

**§ 73.202 [Amended]**

2. Section 73.202(b), the Table of FM Allotments, under Idaho, is amended by adding St. Maries, Channel 221A and Troy, Channel 262A and by removing Channel 276C2 at Coeur d'Alene and adding Post Falls, Channel 276C1.

Federal Communications Commission.

**John A. Karousos,**

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

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## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Parts 1, 20, and 95

[FCC 99-239; WT Docket No. 98-169]

### 218-219 MHz Service

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** This document modifies the regulations governing the licensing of the 218-219 MHz Service to maximize the efficient and effective use of the 218-219 MHz band. The Commission amends the rules to redesignate the 218-219 MHz Service from a strictly private radio service to a service that can be used in common carrier and private operations, extend the license term to ten years, adopt a "substantial service" analysis to replace the three- and five-year construction benchmarks, and permit partitioning and disaggregation of spectrum. Additionally, the Commission addresses the constitutional issues raised by Graceba Total Communications, Inc. that are before the Commission on remand from the D.C. Circuit Court of Appeals, together with similar issues raised by other commenters in the proceeding.

**DATES:** Effective January 3, 2000.

**ADDRESSES:** Federal Communications Commission, 445 12th Street, S.W., Room 4-C207, Washington, D.C. 20554. A copy of any comments on the information collection contained herein should be submitted to Judy Boley, Federal Communications Commission, 445 12th Street, S.W., Room 1-C804, Washington, D.C. 20554 or via the Internet to [jboley@fcc.gov](mailto:jboley@fcc.gov); and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 17th Street, N.W., Washington, D.C. 20503 or via the Internet to [fain-t@al.eop.gov](mailto:fain-t@al.eop.gov).

**FOR FURTHER INFORMATION CONTACT:**

Jamison Prime, Shellie Blakeney or Nick Kolovos of the Policy and Rules Branch,

Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, (202) 418-0680. For further information concerning the information collection contained in the *Report and Order and Memorandum Opinion and Order*, contact Judy Boley at (202) 418-0215 or via the Internet to [jboley@fcc.gov](mailto:jboley@fcc.gov).

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's *Report and Order and Memorandum Opinion and Order* in WT Docket No. 98-169, FCC 99-239, adopted September 7, 1999, and released September 10, 1999. The full text of the *Report and Order and Memorandum Opinion and Order* is available for inspection and copying during normal business hours in the FCC Reference Center, 445 12th Street, S.W., Room CY-A257, Washington, D.C. 20554. The full text of the *Report and Order and Memorandum Opinion and Order* may also be purchased from the Commission's copy contractor, International Transcription Services, 1231 20th Street, N.W., Washington, D.C. 20036, telephone (202) 857-3800, facsimile (202) 857-3805. The full text of the *Report and Order and Memorandum Opinion and Order* may also be downloaded at: <http://www.fcc.gov/Bureaus/Wireless/Orders/1999/fcc99239.wp>. Alternative formats (computer diskette, large print, audio cassette, and Braille) are available to persons with disabilities by contacting Martha Contee at (202) 418-0260, TTY (202) 418-2555, or at [mcontee@fcc.gov](mailto:mcontee@fcc.gov).

### Synopsis of the Report and Order and Memorandum Opinion and Order

The *Report and Order* gives maximum flexibility to 218-219 MHz Service providers, letting them choose their regulatory status. Mobile service providers may elect their regulatory status as either commercial (under the Commercial Mobile Radio Service [CMRS] rules) or private (under the Private Mobile Radio Service rules). Fixed service providers may elect their regulatory status as either common carrier or private, under the conditions set forth in Title III of the Communications Act of 1934, as amended. Regardless of regulatory status, the *Report and Order* further clarifies that both one- and two-way communications are permissible, as well as Response Transmitter Unit-to-Response Transmitter Unit (RTU-to-RTU) communications (in addition to RTU interconnection with the public switched network or any CMRS service). License terms are extended to ten years, regardless of whether the license was obtained by lottery or auction.

Regarding payment options, existing licensees that (a) were current in installment payments (*i.e.*, less than 90 days delinquent) as of March 16, 1998, or (b) had properly filed grace period requests under the former installment payment rules, are eligible for a new payment structure. These eligible licensees may choose between (a) reamortization of principal and interest installment payments over the new ten-year period; (b) amnesty wherein licensees surrender any licenses they choose to the Commission for subsequent auction and, in return, have all of the outstanding debt on those licenses forgiven (together with a refund of any installment payments already made, either in full or applied toward retained licenses, as applicable); or (c) prepayment whereupon licensees may retain or return as many licenses as they desire. Licensees electing the prepayment option, however, must prepay the outstanding principal of any license they wish to retain.

The *Report and Order* also resolves constitutional concerns raised by Graceba Total Communications, Inc. regarding a bidding preference for minorities and women that was used in the 1994 auction for what is now the 218-219 MHz Service. Now, every winning bidder that met the small business qualifications for that auction receives a 25 percent bidding credit, in order to achieve parity with the bidding credit formerly given to minorities and women. Minority- and women-owned winning bidders are not disadvantaged by this action because all such bidders also met the small business qualifications.

Regarding service and construction requirements, the three- and five-year construction benchmarks are replaced by a "substantial service" construction requirement, defined as a "service that is sound, favorable, and substantially above a level of mediocre service which might minimally warrant renewal." In addition, the following "safe harbor" examples achieve compliance: (a) a demonstration of coverage to twenty percent of the population or land area of the licensed service area; (b) a demonstration of specialized or technologically sophisticated service that does not require a high level of coverage to be of benefit to customers; or (c) a demonstration of service to niche markets or a focus on serving populations outside of areas currently serviced by other licensees. These criteria are to be demonstrated at the time of license renewal.

License transfer restrictions on lotteried licenses are relaxed, though they remain subject to case-by-case,

public interest analysis. Spectrum aggregation restrictions are also relaxed, so that cross-ownership is allowed of both frequency segment A (218.0–218.5 MHz) and frequency segment B (218.5–219.0 MHz) in the same service area. Partitioning and disaggregation are now allowed, and any partitionee/disaggregatee is authorized to hold its license for the remainder of the original licensee's term.

The *Report and Order* revises several technical standards as well, responsive to changes in the original scope of use contemplated for the 218–219 MHz Service. The duty cycle limitation, of a maximum of five seconds per hour for each RTU, is eliminated. The 100 milliwatt power limitation on mobile RTUs is reduced to an average of 4 watts, while maintaining protection for TV Channel 13 reception. Automatic power control restrictions are eliminated. The cell transmitter station (CTS) antenna height/transmitter power ratios are removed, but CTS antennas may still not be taller than is necessary to assure adequate service. The 20 watt maximum effective radiated power for transmitters is retained. Section 95.861(e) of the Commission's Rules continues to provide the framework for resolving interference complaints, with the further requirement that licensees produce an interference control plan that includes, as part of the planning process, an analysis of the proposed system and the methods used to eliminate co- and adjacent channel interference, together with updates to reflect changes in system design or construction.

Finally, the Part 1, Subpart Q standardized auction rules are incorporated by reference, providing a uniform set of competitive bidding rules on issues concerning designated entities, application and payment, competitive bidding design, procedure and timing, and anti-collusion. Small businesses and very small businesses will receive bidding credits consistent with the Part 1 rules, but installment payments will no longer be available as a means of financing winning bids. Small businesses are defined as having average annual gross revenues not to exceed \$15 million for the preceding three years, and very small businesses are defined as having average annual gross revenues not to exceed \$3 million for the preceding three years.

The *Memorandum Opinion and Order* dismisses a Petition for Reconsideration filed by Interactive America Corporation (IAC). IAC challenged the Commission's failure, prior to the then-planned auction of IAC's defaulted licenses, to disclose IAC's pending appeal (Auction

No. 13), but that argument is moot because the Commission subsequently postponed Auction No. 13, and the D.C. Circuit denied IAC's petition for review. IAC also argued that any 218–219 MHz Service auction should be delayed until final rules are adopted. However, this *Report and Order* adopts such rules, rendering that argument moot as well.

### Regulatory Flexibility Act Final Analysis

As required by the Regulatory Flexibility Act (RFA),<sup>1</sup> an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218–219 MHz Service and Amendment of Part 95 of the Commission's Rules to Allow Interactive Video and Data Service Licensees to Provide Mobile Services, Order, Memorandum Opinion and Order, and Notice of Proposed Rulemaking*.<sup>2</sup> The Commission sought written public comment on the proposals in the *218–219 MHz Flex NPRM*, including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.<sup>3</sup>

### I. Need for, and Objectives of, the Report and Order

This rulemaking proceeding was initiated to secure public comment on proposals to maximize the efficient and effective use of spectrum in the 218–219 MHz band, allocated in 1992 to the Interactive Video and Data Service (IVDS) in the Personal Radio Services, now redesignated as the 218–219 MHz Service. In attempting to maximize the use of the 218–219 MHz band, we continue our efforts to improve the efficiency of spectrum use, reduce the regulatory burden on spectrum users, facilitate technological innovation, and provide opportunities for development of competitive new service offerings. The rules adopted in this *Report and Order* are also designed to implement Congress' goal of giving small businesses the opportunity to

participate in the provision of spectrum-based services in accordance with Section 309(j) of the Communications Act of 1934, as amended (the Communications Act).<sup>4</sup>

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

No petitions were filed in direct response to the IRFA. In general, commenters and reply commenters supported our proposals to provide additional flexibility in the 218–219 MHz Service. Moreover, many of the commenters and reply commenters were existing 218–219 MHz Service licensees many of whom, as discussed *infra*, qualify as small businesses. These commenters overwhelmingly supported proposals that would permit (1) acquisitions by partitioning or disaggregation; (2) 218–219 MHz Service licensees and applicants to choose regulatory status; and (3) non-defaulting 218–219 MHz Service licensees currently participating in the installment payment plan to elect one of three restructuring plans concerning their outstanding payments, despite the increased reporting requirements that these proposals may entail.

### III. Description and Estimate of the Number of Small Entities to Which the Rules Apply

The Regulatory Flexibility Act 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. The Regulatory Flexibility Act generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act, unless the Commission has developed one or more definitions that are appropriate for its activities.<sup>5</sup> 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

<sup>1</sup> 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, Public Law Number 104–121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

<sup>2</sup> *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218–219 MHz Service and Amendment of Part 95 of the Commission's Rules to Allow Interactive Video and Data Service Licensees to Provide Mobile Services (proceeding terminated), Order, Memorandum Opinion and Order, and Notice of Proposed Rulemaking*, 63 FR 52215 (Sept. 30, 1998), 13 FCC Rcd 19064, 19101 (1998) (*218–219 MHz Flex NPRM*).

<sup>3</sup> See 5 U.S.C. 604.

<sup>4</sup> 47 U.S.C. 257, 309(j).

<sup>5</sup> U.S.C. 601(3) (incorporating by reference the definition of "small business concern" in 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**."

established by the SBA.<sup>6</sup> A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."<sup>7</sup> Below, we further describe and estimate the number of small entity licensees and regulatees that may be affected by the proposed rules, if adopted.

The rules adopted in this *Report and Order* affect a number of small entities who are either licensees, or who may choose to become applicants for licenses, in the 218–219 MHz Service. Such entities fall into two categories: (1) those using the 218–219 MHz Service for providing interactivity capabilities in conjunction with broadcast services; and (2) those using the 218–219 MHz Service to operate other types of wireless communications services with a wide variety of uses, such as commercial data applications and two-way telemetry services. Theoretically, an entity could fall into both categories. The spectrum uses in the two categories differ markedly.

With respect to the first category, the provision of interactivity capabilities in conjunction with broadcast services could be described as a wireless provider of subscription television service. The SBA's rules applicable to subscription television services define small entities as those with annual gross revenues of \$11 million or less.<sup>8</sup> In the *Competitive Bidding Tenth Report and Order*, we extended special competitive bidding provisions to small businesses with annual gross revenues that are not more than \$15 million, and additional benefits to very small businesses with annual gross revenues that are not more than \$3 million.<sup>9</sup> On January 6, 1998, the SBA approved of the small business size standards established in the *Competitive Bidding Tenth Report and Order*.<sup>10</sup>

The Commission's estimate of the number of small business entities operating in the 218–219 MHz band for interactivity capabilities with television viewers begins with the 1992 Bureau of Census report on businesses listed under SIC Code 4841, subscription television services, which is the most recent information available. The total number of entities under this category is

1,788.<sup>11</sup> There are 1,463 companies in the 1992 Census Bureau report which are categorized as small businesses providing cable and pay TV services.<sup>12</sup> We know that many of these businesses are cable and television service businesses, rather than businesses operating in the 218–219 MHz band. We also know that, to date, we have issued 612 licenses in the 218–219 MHz Service. Therefore, the number of small entities currently providing interactivity capability to television viewers in the 218–219 MHz Service which will be subject to the rules will be less than 612.

With respect to the second category, neither the Commission nor the SBA has developed a specific definition of small entities applicable to 218–219 MHz band licensees that would provide wireless communications services other than that described above. Generally, the applicable definition of a small entity in this instance appears to be the definition under the SBA rules applicable to establishments primarily engaged in furnishing telegraph and other message communications, SIC Code 4822. This definition provides that a small entity is an entity with annual receipts of \$5 million or less.<sup>13</sup> The 1992 Census data, which is the most recent information available, indicates that of the 286 firms under this category, 247 had annual receipts of \$4.999 million or less.<sup>14</sup>

The first auction of 218–219 MHz spectrum resulted in 170 entities winning licenses for 594 Metropolitan Statistical Area (MSA) licenses. Of the 594 licenses, 557 were won by entities qualifying as a small business. For that auction, we defined a small business as an entity, together with its affiliates, that has no more than a \$6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than \$2 million in annual profits

each year for the previous two years.<sup>15</sup> We cannot estimate, however, the number of licenses that will be won by entities qualifying as small or very small businesses under our rules in future auctions of 218–219 MHz spectrum. Given the success of small businesses in the previous auction, and the above discussion regarding the prevalence of small businesses in the subscription television services and message communications industries, we assume for purposes of this FRFA that in future auctions, all of the licenses may be awarded to small businesses, which would be affected by the rule changes we propose.

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

The final rules adopted in this *Report and Order* alter the reporting and recordkeeping requirements for a number of small business entities. Specifically, (1) 218–219 MHz Service licensees will not be required to file a license renewal application after five years from the date of grant of the license, but will be required to file a license renewal application after ten years after the date of grant of the license; (2) 218–219 MHz Service licensees will not be required to file construction reports at specified intervals after initial licensure, but will be obligated to demonstrate that they are providing "substantial service" as a condition for renewal of their license; and (3) acquisitions by partitioning or disaggregation will be treated as assignments of a license and parties will be required to comply with the 218–219 MHz Service licensing requirements. In addition small business may make elections under the final rules that will alter their reporting and recordkeeping requirements. Specifically, (1) 218–219 MHz Service licensees and applicants may choose to elect regulatory status (common carrier, private, commercial mobile radio service, private mobile radio service) and file appropriate documentation coincident with the regulatory status elected; (2) non-defaulting 218–219 MHz Service licensees currently participating in the installment payment plan may elect one of three restructuring plans concerning their outstanding payments; and (3) 218–219 MHz Service licensees electing to continue making installment payments may be required to execute loan documents as a condition of the

<sup>11</sup> U.S. Small Business Administration 1992 Economic Census Industry and Enterprise Report, Table 2D, SIC Code 4841 (Bureau of the Census data adapted by the Office of Advocacy of the U.S. Small Business Administration).

<sup>12</sup> The Census table divides those companies by the amount of annual receipts. There is a dividing point at companies with annual receipts of \$10 million. The next increment is annual receipts of \$17 million, a category that greatly exceeds the SBA definition of small businesses that provide subscription television services. However, there are 17 firms in this category, with revenues between \$10–\$17 million. Approximately 1,480 SIC Code 4841 category firms have annual gross receipts of \$15 million or less. Only a small fraction of those 1,480 firms provide IVDS.

<sup>13</sup> 13 CFR 121.201, SIC Code 4822.

<sup>14</sup> 1992 Economic Census Industry and Enterprise Receipts Size Report, U.S. Bureau of the Census, U.S. Department of Commerce, Table 2D, SIC Code 4822 (industry data prepared by the Census Bureau under contract to the U.S. SBA Office of Advocacy).

<sup>15</sup> Implementation of Section 309(j) of the Communications Act, Competitive Bidding, PP Docket No. 93–253, *Fourth Report and Order*, 59 FR 24947 (May 13, 1994), 9 FCC Rcd 2330, 2336 (1994).

<sup>6</sup> Small Business Act, 15 U.S.C. 632 (1996).

<sup>7</sup> 5 U.S.C. 601(4).

<sup>8</sup> 13 CFR 121.201, SIC Code 4841.

<sup>9</sup> Implementation of Section 309(j) of the Communications Act, Competitive Bidding, PP Docket No. 93–253, *Tenth Report and Order*, 61 FR 60198 (Nov. 27, 1996), 11 FCC Rcd 19974, 19981–85 (1996) (*Competitive Bidding Tenth Report and Order*), recon. pending.

<sup>10</sup> See Letter to Daniel B. Phythyon, Chief, WTB, from Aida Alvarez, Administrator, SBA, Dated Jan. 6, 1998.

reamortization of its installment payment plan under the revised ten-year term.

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

In response to general comments filed in this proceeding we have adopted final rules designed to maximize opportunities for participation by, and growth of, small businesses in providing wireless services. Specifically, we expect that the extension of license terms from five to ten years and allowing partitioning and disaggregation of licenses, will specifically assist small businesses. We adopted a plan that provided for a reamortization of installment payment debt in conjunction with the extension of license term that differed from our original proposal in specific response to concerns raised in comments and reply comments. Commenters noted that our original proposal would have required licensees to pay two years worth of principal payments, as well as the accrued interest, in a lump sum, within ninety days of the *Report and Order* to retain their licenses, and claimed that such a plan would not allow licensees in particular, small businesses sufficient time to make new capital arrangements. Commenters proposed a variety of means of providing relief beyond that which we proposed in the *218-219 MHz Flex NPRM*. We note that some of these proposals such as a ten-year payout schedule that would be entirely interest-free<sup>16</sup> may have resulted in greater relief than that provided by the reamortization procedures adopted in the *Report and Order*.

We also believe that our proposals regarding permissible uses of 218-219 MHz Service, liberalization of construction requirements and technical restrictions, and elimination of the cross-ownership restriction, will make expansion of 218-219 MHz Service operations easier, and this flexibility assists all licensees, including small business licensees. We considered proposals by small business interests to eliminate (instead of liberalize) technical restrictions for the service,<sup>17</sup> but concluded that limited technical restrictions are still necessary in order to protect other licensees offering services (such as TV Channel 13 broadcasting) operating in or in close proximity of the 218-219 MHz band. We further believe that by retroactively applying a bidding credit for small businesses to the IVDS auction and by

adopting our general auction rules that provide for small business bidding credits, we will maximize opportunities for participation by, and growth of, small businesses in the 218-219 MHz Service. For these reasons, we did not consider any significant alternatives to our proposals to minimize significant economic impact on small entities, nor were any significant alternatives of this nature proposed by commenters and reply commenters.

#### 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 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).

#### List of Subjects in 47 CFR Parts 1, 20 and 95

Communications equipment, Radio, Reporting and recordkeeping requirements.

Federal Communications Commission.

**Magalie Roman Salas,**  
*Secretary.*

#### Rule Changes

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 1, 20 and 95 as follows:

#### PART 1—PRACTICE AND PROCEDURE

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

**Authority:** 15 U.S.C. 79 *et seq.*; 47 U.S.C. 151, 154(i), 154(j), 155, 225, and 303(r).

2. Section 1.2105 is amended by revising paragraph (a)(2)(xi) to read as follows:

#### § 1.2105 Bidding application and certification procedures; prohibition of collusion.

(a) \* \* \*

(2) \* \* \*

(xi) For C block and 218-219 MHz Service applicants, an attached statement made under penalty of perjury indicating whether or not the applicant has ever been in default on any Commission licenses or has ever been delinquent on any non-tax debt owed to any Federal agency.

\* \* \* \* \*

#### PART 20—COMMERCIAL MOBILE RADIO SERVICES

3. The authority citation for Part 20 continues to read as follows:

**Authority:** 47 U.S.C. 154, 160, 251-254, 303, and 332 unless otherwise noted.

4. Section 20.9 is amended by redesignating paragraph (a)(13) as (a)(14), redesignating paragraph (a)(12) as (a)(13) and by adding a new paragraph (a)(12) to read as follows:

#### § 20.9 Commercial mobile radio services.

(a) \* \* \*

(12) Mobile operations in the 218-219 MHz Service (part 95, subpart F of this chapter) that provide for-profit interconnected service to the public;

\* \* \* \* \*

#### PART 95—PERSONAL RADIO SERVICES

5. The authority citation for Part 95 continues to read as follows:

**Authority:** Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303.

6. Section 95.1 is amended by revising paragraph (b) to read as follows:

#### § 95.1 The General Mobile Radio Service (GMRS).

\* \* \* \* \*

(b) The 218-219 MHz Service is a two-way radio service authorized for system licensees to provide communication service to subscribers in a specific service area. The rules for this service are contained in subpart F of this part.

#### Subpart F Heading—[Revised]

7. The heading for subpart F is revised to read, "218-219 MHz Service."

8. Section 95.801 is revised to read as follows:

#### § 95.801 Scope.

This subpart sets out the regulations governing the licensing and operation of a 218-219 MHz system. This subpart supplements Part 1, Subpart F of this chapter, which establishes the requirements and conditions under which commercial and private radio stations may be licensed and used in the Wireless Telecommunications Services. The provisions of this subpart contain additional pertinent information for current and prospective licensees specific to the services governed by this part 95.

9. Sections 95.803 (a) and (b) and the section heading are revised to read as follows:

<sup>16</sup> See CRSPI Reply Comments at 2.

<sup>17</sup> See, e.g., Petty Comments at 1.

**§ 95.803 218–219 MHz Service description.**

(a) The 218–219 MHz Service is a two-way radio service authorized for system licensees to provide communication service to subscribers in a specific service area.

(b) The components of each 218–219 MHz Service system are its administrative apparatus, its response transmitter units (RTUs), and one or more cell transmitter stations (CTSs). RTUs may be used in any location within the service area.

\* \* \* \* \*

10. Section 95.805 is revised to read as follows:

**§ 95.805 Permissible communications.**

A 218–219 MHz Service system may provide any fixed or mobile communications service to subscribers within its service area on its assigned spectrum, consistent with the Commission's rules and the regulatory status of the system to provide services on a common carrier or private basis.

11. Section 95.807 is added to read as follows:

**§ 95.807 Requesting regulatory status.**

(a) Authorizations for systems in the 218–219 MHz Service will be granted to provide services on a common carrier basis or a private basis, or on both a common carrier and private basis in a single authorization.

(1) *Initial applications.* An applicant will specify on FCC Form 601 if it is requesting authorization to provide services on a common carrier basis, a private basis, or on both a common carrier and private basis.

(2) *Amendment of pending applications.* Any pending application may be amended to:

(i) Change the carrier status requested; or

(ii) Add to the pending request in order to obtain both common carrier and private status in a single license.

(3) *Modification of license.* A licensee may modify a license to:

(i) change the carrier status authorized; or

(ii) add to the status authorized in order to obtain both common carrier and private status in a single license. Applications to change, or add to, carrier status in a license must be submitted on FCC Form 601 in accordance with § 1.1102 of this chapter.

(4) *Pre-existing licenses.* Licenses issued before [effective date of rules] are authorized to provide services on a private basis. Licensees may modify this initial status pursuant to paragraph (a)(3) of this section.

(b) An applicant or licensee may submit a petition at any time requesting

clarification of the regulatory status required to provide a specific communications service.

12. Section 95.811 is amended by revise paragraphs (b), (c), and (d) to read as follows:

**§ 95.811 License requirements.**

\* \* \* \* \*

(b) A CTS must be individually licensed to the 218–219 MHz Service licensee for the service area in which the CTS is located in accordance with part 1, subpart F of this chapter if it:

(1) Is in the vicinity of certain receiving locations (see § 1.924 of this chapter);

(2) May have significant environmental effect (see part 1, subpart I of this chapter);

(3) Is part of an antenna structure that requires notification to the Federal Aviation Administration (see part 17, subpart B of this chapter); or

(4) Has an antenna the tip of which exceeds:

(i) 6.1 meters (20 feet) above ground level; or

(ii) 6.1 meters (20 feet) above the top of an existing man-made structure (other than an antenna structure) on which it is mounted.

(c) All CTSs not meeting the licensing criteria under paragraph (b) of this section are authorized under the 218–219 MHz Service system license.

(d) Each component RTU in a 218–219 MHz Service system is authorized under the system license or if associated with an individually licensed CTS, under that CTS license.

13. Section 95.812 is added to read as follows:

**§ 95.812 License term.**

(a) The term of each 218–219 MHz Service system license is ten years from the date of original issuance or renewal.

(b) Licenses for individually licensed CTSs will be issued for a period running concurrently with the license of the associated 218–219 MHz Service system with which it is licensed.

14. Section 95.813 is amended by removing paragraph (c) and by revising paragraph (b) to read as follows:

**§ 95.813 License eligibility.**

\* \* \* \* \*

(b) An entity that loses its 218–219 MHz Service authorization due to failure to meet the construction requirements specified in § 95.833 of this part may not apply for a 218–219 MHz Service system license for three years from the date the Commission takes final action affirming that the 218–219 MHz Service license has been canceled.

15. Section 95.815 is amended by revising paragraphs (a) and (b) to read as follows:

**§ 95.815 License application.**

(a) In addition to the requirements of part 1, subpart F of this chapter, each application for a 218–219 MHz Service system license must include a plan analyzing the co- and adjacent channel interference potential of the proposed system, identifying methods being used to minimize this interference, and showing how the proposed system will meet the service requirements set forth in § 95.831 of this part. This plan must be updated to reflect changes to the 218–219 MHz Service system design or construction.

(b) In addition to the requirements of part 1, subpart F of this chapter, each request by a 218–219 MHz Service system licensee to add, delete, or modify technical information of an individually licensed CTS (see § 95.811(b) of this part) must include a description of the system after the proposed addition, deletion, or modifications, including the population in the service area, the number of component CTSs, and an explanation of how the system will satisfy the service requirements specified in § 95.831 of this part.

\* \* \* \* \*

16. Section 95.816 is revised to read as follows:

**§ 95.816 Competitive bidding proceedings.**

(a) Mutually exclusive initial applications for 218–219 MHz Service system licenses are subject to competitive bidding procedures. The procedures set forth in part 1, Subpart Q of this chapter will apply unless otherwise provided in this part.

(b) *Installment payments.* Eligible Licensees that elect resumption pursuant to Amendment of part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218–219 MHz Service, *Report and Order and Memorandum Opinion and Order*, FCC 99–239 (released September 10, 1999) may continue to participate in the installment payment program. Eligible Licensees are those that were current in installment payments (*i.e.* less than ninety days delinquent) as of March 16, 1998, or those that had properly filed grace period requests under the former installment payment rules. All unpaid interest from grant date through election date will be capitalized into the principal as of Election Day creating a new principal amount. Installment payments must be made on a quarterly basis. Installment payments will be calculated based on new principal

amount as of Election Day and will fully amortize over the remaining term of the license. The interest rate will equal the rate for five-year U.S. Treasury obligations at the time of licensing.

(c) *Eligibility for small business provisions.*

(1) A small business is an entity that, together with its affiliates and controlling interests, has average gross revenues not to exceed \$15 million for the preceding three years.

(2) A very small business is an entity that, together with its affiliates and controlling interests, has average gross revenues not to exceed \$3 million for the preceding three years.

(3) For purposes of determining whether an entity meets either of the definitions set forth in paragraph (b)(1) or (b)(2) of this section, the gross revenues of the entity, its affiliates, and controlling interests shall be considered on a cumulative basis and aggregated.

(4) Where an applicant (or licensee) cannot identify controlling interests under the standards set forth in this section, the gross revenues of all interest holders in the applicant, and their affiliates, will be attributable.

(5) A consortium of small businesses (or a consortium of very small businesses) is a conglomerate organization formed as a joint venture between or among mutually independent business firms, each of which individually satisfies the definition in paragraph (b)(1) of this section (or each of which individually satisfies the definition in paragraph (b)(2) of this section). Where an applicant or licensee is a consortium of small businesses (or very small businesses), the gross revenues of each small business (or very small business) shall not be aggregated.

(d) *Controlling interest.*

(1) For purposes of this section, controlling interests includes individuals or entities with *de jure* and *de facto* control of the applicant. *De jure* control is greater than 50 percent of the voting stock of a corporation, or in the case of a partnership, the general partner. *De facto* control is determined on a case-by-case basis. An entity must disclose its equity interest and demonstrate at least the following indicia of control to establish that it retains *de facto* control of the applicant:

- (i) The entity constitutes or appoints more than 50 percent of the board of directors or management committee;
- (ii) The entity has authority to appoint, promote, demote, and fire senior executives that control the day-to-day activities of the licensee; and
- (iii) the entity plays an integral role in management decisions.

(2) *Calculation of certain interests.*

(i) Ownership interests shall be calculated on a fully diluted basis; all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised.

(ii) Partnership and other ownership interests and any stock interest equity, or outstanding stock, or outstanding voting stock shall be attributed as specified below.

(iii) Stock interests held in trust shall be attributed to any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and, to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal, or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust.

(iv) Non-voting stock shall be attributed as an interest in the issuing entity.

(v) Limited partnership interests shall be attributed to limited partners and shall be calculated according to both the percentage of equity paid in and the percentage of distribution of profits and losses.

(vi) Officers and directors of an entity shall be considered to have an attributable interest in the entity. The officers and directors of an entity that controls a licensee or applicant shall be considered to have an attributable interest in the licensee or applicant.

(vii) Ownership interests that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest.

(viii) Any person who manages the operations of an applicant or licensee pursuant to a management agreement shall be considered to have an attributable interest in such applicant or licensee if such person, or its affiliate pursuant to § 1.2110(b)(4) of this chapter, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence:

- (A) The nature or types of services offered by such an applicant or licensee;

- (B) The terms upon which such services are offered; or

- (C) The prices charged for such services.

(ix) Any licensee or its affiliate who enters into a joint marketing arrangement with an applicant or licensee, or its affiliate, shall be considered to have an attributable interest, if such applicant or licensee, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence:

- (A) The nature or types of services offered by such an applicant or licensee;

- (B) The terms upon which such services are offered; or

- (C) The prices charged for such services.

(e) *Bidding credits.* A winning bidder that qualifies as a small business or a consortium of small businesses as defined in this subsection may use the bidding credit specified in § 1.2110(e)(2)(ii) of this chapter. A winning bidder that qualifies as a very small business or a consortium of very small businesses as defined in this subsection may use the bidding credit specified in accordance to § 1.2110(e)(2)(i) of this chapter.

(f) Winning bidders in Auction No. 1, which took place on July 28–29, 1994, that, at the time of that auction, met the qualifications under the Commission's rules then in effect, for small business status will receive a twenty-five percent bidding credit pursuant to Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218–219 MHz Service, *Report and Order and Memorandum Opinion and Order*, FCC 99–239 (released September 10, 1999).

17. Section 95.819 is revised to read as follows:

**§ 95.819 License transferability.**

(a) A 218–219 MHz Service system license acquired through competitive bidding procedures (including licenses obtained in cases of no mutual exclusivity), together with all of its component CTS licenses, may be transferred, assigned, sold, or given away only in accordance with the provisions and procedures set forth in 47 CFR 1.2111.

(b) A 218–219 MHz Service system license obtained through random selection procedures, together with all of its component CTS licenses, may be transferred, assigned, sold, or given away, to any other entity in accordance with the provisions and procedures set forth in § 1.948 of this chapter.

(c) If the transfer, assignment, sale, or gift of a license is approved, the new

licensee is held to the construction requirements set forth in § 95.833 of this part.

18. Section 95.823 is added to read as follows:

**§ 95.823 Geographic partitioning and spectrum disaggregation.**

(a) *Eligibility.* Parties seeking Commission approval of geographic partitioning or spectrum disaggregation of 218–219 MHz Service system licenses shall request an authorization for partial assignment of license pursuant to § 1.948 of this chapter.

(b) *Technical standards.*

(1) *Partitioning.* In the case of partitioning, requests for authorization of partial assignment of a license must include, as attachments, a description of the partitioned service area and a calculation of the population of the partitioned service area and the licensed geographic service area. The partitioned service area shall be defined by coordinate points at every 3 seconds along the partitioned service area unless an FCC-recognized service area (*i.e.* Economic Areas) is utilized or county lines are followed. The geographic coordinates must be specified in degrees, minutes, and seconds, to the nearest second of latitude and longitude, and must be based upon the 1983 North American Datum (NAD83). In the case where an FCC-recognized service area or county lines are utilized, applicants need only list the specific area(s) (through use of FCC designations or county names) that constitute the partitioned area.

(2) *Disaggregation.* Spectrum maybe disaggregated in any amount.

(3) *Combined partitioning and disaggregation.* The Commission will consider requests for partial assignments of licenses that propose combinations of partitioning and disaggregation.

(c) *Provisions applicable to designated entities.*

(1) *Unjust enrichment.* See § 1.2111(e) of this chapter.

(2) *Parties not qualified for installment payment plans.*

(i) When a winning bidder (partitionor or disaggregator) that elected to pay for its license through an installment payment plan partitions its license or disaggregates spectrum to another party (partitionee or disaggregatee) that would not qualify for an installment payment plan, or elects not to pay for its share of the license through installment payments, the outstanding principal balance owed by the partitionor or disaggregator shall be apportioned according to § 1.2111(e)(3) of this chapter. The partitionor or

disaggregator is responsible for accrued and unpaid interest through and including the consummation date.

(ii) The partitionee or disaggregatee shall, as a condition of the approval of the partial assignment application, pay its entire *pro rata* amount of the outstanding principal balance on or before the consummation date. Failure to meet this condition will result in cancellation of the grant of the partial assignment application.

(iii) The partitionor or disaggregator shall be permitted to continue to pay its *pro rata* share of the outstanding balance and, if applicable, shall receive loan documents evidencing the partitioning and disaggregation. The original interest rate, established pursuant to § 1.2110(f)(3)(i) of this chapter at the time of the grant of the initial license in the market, shall continue to be applied to the partitionor's or disaggregator's portion of the remaining government obligation.

(iv) A default on the partitionor's or disaggregator's payment obligation will affect only the partitionor's or disaggregator's portion of the market.

(3) Parties qualified for installment payment plans.

(i) Where both parties to a partitioning or disaggregation agreement qualify for installment payments, the partitionee or disaggregatee will be permitted to make installment payments on its portion of the remaining government obligation.

(ii) Each party may be required, as a condition to approval of the partial assignment application, to execute loan documents agreeing to pay its *pro rata* portion of the outstanding principal balance due, as apportioned according to § 1.2111(e)(3) of this chapter, based upon the installment payment terms for which it qualifies under the rules. Failure by either party to meet this condition will result in the automatic cancellation of the grant of the partial assignment application. The interest rate, established pursuant to

§ 1.2110(f)(3)(i) of this chapter at the time of the grant of the initial license in the market, shall continue to be applied to both parties' portion of the balance due. Each party will receive a license for its portion of the partitioned market.

(iii) A default on an obligation will affect only that portion of the market area held by the defaulting party.

(d) *Construction requirements.*

(1) *Partitioning.* Partial assignors and assignees for license partitioning have two options to meet construction requirements. Under the first option, the partitionor and partitionee would each certify that they will independently satisfy the applicable construction requirements set forth in § 95.833 of this

part for their respective partitioned areas. If either licensee failed to meet its requirement in § 95.833 of this part, only the non-performing licensee's renewal application would be subject to dismissal. Under the second option, the partitionor certifies that it has met or will meet the requirement in § 95.833 of this part for the entire market. If the partitionor fails to meet the requirement in § 95.833 of this part, however, only its renewal application would be subject to forfeiture at renewal.

(2) *Disaggregation.* Partial assignors and assignees for license disaggregation have two options to meet construction requirements. Under the first option, the disaggregator and disaggregatee would certify that they each will share responsibility for meeting the applicable construction requirements set forth in § 95.833 of this part for the geographic service area. If parties choose this option and either party fails to do so, both licenses would be subject to forfeiture at renewal. The second option would allow the parties to agree that either the disaggregator or the disaggregatee would be responsible for meeting the requirement in § 95.833 of this part for the geographic service area. If parties choose this option, and the party responsible for meeting the construction requirement fails to do so, only the license of the non-performing party would be subject to forfeiture at renewal.

(3) All applications requesting partial assignments of license for partitioning or disaggregation must include the above-referenced certification as to which of the construction options is selected.

(4) Responsible parties must submit supporting documents showing compliance with the respective construction requirements within the appropriate construction benchmarks set forth in § 95.833 of this part.

19. Section 95.831 is revised to read as follows:

**§ 95.831 Service requirements.**

Subject to the initial construction requirements of § 95.833 of this subpart, each 218–219 MHz Service system license must demonstrate that it provides substantial service within the service area. Substantial service is defined as a service that is sound, favorable, and substantially above a level of service which might minimally warrant renewal.

20. Section 95.833 is revised to read as follows:

**§ 95.833 Construction requirements.**

(a) Each 218–219 MHz Service licensee must make a showing of



“substantial service” within ten years of the license grant. A “substantial service” assessment will be made at renewal pursuant to the provisions and procedures contained in § 1.949 of this chapter.

(b) Each 218–219 MHz Service licensee must file a report to be submitted to inform the Commission of the service status of its system. The report must be labeled as an exhibit to the renewal application. At minimum, the report must include:

(1) A description of its current service in terms of geographic coverage and population served;

(2) An explanation of its record of expansion, including a timetable of new construction to meet changes in demand for service;

(3) A description of its investments in its 218–219 MHz Service systems;

(4) A list, including addresses, of all component CTSs constructed; and

(5) Copies of all FCC orders finding the licensee to have violated the Communications Act or any FCC rule or policy; and a list of any pending proceedings that relate to any matter described in this paragraph.

(c) Failure to demonstrate that substantial service is being provided in the service area will result in forfeiture of the license, and will result in the licensee’s ineligibility to apply for 218–219 MHz Service licenses for three years from the date the Commission takes final action affirming that the 218–219 MHz Service license has been canceled pursuant to § 95.813 of this part.

21. Section 95.853 is revised to read as follows:

#### **§ 95.853 Frequency segments.**

There are two frequency segments available for assignment to the 218–219 MHz Service in each service area. Frequency segment A is 218.000–218.500 MHz. Frequency segment B is 218.501–219.000 MHz.

22. Section 95.855 is revised to read as follows:

#### **§ 95.855 Transmitter effective radiated power limitation.**

The effective radiated power (ERP) of each CTS and RTU shall be limited to the minimum necessary for successful communications. No CTS or fixed RTU may transmit with an ERP exceeding 20 watts. No mobile RTU may transmit with an ERP exceeding 4 watts.

23. Section 95.859 is amended by revising paragraph (a) and by removing and reserving paragraph (b) to read as follows:

#### **§ 95.859 Antennas.**

(a) The overall height from ground to topmost tip of the CTS antenna shall not

exceed the height necessary to assure adequate service. Certain CTS antennas must be individually licensed to the 218–219 MHz System licensee (see § 95.811(b) of this part) and the antenna structures of which they are a part must be registered with the Commission (see part 17 of this chapter).

24. Section 95.861 is revised to read as follows:

#### **§ 95.861 Interference.**

(a) When a 218–219 MHz Service system suffers harmful interference within its service area or causes harmful interference to another 218–219 MHz Service system, the licensees of both systems must cooperate and resolve the problem by mutually satisfactory arrangements. If the licensees are unable to do so, the Commission may impose restrictions including, but not limited to, specifying the transmitter power, antenna height or area, duty cycle, or hours of operation for the stations concerned.

(b) The use of any frequency segment (or portion thereof) at a given geographical location may be denied when, in the judgment of the Commission, its use in that location is not in the public interest; the use of a frequency segment (or portion thereof) specified for the 218–219 MHz Service system may be restricted as to specified geographical areas, maximum power, or other operating conditions.

(c) A 218–219 MHz Service licensee must provide a copy of the plan required by § 95.815(b) of this part to every TV Channel 13 station whose Grade B predicted contour overlaps the licensed service area for the 218–219 MHz Service system. The 218–219 MHz Service licensee must send the plan to the TV Channel 13 licensee(s) within 10 days from the date the 218–219 MHz Service licensee submits the plan to the Commission, and the 218–219 MHz Service licensee must send updates to this plan to the TV Channel 13 licensee(s) within 10 days from the date that such updates are filed with the Commission pursuant to § 95.815(b) of this part.

(d) Each 218–219 MHz Service system licensee must provide upon request, and install free of charge, an interference reduction device to any household within a TV Channel 13 station Grade B predicted contour that experiences interference due to a component CTS or RTU.

(e) Each 218–219 MHz Service system licensee must investigate and eliminate harmful interference to television broadcasting and reception, from its component CTSs and RTSs, within 30 days of the time it is notified in writing,

by either an affected television station, an affected viewer, or the Commission, of an interference complaint. Should the licensee fail to eliminate the interference within the 30-day period, the CTS(s) or RTU(s) causing the problem(s) must discontinue operation.

(f) The boundary of the 218–219 MHz Service system, as defined in its authorization, is the limit of interference protection for that 218–219 MHz Service system.

#### **§ 95.863 [Removed]**

25. Section 95.863 is removed.

[FR Doc. 99–27874 Filed 11–2–99; 8:45 am]

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## **FEDERAL COMMUNICATIONS COMMISSION**

### **47 CFR Part 101**

[FCC 99–179–ET Docket No. 95–183]

### **37.0–38.6 GHz and 38.6–40.0 GHz Bands**

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule; correction.

**SUMMARY:** The Federal Communications Commission published rules in the **Federal Register** concerning the service rules for the 37.0–38.6 GHz and 38.6–40.0 GHz bands. This document makes corrections to those rules.

**DATES:** Effective October 22, 1999.

**FOR FURTHER INFORMATION CONTACT:** Jennifer Burton, Wireless Telecommunications Bureau, Public Safety and Private Wireless Division, Policy and Rules Branch, (202) 418–0680. **TTY:** (202) 418–7233.

#### **SUPPLEMENTARY INFORMATION:**

#### **Background**

The Commission inadvertently included typographical errors in certain final rules published in the **Federal Register** dated August 23, 1999, (64 FR 45891). This correction amends those typographical errors. This correction also amends § 101.56(i) to comport with the Commission’s decision in the *Memorandum Opinion and Order* to allow 39 GHz licensees that obtain a bidding credit at auction to subsequently partition or disaggregate subject to the Commission’s unjust enrichment rules, the substance of which was not reflected in the final regulations.

#### **List of Subjects in 47 CFR Part 101**

Radio, Communications equipment.