consumers force sellers to compete with one another. This competition drives down costs and pushes up quality, because the seller with the best product or service will win the informed consumer.

Without information, however, consumers are in the dark. They cannot comparison shop because they don't know how products and services differ. They cannot determine how much a product or service is worth, because they do not know the quality of what they are considering purchasing. This lack of information means that sellers are not forced to compete as vigorously. Costs can stay higher and quality can stay lower.

For cellular customers, the service area of a given cellular plan is critical information. It allows them to determine where they can use their phone and where they cannot. It allows then to determine the size of their monthly bill. In rural areas, it allows them to determine where 911 calls will go through and where their signal will never be heard. Armed with information on service areas, consumers will seek out carriers with the largest, most complete service areas, while also seeking better technology, and better prices.

Carriers provide service area information now. Cellular carriers were, until today, required to do so. PCS carriers, who came into a market where such provision was required of their competitors, naturally followed suit. But when the cellular rule disappears, we face the risk that carriers with the worst service areas will try to conceal their inferiority by not making service maps available. Unsophisticated consumers may assume to their detriment that since the carrier provides them with no coverage map that coverage exists everywhere. Competition and consumers will suffer.

Some argue that we do not need a requirement because market forces will protect consumers – that we do not need consumer protection rules because the unfettered market will do just as well. I believe that consumer protection is important even where competition exists. This is especially true for rules that put the power of information in the hands of consumers. Consumers cannot possibly determine a carrier's service area unless the carrier provides it. This information is, practically, under the sole control of the carrier. Where such information access asymmetries exist, rules that make information more widely available can address market failures that could otherwise undermine a market and lead to inefficiencies. Additionally, many believe that the wireless industry will soon experience significant consolidation. Even if one believes that competition without consumer protection will cause carriers to disclose service areas today, with less competition tomorrow this will be less likely to occur.

To sum up, the majority seems to believe that we can safely assume that competitive forces will result in all carriers continuing to provide customers with coverage maps – and that while these maps are undoubtedly important to consumers, that the rule is not needed to maintain their availability. I believe that this assumption is wrong, and that we are opening the door to a market where such maps are no longer universally available.

I could be wrong. But even if I was wrong and the rule was retained, and maps stayed available through a rule that was not necessary, consumers would remain protected *at no additional cost to industry*. After all, even if the rule were eliminated, the majority assumes competition would force carriers to provide the very same maps. But if the majority is wrong, and competitive forces do not force carriers to provide accurate coverage area information once the rule is gone, coverage maps will no longer be a ubiquitous consumer protection. Thus, for the mere sake of eliminating a costless rule, the majority is willing to take this substantial risk. I am not.

**CONSOLIDATED SEPARATE STATEMENT OF COMMISSIONER KEVIN J . MARTIN, APPROVING IN PART AND CONCURRING IN PART**

*Re:* *Year 2000 Biennial Regulatory Review – Amendment of Part 22 of the Commission's Rules To Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and other Commercial Mobile Radio Services*, WT Docket No. 01-108, Report and Order (FCC 02-229) and Second Report and Order (FCC 02-247)

I support these Orders, which modify or eliminate a number of our Part 22 rules pursuant to the biennial review mandated by section 11 of the Communications Act. I concur, however, with respect to the Orders' discussion of the legal standard for Section 11's biennial review. I also write separately to emphasize my support for ensuring that people with hearing disabilities have sufficient access to wireless services.

Section 11 requires the Commission to review its regulations for providers of telecommunications service every two years and to "determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service." 47 U.S.C. § 161(a). The provision then mandates that "The Commission shall repeal or modify any regulation it determines to be no longer necessary in the public interest." *Id.* § 161(b).

While I agree with much of the Orders' discussion of Section 11's legal standard (*see* First Report and Order ¶ 4; Second Report and Order ¶ 6) – as well as the Orders' application of the standard to the regulations at issue – I am concerned by the Orders' failure to discuss the meaning of the term "necessary" in Section 11. In a similar context, the Commission has argued that the term "necessary" means only "useful" or "appropriate." *See* FCC's Petition for Rehearing or Rehearing *En Banc*, *Fox Television Stations, Inc. v. FCC*, Nos. 00-1222, *et al.*, 2002 WL 1343461, at 5 (D.C. Cir. Jun 21, 2002) ("Terms such as 'necessary' and 'required' must be read in their statutory context and, so read, can reasonably be interpreted as meaning 'useful' or 'appropriate' rather than 'indispensable' or 'essential.'"). As I have argued elsewhere, I believe the term "necessary" should be read in accordance with its plain meaning, to mean something closer to "essential."[55] But at the very least, I think the Commission should clarify that the term means something more than merely "useful" or "appropriate." Accordingly, I concur in the Orders' discussion of Section 11's legal standard.

I also wish to note my support for ensuring that people with hearing disabilities have sufficient access to wireless services. Currently, hearing disabled people must generally rely on analog wireless service, because most digital phones cause interference to most hearing aids and cochlear implants. For this reason, among others, the First Report and Order leaves in place the requirement that cellular carriers provide analog service for another five years. More importantly, that Order makes clear that – even after the five-year period – the Commission will not eliminate the analog requirement if hearing-aid compatible digital devices are still not available. This latter point was fundamental to my support of the item.

Ultimately, however, the Commission must ensure the availability of digital phones that are compatible with hearing aids and cochlear implants. Fixing the digital compatibility problem, rather than

[55] *See* Separate Statement of Commissioner Kevin J. Martin, *Verizon Wireless's Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation*, Memorandum Opinion and Order, WT Docket No. 01-184, CC Docket No. 95-116 (adopted July 16, 2002); Separate statement of Commissioner Kevin J. Martin, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition*, Report and Order, CS Docket No. 01-290 (adopted June 13, 2002).

relegating the hearing disabled community to analog phones, is the real solution. I thus look forward to tackling that issue and completing our proceeding under the Hearing Aid Compatibility Act of 1988. Completing that proceeding should be, and is, a priority for the Commission.