FCC 95-312

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C.

In the Matter of

Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service	)	PR Docket No. 89-552 RM-8506
Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services	)	GN Docket No. 93-252
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 220-222 MHz	)	PP Docket No. 93-253

SECOND MEMORANDUM OPINION AND ORDER

and

THIRD NOTICE OF PROPOSED RULEMAKING

Adopted: July 28, 1995; **Released:** August 28, 1995

Comments Due: **September 27, 1995**
Reply Comments Due: **October 12, 1995**

By the Commission: Commissioner Quello issuing a separate statement.

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I. INTRODUCTION

1. By this Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking, we propose a new framework for the operation and licensing of the 220-222 MHz band (220 MHz service).[1] This action is taken as part of our continuing implementation of the new regulatory framework for mobile radio services enacted by Congress in Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 (Budget Act), which amended Sections 3(n) and 332 of the Communications Act of 1934.[2] We began the implementation of the provisions of the Budget Act with the adoption of a Notice of Proposed Rulemaking in GN Docket No. 93-252.[3] In that proceeding, we adopted rules governing the commercial and private mobile radio services, including the 220 MHz service, consistent with the policy of regulatory parity as reflected in the Congressional revisions to Section 332 of the Act. The proceeding we are initiating with this Notice is an outgrowth of the *CMRS Third Report and Order*,[4] which deferred a comprehensive examination of the 220 MHz service to a separate rulemaking proceeding. In addition, we address various petitions and waiver requests relating to 220 MHz operations and address certain decisions made in the *CMRS Third Report and Order* with regard to the 220 MHz service.

2. Our primary goal in this proceeding is to establish a flexible regulatory framework that will allow for more efficient licensing of the 220-222 MHz band, eliminate unnecessary regulatory burdens on both existing and future licensees, and enhance the competitive potential of the 220 MHz service in the mobile services marketplace. In addition, we seek to ensure that licenses are granted to those who value the spectrum most highly and will maximize its use to provide the best quality and variety of service to consumers. The 220 MHz service is an infant industry that presents unique issues and concerns. We believe our proposals strike a fair balance between the interests of current licensees and licensees to be authorized under the new rules. The adoption of the rules set forth in this Notice will enable the continued development of the 220 MHz radio service and the implementation of a variety of new communications services to meet the future needs of the American public.

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[1] We will refer herein to any licenses granted pursuant to this new framework as Phase II licenses. Licenses granted under the current rules are referred to herein as Phase I licenses.

[2] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI § 6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392 (1993) (Budget Act).

[3] Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Notice of Proposed Rulemaking, 8 FCC Rcd 7988 (1993).

[4] Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Third Report and Order, 9 FCC Rcd 7988 (1994) (*CMRS Third Report and Order*).

II. BACKGROUND

A. THE 220-222 MHz SERVICE

3. In 1988, we adopted a Report and Order in GN Docket No. 87-14,[5] reallocating the 220-222 MHz band for private and Federal Government land mobile use. In so doing, we dedicated this spectrum for the development of spectrally-efficient narrowband technology to afford this technology an opportunity to gain acceptance in the marketplace. The 220 MHz service was then established in 1991 with the adoption of the *220 MHz Report and Order*.[6] It is regulated under Subpart T of Part 90 of our rules.[7]

4. In the *220 MHz Report and Order,* we adopted service rules for the assignment of 200 five kilohertz channel pairs in the 220-222 MHz band to both Federal Government and private land mobile users. We authorized 60 of the 200 channel pairs for nationwide licensing, with 10 of these designated for assignment to Federal Government entities. The remaining 50 nationwide channel pairs were reserved for non-Government users, with 20 channel pairs designated for "commercial" use and 30 channel pairs designated for "non-commercial" use.[8] The 20 commercial channel pairs were divided into four five-channel blocks and the 30 non-commercial channel pairs were divided into two 10-channel and two five-channel blocks. We allocated the remaining 140 channel pairs for non-nationwide use by both Government and non-Government licensees. We also decided that all applications

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[5] Amendment of Part 2 of the Commission's Rules Regarding the Allocation of the 216-225 MHz Band, Report and Order, Gen. Docket No. 87-14, 3 FCC Rcd. 5287 (1988) (*220 MHz Allocation Order*); *recon. denied*, Memorandum Opinion and Order, 4 FCC Rcd 6407 (1989), *affd.* American Radio Relay League, Inc., v. FCC, No. 89-1602 (D.C. Cir. Dec. 3, 1990).

[6] Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services, PR Docket No. 89-552, Notice of Proposed Rule Making, 4 FCC Rcd 8593 (1989) (*220 MHz Notice*); Report and Order, 6 FCC Rcd 2356 (1991) (*220 MHz Report and Order*); Further Notice of Proposed Rule Making, 7 FCC Rcd 898 (1992) (*220 MHz Further Notice); recon. granted in part and denied in part and rules amended,* Memorandum Opinion and Order, 7 FCC Rcd 4484 (1992) (*220 MHz Memorandum Opinion and Order*); Erratum, DA 92-1177, released Aug. 28, 1992; Second Erratum, 7 FCC Rcd 6297 (1992); *recon. granted in part and denied in part*, Order, 8 FCC Rcd 4161 (1993) (*220 MHz Second Reconsideration Order*); *appeal dismissed*, Evans v. FCC, Case No. 92-137, (D.C. Cir. Mar. 18, 1994).

[7] Subpart T of Part 90 of the Commission's Rules, 47 C.F.R. §§ 90.701-90.741.

[8] At the time of the adoption of the *220 MHz Report and Order*, we used the term "commercial" to refer to licensees who would operate as carriers under Part 90 of our rules and provide commercial radio services to end users. We used the term "non-commercial" to refer to licensees who would use spectrum to satisfy their own internal communications requirements. These terms do not correlate directly with the terms Commercial Mobile Radio Service (CMRS) and Private Mobile Radio Service (PMRS), as defined in Section 20.3 of the Commission's Rules, 47 C.F.R. § 20.3.

for 220 MHz channels would be granted on a first-come, first-served basis and that mutually exclusive applications would be assigned through random selection procedures.

5. On May 1, 1991, the Commission began accepting applications for nationwide and non-nationwide licenses in the 220-222 MHz band. We received more than 59,000 applications, and on May 24, 1991, the former Private Radio Bureau suspended the acceptance of applications.[9] We have not re-opened the filing window for 220 MHz applications since that date. In 1992[10] and 1993[11] we conducted random selection proceedings to resolve mutually exclusive non-nationwide and nationwide applications, respectively, and have since issued nearly 3,800 authorizations for non-nationwide stations and four licenses for nationwide, commercial systems.

B. LEGISLATIVE AND COMMISSION ACTIONS PURSUANT TO THE BUDGET ACT

6. On August 10, 1993, Congress enacted the Budget Act, in which it, *inter alia*, amended Section 332 of the Communications Act of 1934[12] to replace the existing mobile common carrier and private land mobile radio definitions with two newly defined categories of mobile services: commercial mobile radio service (CMRS) and private mobile radio service (PMRS). CMRS is defined as "any mobile service (as defined in section 3(n) [of the Communications Act]) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public."[13] PMRS is defined as "any mobile service (as defined in section 3(n)) that is not a commercial mobile service or the functional equivalent of a commercial mobile service,[14] as specified by regulation by the Commission."

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[9] Acceptance of 220-222 MHz Private Land Mobile Applications, Order, 6 FCC Rcd 3333 (1991) (*220 MHz Freeze Order*). The former Private Radio Bureau imposed the freeze so that it could process the large number of applications before accepting more applications.

[10] Public Notice, Commission Announces Lottery for Rank Ordering of 220-222 MHz Private Land Mobile "Local" Channels, 7 FCC Rcd 6378 (1992) (*Public Notice: Non-Nationwide Lottery*).

[11] Public Notice, Commission Announces Lottery to Select Commercial Nationwide 220-222 MHz Band Private Land Mobile Licensees, DA 93-159 (released February 16, 1993), 58 Fed. Reg. 09174 (February 19, 1993) (*Public Notice: Nationwide Lottery*).

[12] Communications Act of 1934, 47 U.S.C. §§ 151-713 (Communications Act).

[13] *Id.*, Section 332(d)(1), 47 U.S.C. § 332(d)(1).

[14] *Id.*, Section 332(d)(3), 47 U.S.C. § 332(d)(3). The term "mobile service;" as used in the quoted language in the text, is defined in Section 3(n) of the Communications Act, 47 U.S.C. § 153(n).

7. The statute directed the Commission to implement these classifications in its regulations and to provide for comparable regulation of substantially similar CMRS services. Accordingly, we initiated our CMRS proceeding in GN Docket No. 93-252 and began the process of implementing the Budget Act in the *CMRS Second Report and Order* released on March 7, 1994.[15] In the *CMRS Second Report and Order*, we determined that our private land mobile service rules with respect to Specialized Mobile Radio (SMR), Business Radio, 220-222 MHz, and private paging allow, but do not require, licensees to offer for-profit, interconnected service to the public, thus meeting the CMRS definition.[16] We found that, to the extent that 220-222 MHz channels are used to offer for-profit and interconnected service, the channels fall within the definition of CMRS.[17]

8. On April 20, 1994, we adopted the *CMRS Further Notice*, in which we proposed revisions to our technical, operational, and licensing rules and procedures for reclassified CMRS services.[18] The Budget Act required that we determine if a reclassified private land mobile service is "substantially similar" to a common carrier service and, if so, the extent to which it is "necessary and practical" to modify our rules to ensure that the two services are subject to "comparable" technical requirements.[19] We observed that, because licensing of the 220-222 MHz band only commenced in 1993 and most systems were not yet constructed, it was difficult to assess whether commercial 220 MHz licensees would provide service that is similar to any common carrier mobile service licensed under Part 22 of our rules. We requested specific comment on certain aspects of the 220 MHz service, including channel assignment policy, definition of service area, construction periods, and coverage requirements.

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[15] Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411 (1994) (*CMRS Second Report and Order*); Erratum, 9 FCC Rcd 2156 (1994).

[16] *CMRS Second Report and Order*, 9 FCC Rcd at 1450-53 (paras. 88-97).

[17] *Id.* We adopted the timetable for transition to the new regulatory structure for reclassified CMRS licensees as set forth in the Budget Act. Licensees authorized before enactment of the Act on August 10, 1993, and reclassified as CMRS will continue to be regulated as private service providers for a three-year period, until August 10, 1996. *Id.* at 1512-14 (paras. 278-284).

[18] Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Further Notice of Proposed Rule Making, 9 FCC Rcd 2863 (1994) (*CMRS Further Notice*).

[19] Budget Act, § 6002(d)(3).

9. On August 9, 1994, we adopted the *CMRS Third Report and Order*. We noted therein that the vast majority of commenters addressing the 220 MHz service contended that, for technical reasons, 220 MHz service is not substantially similar to any Part 22 service.[20] We concluded, however, that most commenters had taken a relatively narrow view of CMRS competition, and that, for the purposes of determining whether CMRS services are substantially similar, 220 MHz offerings have the potential to compete with other commercial mobile offerings as technology evolves and the offerings begin to gain commercial acceptance.[21]

10. After reviewing the comments, we decided to defer consideration of a new licensing plan for the 220 MHz service based on different-sized channel blocks or service areas to a separate proceeding, where a more comprehensive record could be developed.[22] While adopting the use of competitive bidding procedures to resolve competing CMRS applications, we specifically deferred the adoption of new application filing and selection procedures for the 220 MHz service to this instant proceeding. We also deferred any decision on how to define initial applications, amendments to applications and license modifications for the service to this proceeding.[23]

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[20] *CMRS Third Report and Order*, 9 FCC Rcd at 8006-07 (para. 34).

[21] *Id.* at 8026 (para. 67).

[22] *Id.* at 8055 (paras. 126-127).

[23] Because of the freeze on 220 MHz applications, licensees relied on grants of Special Temporary Authority (STAs) to modify their authorizations, and many of the commenters requested special provisions to enable them to file modification applications before any new application procedures were put in place. *CMRS Third Report and Order*, 9 FCC Rcd at 8147-8148 (paras. 359 and 362).

III. EXECUTIVE SUMMARY

A. THIRD NOTICE OF PROPOSED RULEMAKING

11. The following is a summary of the various rules and procedures proposed in this Notice:

1. Phase II Licensing

a. Nationwide Licensing

12. We seek comment regarding whether to resolve pending mutually exclusive, non-commercial, nationwide applications by lottery, comparative hearing, or to return the applications and adopt a new licensing scheme for the 30 channels associated with the applications. If we return the applications, we make the following proposals for Phase II nationwide licensing of these channels:

- To license the 30 channels on a nationwide basis to all applicants -- *i.e.*, applicants that intend to use the channels to offer commercial services as well as applicants that intend to use the channels for their private, internal use.

- To assign these channels, in the form of three 10-channel authorizations, through competitive bidding pursuant to our tentative conclusion that the principal use of the spectrum will be for the provision of for-profit, subscriber-based services.

b. Non-Nationwide Licensing

13. We make the following proposals for Phase II, non-nationwide licensing of the 220 MHz band:

- To assign 60 channels in the 172 geographic areas defined as Economic Areas by the Bureau of Economic Analysis, Department of Commerce ("EA licenses") and 65 channels in the geographic areas defined by five "220 MHz Regions" ("Regional licenses") in the following manner:

NON-NATIONWIDE 220 MHz
PROPOSED CHANNEL ALLOCATION PLAN

EA BLOCK	CHANNELS
Channels 61-70	10
Channels 71-80	10
Channels 91-100	10
Channels 101-110	10
Channels 121-125	5
Channels 126-130	5
Channels 131-135	5
Channels 136-140	5
TOTAL	60

REGIONAL BLOCK	CHANNELS
Channels 171-180	10
Channels 186-200	15
Channels 1-10	10
Channels 11-20	10
Channels 31-50	20
TOTAL	65

- To allow all applicants to apply for these channels -- *i.e.*, applicants that intend to use the channels for private, internal use as well as applicants that intend to use the channels to offer commercial services.

- To assign these channels through competitive bidding based on our tentative conclusion that the principal use of the spectrum will be for the provision of for-profit, subscriber-based services.

- To permit EA and Regional licensees to operate stations anywhere within their geographic borders, provided that their transmissions do not exceed a predicted field strength of 38 dBuV/m at their border and they protect Phase I licensees in accordance with existing co-channel separation criteria.

- To provide a 10-year license term for EA and Regional licensees and require EA and Regional licensees to meet five and ten-year construction benchmarks.

- To eliminate existing channel use restrictions, *i.e.*, the "data-only" and "non-trunked" channel designations.

- To continue to assign, on a single-station basis, 10 channels exclusively to applicants eligible in the Public Safety Radio Service (the "Public Safety Pool") and five channels exclusively to applicants eligible in the Emergency Medical Radio Service (the "EMRS Pool").

- To continue to assign channels in the Public Safety and EMRS Pools on a first-come, first-served basis and resolve mutually exclusive applications by random selection procedures.

2. Technical and Operational Matters

14. We propose modifications to our existing rules with regard to fixed operations, paging operations, and the use of 5 kHz-wide channels. Specifically, we propose:

- To allow fixed and paging operations for all 220 MHz licensees without the requirement that such use be on an ancillary basis to land mobile operations.

- To allow licensees, under certain conditions, to aggregate any and all of their authorized channels to operate on channels wider than 5 kHz.

3. Application Procedures

15. We propose to adopt definitions for initial applications, amended applications, and applications to modify authorizations in the following manner:

- To define initial applications for 220 MHz licenses as applications for the nationwide, EA, and Regional licenses to be assigned in Phase II.

- To adopt the same procedures for amending applications and modifying authorizations for Phase II 220 MHz licenses that are established for other Part 90 CMRS services.

- To require non-grandfathered CMRS 220 MHz licensees to obtain STAs under the same restrictions applicable to other non-grandfathered Part 90 CMRS licensees.

- To extend to all 220 MHz licensees the Part 22 renewal standards adopted in the *CMRS Third Report and Order* for Part 90 CMRS services.

4. Auction Procedures

16. We propose competitive bidding procedures to resolve mutually exclusive initial applications filed in Phase II.

B. SECOND MEMORANDUM OPINION AND ORDER

1. Petitions for Reconsideration and Waiver Requests

17. In the *CMRS Third Report and Order*,[24] we denied a Request for Declaratory Ruling filed by SunCom Mobile & Data, Inc. (SunCom) which sought approval to aggregate non-nationwide 220 MHz five-channel blocks on a regional basis to provide multiple-market service on a single system. We also denied a concurrently filed waiver request by SunCom to allow an extended period for the construction of its system. SunCom filed a Petition for Reconsideration of these decisions. Wireless Plus, Inc., a manager of 220 MHz stations, filed a waiver request similar to SunCom's Request for Declaratory Ruling. We deny these three requests in this Order.

18. We also received waiver requests from the 220 MHz QO Coalition and Northeast Florida Telephone Company seeking waiver of our rules to permit licensees authorized on Channels 171-180 to operate in the trunked mode. We deny both of these requests.

2. 220 MHz Licensees Near the Canadian Border

19. We extend the construction deadline for Phase I 220 MHz licensees located within Line A of the Canadian border until 12 months after the signing of an agreement with Canada on the sharing of 220-222 MHz channels near the border.

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[24] *Id.* at 8056 (paras. 128-129).

IV. THIRD NOTICE OF PROPOSED RULEMAKING

A. OVERVIEW

20. Based on our review of the comments in the *CMRS Further Notice*,[25] the *CMRS Third Report and Order* and related CMRS decisions, and the status of the 220 MHz service under the current regulations, we propose to adopt a revised regulatory scheme for the 220 MHz service. The proposed rules would govern all applications filed in Phase II of licensing of the 220 MHz service and certain existing Phase I licensees as described herein. The Budget Act replaced the traditional regulation of mobile services with an approach that brings all mobile service providers under a comprehensive, consistent regulatory framework and that gives the Commission flexibility to establish appropriate levels of regulation for mobile service providers. While the other private mobile radio services classified as CMRS and covered by the Budget Act have all been subject to the revision of their pre-Budget Act rules to remove operating restrictions and open up service areas to permit licensees more flexible operations, we have not examined the 220 MHz service band since creating the service in 1991. In the *CMRS Third Report and Order*, we decided to undertake a comprehensive review of the service in this instant rulemaking proceeding.

21. Virtually all 220 MHz commenters to the *CMRS Further Notice* emphasized the unique nature of the 220 MHz service as a new and largely undeveloped service, confined to a tiny bandwidth with technical limitations that make two-way interconnected voice communications an uncertainty. As a result, they contend the service currently is not similar to the other reclassified private services. They are concerned about the impact of CMRS regulations on the newly-emerging systems and urge the Commission to consider their special circumstances.

22. Some of the commenters oppose changes that would alter the service at this time. SEA, Inc. (SEA) is a manufacturer of narrowband radio equipment, as well as a service manager and a holder of several licenses for five-channel, trunked local systems. SEA urges the Commission to preserve the original goal of the service to permit meaningful development of narrowband technology and create a "niche" service for local dispatch customers. It contends that, because only a few providers will be reclassified as CMRS, imposing CMRS rules comparable to those of other reclassified services would be burdensome and impractical.[26]

23. SmartLink Development Limited Partnership (SmartLink) manufactures radio products for mobile services. Like SEA, it is concerned about the nascent state of the 220

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[25] The comments and reply comments are incorporated in the record in this proceeding and are listed in Appendix B.

[26] SEA Comments at 4 and 7.

MHz service and urges that no changes be made in the rules until the service develops.[27] Global Cellular Communications, Inc. and Jean M. Warren (Global and Warren) argue that any rule changes would be disruptive to the newly established 220 MHz service, contending that the current rules are sufficiently flexible to permit companies to build systems and implement regional networks.[28]

24. Most of the commenters, however, support changes that permit more flexible operations. The RF Technologies Group requests that we revise our rules, or grant waivers, to permit the spectrum to be reconfigured to provide the greatest benefit to users.[29] Simrom, Inc. (Simrom) and its affiliates are involved in establishing two-way radio systems and managing some 300 220 MHz systems in about 150 markets. While urging us to be careful in crafting a new regulatory treatment, Simrom supports changes such as area-based licensing to make the service competitive with narrowband PCS service and other mobile services.[30] US MobilComm, Inc. (USM) also builds, manages, and operates major market wireless voice and data networks of individually owned five-channel 220 MHz systems. Like Simrom, USM seeks to be able to develop regional 220 MHz networks. It contends that the market niche would be enhanced by eliminating those rules that inhibit growth.[31] The National Association of Business and Educational Radio, Inc. (NABER) and the American Mobile Telecommunications Association, Inc. (AMTA) support rule changes to permit regional licensing.[32]

25. As described more fully below, we propose to retain the basic framework of the technical and operational rules consistent with the original service goals, but to revise them to permit more flexible operations consistent with the goals of the Budget Act for reclassified CMRS licensees and the service needs identified by comments filed in response to the *CMRS Further Notice* and our CMRS decisions.

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[27] SmartLink Comments at 7.

[28] Global and Warren Comments at 2.

[29] RF Technologies Comments at 3.

[30] Simrom Comments at 1.

[31] USM Comments at 6.

[32] NABER Comments at 24 and AMTA Comments at 24.

B. CHANNEL ASSIGNMENT AND SERVICE AREA RULES

26. In the *CMRS Further Notice*, we requested comment on whether and to what extent we should revise the channel assignment and service area rules applicable to 220 MHz service. We invited comment on whether the statutory goals would be furthered by allowing regional licensing of 220 MHz systems and, if so, what regulatory restrictions on 220 MHz systems would be appropriate to ensure comparable treatment for similar mobile services. Such restrictions might include limiting the number of channels available to a single licensee within a particular area or designating areas of operation in accordance with Commission-defined regions, such as Basic Trading Areas (BTAs) or Major Trading Areas (MTAs).

27. The current rules, which provide for both nationwide and non-nationwide channels, were established to enable licensees to meet the diverse demands for narrowband communications in the 220 MHz band.[33] We continue to believe that both nationwide and non-nationwide channels should be made available in the band to enable a variety of services to be made available to the public. We therefore propose to retain the identification of these two categories of channels.

1. Nationwide Licensing

a. Background

28. We decided, in our *220 MHz Report and Order*, to authorize 60 of the 200 channel pairs in the 220-222 MHz band for nationwide licensing. Ten of these channel pairs were for assignment to Federal Government entities and of the remaining 50 channel pairs reserved for non-Government users, 20 were designated for "commercial" use and 30 were designated for "non-commercial" use.[34] The 20 commercial channel pairs were divided into four five-channel blocks (Channels 21-25, 26-30, 151-155, and 156-160). The 30 non-commercial channel pairs were divided into two 10-channel blocks (Channels 51-60 and 141-150), and two five-channel blocks (Channels 81-85 and 86-90). On May 1, 1991, we received 140 applications for the four commercial licenses. We also received 14 applications for the two 10-channel non-commercial licenses and 20 applications for the two five-channel non-commercial licenses.[35]

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[33] *220 MHz Report and Order*, 6 FCC Rcd at 2362 (para. 38).

[34] *Id.* at 2361-62 (paras. 34-36).

[35] Subsequently, one of the 34 applicants withdrew its application pursuant to the rule changes we adopted in the *220 MHz Memorandum Opinion and Order* that we found significantly altered the construction and operational requirements for the nationwide, non-commercial channels. We permitted nationwide, non-commercial applicants to withdraw their applications and provided for the refund of their filing fees. *220 MHz Memorandum Opinion and Order*, 7 FCC Rcd at 4489 n. 66

29. The rules adopted in the *220 MHz Report and Order* provided that applicants for nationwide authorizations would have to submit additional information to satisfy specified entry criteria and financial requirements.[36] Applicants were not required to file this information at the time they filed their applications, but rather were to be notified in a public notice when this information should be submitted.[37] In our *220 MHz Memorandum Opinion and Order*, released July 16, 1992, we modified the entry criteria and financial requirements for nationwide authorizations.[38] Subsequently, a petition was filed seeking reconsideration of certain of these modifications relating to the licensing of nationwide, *non-commercial* systems. Consequently, the Private Radio Bureau announced, in a September 29, 1992, Public Notice,[39] that it would require the amending application information from nationwide commercial applicants by November 19, 1992, but that it would not accept filings from non-commercial applicants until the adoption of an order addressing the petition for reconsideration of the *220 MHz Memorandum Opinion and Order*. Following the receipt of the filings from the commercial applicants, the Bureau conducted a lottery on March 31, 1993,[40] that led to the assignment of the four nationwide commercial licenses.[41] In the *220 MHz Second Reconsideration Order*, released June 21, 1993, we addressed the matters relating to non-commercial nationwide licensing raised on reconsideration.[42] However, following the adoption of the *220 MHz Second Reconsideration Order*, we received three additional petitions seeking reconsideration of certain decisions in that Order. With this proceeding not yet terminated, we have not solicited the amending application information from the applicants for non-commercial licenses.

(para. 23).

[36] *220 MHz Report and Order*, 6 FCC Rcd at 2363-64 (paras. 50-55); Section 90.713 of the Commission's Rules, 47 C.F.R. § 90.713.

[37] *Id.* at 2364 n. 118 (para. 55).

[38] *220 MHz Memorandum Opinion and Order*, 7 FCC Rcd at 4493 (para. 41).

[39] Public Notice, November 19, 1992 Date Established for Commercial Nationwide 220-222 MHz Band Applicants To File Application Amendments To Satisfy Entry Criteria, DA 92-1321 (released Sept. 29, 1992), 57 Fed. Reg. 49475 (Sept. 29, 1992).

[40] *Public Notice: Nationwide Lottery*, DA 93-159 (rel. Feb. 16, 1993).

[41] Public Notice, Commission Announces Tentative Selectees for 220-222 MHz Nationwide Commercial Private Land Mobile Channels, DA 93-376 (released April 1, 1993), 58 Fed. Reg. 26322 (May 3, 1993).

[42] *220 MHz Second Reconsideration Order*, 8 FCC Rcd at 4164 (para. 11).

b. Pending Applications for 220 MHz Channels

30. We have not yet solicited the amending information necessary to process the 33 pending Phase I applications for the nationwide, non-commercial channels and therefore we are unable to take any action with respect to these applications at this time. We seek comment on three possible ways in which to address these applications. First, we could, upon adoption of final rules in this proceeding, return these applications without prejudice, as well as the appropriate filing fees, to the 33 applicants, and proceed to auction nationwide licenses as discussed in Section c.3, *infra*.[43] Second, we could act on the pending petitions for reconsideration of our June 21, 1993, Order, solicit the required amending information from the 33 applicants, and then conduct a lottery to award the four available nationwide licenses.[44] The third option would be to grant authorizations among the 33 applicants through comparative hearings. We seek comment on the advantages and disadvantages of each of these proposals. We note that the statute granting the Commission discretion to determine the method that will be used to dispose of applications filed prior to its receipt of auction authority does not set forth factors which the Commission must consider when making such a determination.[45] Therefore, commenters should address factors that should be deemed relevant for the purposes of ascertaining the method used to dispose of the pending 220 MHz applications discussed above.

31. Relatedly, we have processed nearly all of the nearly 60,000 applications filed for non-nationwide licenses. However, there are five groups of applications, totalling 34 applications, that were filed on the final day we accepted 220 MHz applications and are mutually exclusive with one another. We therefore ask comment on whether we should treat these pending applications for non-nationwide licenses in a manner similar to the way we ultimately treat the pending nationwide licenses. In other words, commenters should address whether the Commission should resolve these mutually exclusive situations using competitive bidding, lotteries, or comparative hearings.

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[43] Communications Act, § 309(j)(3)(B).

[44] *See* Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, MM Docket No. 94-131, and Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Report and Order, FCC 95-230, released June 30, 1995, at paras. 87-95 (*MMDS Report and Order*); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Memorandum Opinion and Order, 9 FCC Rcd 7387 (1994) (*Unserved Cellular Lottery Order*); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Notice of Proposed Rulemaking, 8 FCC Rcd 7635, 7659 (note 150, pertaining to applications for Interactive Video and Data Service).

[45] Budget Act, § 6002(e).

c. Proposals

(1) Nationwide Licensing

32. As we go forward with the second phase of licensing of the 220 MHz band, we consider whether the 30 currently unassigned nationwide, non-commercial channels should continue to be allocated for nationwide use. In the *220 MHz Report and Order*, we concluded that an allocation of nationwide channels was needed to help promote the development of 5 kHz technology.[46] In 1993, we granted nationwide authorizations for paging services because we recognized the demand for nationwide operation in that service.[47] Most recently, we also provided for nationwide channel blocks in narrowband PCS, stating that "large regional and nationwide licensed service areas would provide for flexibility in the design and implementation of narrowband PCS services" and would "alleviate some of the problems licensees have experienced when they tried to aggregate smaller licensed service areas."[48]

33. The success of the narrowband PCS auction indicates that there is interest in the mobile communications marketplace for nationwide licenses. Although it is too soon to determine whether existing Phase I nationwide, commercial 220 MHz operations will be successful, we find, based on the apparent demand for nationwide 900 MHz PCS spectrum, that there is merit to continuing to provide 220 MHz spectrum on a nationwide basis. We find that nationwide licenses will increase competition among nationwide wireless communications providers and will help meet future customer demand for nationwide service. We therefore tentatively conclude that the 30 channels originally designated for "nationwide, non-commercial" use should continue to be allocated for nationwide operations. We seek comment on whether these channels should be so designated or whether they should be allocated for some form of non-nationwide (*i.e.*, regional or local) operations.

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[46] *220 MHz Report and Order*, 6 FCC Rcd at 2361 (para. 34).

[47] Amendment of the Commission's Rules To Provide Exclusivity to Qualified Private Paging Systems at 929-930 MHz, PR Docket No. 93-35, Report and Order, 8 FCC Rcd 8318 (1993) (*900 MHz PCP Exclusivity Order*).

[48] Amendment of the Commission's Rules To Establish New Narrowband Personal Communications Services, GEN Docket No. 90-314, First Report and Order, 8 FCC Rcd 7162 at 7166 (para. 26) (1993) (*Narrowband PCS Order*), *recon.*, Memorandum Opinion and Order, 9 FCC Rcd 1337 (1994) (*Narrowband PCS Reconsideration Order*), *further recon.*, Second Memorandum Opinion and Order, 9 FCC Rcd 4441 (1994); *further recon.*, Memorandum Opinion and Order, 9 FCC Rcd 5031 at 5076 (para. 94).

(2) Non-Commercial Channel Set-Aside

34. In the *220 MHz Report and Order*, we did not decide to allocate spectrum for nationwide, non-commercial operations to satisfy some perceived demand on the part of the public for the use of such spectrum. Rather, we were concerned with implementing rules that would encourage the development of 5 kHz technology, and thus concluded that a combination of commercial and non-commercial nationwide channels would "promote the widest variety of advanced narrowband development."[49] With our Phase I authorization of 3,800 non-nationwide licenses, which will be used for both commercial and non-commercial purposes, we believe that we have taken steps to promote the development of narrowband technology, as envisioned in the *220 MHz Report and Order*. We tentatively conclude, therefore, that it is no longer necessary to require a separate non-commercial allocation in the 220 MHz service. We find that licensees should be allowed to use their authorized spectrum to meet the demands of consumers and be permitted to compete with other 220 MHz and CMRS licensees. We tentatively conclude, therefore, that there should be no set-aside for non-commercial channels in Phase II of licensing, and that nationwide channels should be made available equally to all applicants -- *i.e.*, applicants that intend to use the channels for their internal communications needs and applicants that intend to use the channels to offer service to subscribers. We seek comment on this tentative conclusion.

(3) Assignment of Nationwide Channels

(a) Channel Assignment Method

35. In deciding the assignment methodology for resolving mutually exclusive applications for the 30 Phase II nationwide channels, we are instructed by Section 309(j) of the Communications Act and the *Competitive Bidding Second Report and Order* to determine the "principal" use of the spectrum.[50] The *Competitive Bidding Second Report and Order* specifically indicates that, in making this determination, we must "compare the amount of non-subscription use made by the licensees in a service as a class with the amount of use rendered to eligible subscribers for compensation on the basis of information throughput, time, or spectrum" and that "[a]t least a majority of such use would have to be for service to subscribers for compensation in order for a service to be subject to competitive bidding."[51]

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[49] *220 MHz Report and Order*, 6 FCC Rcd at 2361 (para. 36).

[50] Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, Second Report and Order, 9 FCC Rcd 2348, 2353-54 (paras. 30-36) (1994) (*Competitive Bidding Second Report and Order*).

[51] *Id.* at 2354 (para. 34).

36. In making the 30 Phase II nationwide channels available to all prospective applicants, we cannot determine with absolute certainty, in advance of authorization, whether the primary use of this spectrum will be for licensees' internal use or for the provision of for-profit, subscriber-based services. However, based on a review of our records, it is reasonable to conclude that only a small percentage of the more than 59,000 applicants for 220 MHz non-nationwide stations intended to use their authorized spectrum to meet their internal communications needs and that the vast majority of the applicants were those that intended to provide services to subscibers on a for-profit basis. Although the projected use of 220 MHz channels for non-nationwide operations may not necessarily parallel the planned use of the channels by nationwide licensees, we believe that the fact that most non-nationwide applicants apparently intended to use the channels for the provision of service to subscribers for compensation is a strong indication that this will likely be the principal use of the spectrum by prospective nationwide licensees. We thus tentatively conclude that the principal use of the 30 channels allocated for nationwide use is most likely to be for the transmission or reception of communications signals to subscribers for compensation and therefore, in accordance with Section 309(j)(2)(A) of the Communications Act,[52] mutually exclusive applications for initial licensing of these channels should be assigned by competitive bidding.[53] We request comment on this tentative conclusion, including to what extent potential applicants for nationwide licenses intend to use this spectrum to provide subscriber services for compensation. Commenters who argue that the principal use of this service will not be for subscription-based services for compensation should also propose alternative methods of channel assignment.

(b) Channel Block Sizes

37. In the *220 MHz Report and Order*, we assigned the 30 nationwide, non-commercial channels in two five-channel and two 10-channel blocks. Our rationale for selecting this channel allocation, as indicated in the *220 MHz Notice*, was that, in providing both five- and 10-channel blocks for nationwide, non-commercial licensees we would allow applicants to select the amount of capacity that reflected their needs.[54] In this proceeding, we propose to allow future 220 MHz licensees to offer a wider variety of communications services than are currently permitted in the 220 MHz service. In order to provide these services, we believe that nationwide licensees may require more spectrum than would be available in an authorization consisting of only five 5 kHz channels. We therefore propose to assign the 30 nationwide channels in Phase II in three 10-channel blocks (Channels 51-60, 81-90, and 141-150). We request comment on this proposed channel assignment scheme, as

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[52] 47 U.S.C. § 309(j)(2)(A).

[53] Proposed rules governing competitive bidding procedures are discussed in Section E, *infra*.

[54] *220 MHz Notice*, 4 FCC Rcd at 8595 (para. 18).

well as any alternative channel assignment proposals that commenters believe would be appropriate for Phase II nationwide licensing.

(c) Limit on Nationwide Authorizations

38. With our proposed expansion of permissible uses for 220 MHz spectrum, we look forward to the provision of increased and varied services by 220 MHz licensees to meet the future communications needs of the American public. By restricting the number of nationwide authorizations any single 220 MHz licensee may acquire, we may be able to provide for a greater degree of competition among Phase II nationwide licensees providing services to subscribers. On the other hand, if such licensees are in competition with many other CMRS providers, a restriction on the number of authorizations a single 220 MHz licensee may hold may not be necessary or appropriate. We therefore ask comment on whether a limit should be placed on the number of Phase II nationwide authorizations that may be obtained by a single licensee. Commenters suggesting channel block schemes other than our proposed 10-channel-per-assignment approach should also propose nationwide authorization limits applicable to their preferred scheme.

(d) License Term

39. We recently adopted rules establishing 10-year license terms for both the narrowband and broadband PCS services[55] and the 900 MHz SMR service.[56] Additionally, in the *CMRS Third Report and Order*, we adopted a uniform 10-year licensing term for all CMRS licensees.[57] We believe that a similar license term is appropriate for nationwide 220 MHz licensees because it will encourage investment in the nationwide 220 MHz service. A 10-year license term is also necessary to provide sufficient time to enable nationwide licensees to complete construction of their systems. We therefore propose a 10-year license term for nationwide 220 MHz authorizations and ask comment on this proposal.

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[55] Section 24.15 of the Commission's Rules, 47 C.F.R. § 24.15.

[56] Amendments of Parts 2 and 90 of the Commission's Rules To Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-902 MHz and 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-553, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253; and Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Second Report and Order and Second Further Notice of Proposed Rule Making, FCC 95-159, released April 17, 1995, at Appendix A, para. 8 (*900 MHz Second Report and Order)* (adopting new Section 90.665(a) of the Commission's Rules, 47 C.F.R. § 90.665(a)).

[57] *CMRS Third Report and Order*, 9 FCC Rcd at 8157 (para. 386) (adopting amended Section 90.149 of the Commission's Rules, 47 C.F.R. § 90.149).

2. Non-Nationwide Licensing

a. Background

40. In the *220 MHz Report and Order*, we allocated 140 of the 200 channel pairs in the 220 MHz service for non-nationwide use by both Government and non-Government licensees. The non-Government users eligible for authorization on these channels are those entities eligible for assignment under Subparts B, C, D, and E of Part 90 of our rules[58] as well as those who intend to use the spectrum to provide commercial services.[59] Channels in the non-nationwide 220 MHz service were to be assigned on a first-come, first-served basis, with all mutually exclusive applications filed on the same day assigned through random selection, or lottery, procedures.

41. Applicants for non-nationwide assignments were required to indicate the exact coordinates of their planned 220 MHz base stations. Upon receipt of over 59,000 applications for non-nationwide stations in May, 1991, we decided to conduct the lottery to resolve mutually exclusive applications by "rank ordering" the applications and then assigning authorizations sequentially based on category of channel requested and in accordance with our co-channel station separation criteria. The rank ordering of the applications took place on October 19, 1992[60] and on January 26, 1993 we issued a Public Notice announcing 3,800 tentative selectees.[61] The licenses authorized to these applicants represented virtually all of the stations that could be granted from the original pool of more than 59,000 non-nationwide applications.[62]

42. Most of the 3,800 220 MHz non-nationwide licenses were initially authorized during 1992 and 1993. In accordance with Section 90.725(f) of our Rules, licensees obtaining these authorizations were required to construct their base stations and begin

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[58] These are entities eligible in the Public Safety Radio Services (Subpart B), the Special Emergency Radio Services (Subpart C), the Industrial Radio Services (Subpart D), and the Land Transporation Radio Service (Subpart E). *See* Section 90.703(a) of the Commission's Rules, 47 C.F.R. § 90.703(a). The licensees eligible in these services would use 220 MHz spectrum to meet their internal communications needs.

[59] Section 90.703(c) of the Commission's Rules, 47 C.F.R. § 90.703(c).

[60] *Public Notice: Non-nationwide Lottery,* 7 FCC Rcd at 6378; Section 90.723 of the Commission's Rules, 47 C.F.R. § 90.723.

[61] Public Notice, Commission Announces Tentative Selectees for 220-222 MHz Private Land Mobile "Local" Channels, DA 93-71 (released January 26, 1993).

[62] As explained in paragraph 31, *supra*, five groups of applications, totalling 34 applications, are mutually exclusive with one another.

operation within eight months of initial authorization.[63] However, due to the existence of a pending court appeal which challenged certain aspects of our procedures for the filing and acceptance of 220 MHz applications,[64] the Private Radio Bureau extended the construction deadline for all non-nationwide 220 MHz licensees to a date 120 days after the disposition of the appeal by the Court.[65] Following the disposition of the appeal in March, 1994, the construction deadline for non-nationwide 220 MHz licensees' stations was extended further on three different occasions.[66] The construction deadline is December 31, 1995.

b. Phase II Assignment and Permissible Uses of Channels 161-200

43. In the rules, 40 of the 140 non-nationwide channels (Channels 161-200) are designated for "individual, non-trunked local use,"[67] distinguishing these channels from the 20 five-channel blocks designated for trunked operation.[68] Ten of these 40 channels (Channels 161-170) are reserved exclusively for applicants eligible in the Public Safety Radio Services, five (Channels 181-185) are to be used exclusively by applicants eligible in the Emergency Medical Radio Service (EMRS),[69] and 15 channels (Channels 186-200) are

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[63] Section 90.725(f) of the Commission's Rules, 47 C.F.R. § 90.725(f).

[64] Evans v. FCC, Case No. 92-137 (D.C. Cir. Mar. 18, 1994).

[65] *Public Notice: Non-nationwide Lottery*, 7 FCC Rcd at 6379.

[66] Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services, Order, 9 FCC Rcd 1739 (1994) (extending the deadline to December 2, 1994); *CMRS Third Report and Order*, 9 FCC Rcd at 8077 (para. 184) (extending the deadline to April 4, 1995) (*see also* Public Notice, Private Radio Bureau Extends Time to Construct Non-Nationwide 220 MHz Stations Through April 4, 1995, and Lifts Freeze for Applications to Modify Site Locations, 10 FCC Rcd 744 (1994)); Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services, Order, 10 FCC Rcd 3356 (1995) (extending the deadline to December 31, 1995).

[67] *220 MHz Report and Order*, 6 FCC Rcd at 2362 (paras. 40-44); Section 90.719 of the Commission's Rules, 47 C.F.R. § 90.719.

[68] *Id.* at 2358 (para. 16); Section 90.721 of the Commission's Rules, 47 C.F.R. § 90.721. In the non-trunked, or "conventional" mode of operation, end users on a land mobile system must manually search for an unused channel. Trunking is a computerized technology that automatically selects an unused channel on the system and assigns it to the end user.

[69] Amendment of Part 90 of the Commission's Rules To Create the Emergency Medical Radio Service, PR Docket No. 91-72, RM 7336, Report and Order, 8 FCC Rcd 1454 (1993) (*EMRS Report and Order*).

designated for "data-only" use.[70] The only restrictions on the remaining channels (Channels 171-180) are that they be licensed individually and that they be used for non-trunked operation.

(1) Phase II Assignment of Public Safety Service Channels (Channels 161-170)

44. In the *220 MHz Report and Order*, we decided that a set-aside for Public Safety Radio Service entities was appropriate because we believed that these channels would "prove useful in providing public safety eligibles with the means to more effectively coordinate their responses to safety-of-life situations such as large wildfires, disasters, and other emergencies."[71] We also indicated that, after five years, we would "assess public safety use of this limited set-aside with a view to reassigning this spectrum if it is underutilized."[72] Due to the freeze, in effect since May 24, 1991, on the acceptance of applications for 220 MHz channels, it has not been possible to assess accurately the use of these channels by the public safety community. Nevertheless, we continue to believe that an allocation of the 10 channels for use by Public Safety Radio Service eligibles is desirable. We seek comment on this tentative conclusion, but ask comment as to whether we should continue to provide this separate allocation solely for Public Safety users.

45. If the separate 10-channel allocation for Public Safety is retained, we propose a modification in the way these channels are assigned. That is, one of our primary purposes in allocating these channels was to enable Public Safety licensees to communicate with one another in times of emergency.[73] Our current licensing scheme does not provide for such interoperability because an individual Public Safety licensee in a particular area could obtain base station authorization for its exclusive use on all of the 10 available channels.[74] We therefore propose that five of the ten Public Safety Channels -- Channels 161-165 -- be allocated for shared base station use among all Public Safety eligibles. Under this licensing approach, Public Safety eligibles in a given area could coordinate amongst themselves to

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[70] *220 MHz Report and Order*, 6 FCC Rcd at 2362 (para. 44) (allocating Channels 181-200 for "data-only" use). However, we subsequently reallocated five of these channels for the exclusive use of licensees in the Emergency Medical Radio Service in the *EMRS Report and Order*, thus leaving Channels 186-200 as the current "data-only" channels. *See EMRS Report and Order*, 8 FCC Rcd at 1459 (para. 28).

[71] *220 MHz Report and Order*, 6 FCC Rcd at 2360 (para. 27).

[72] *Id.*

[73] *Id.*

[74] Section 90.720 of our Rules permits all Public Safety entities to operate mobile and portable stations on all of the Public Safety channels without separate authorization. 47 C.F.R. § 90.720.

locate base stations on these channels to maximize interoperability. We seek comment on this proposal.

(2) Phase II Assignment of EMRS Channels (Channels 181-185)

46. In our 1993 *EMRS Report and Order*, we decided to allocate five channels for use by EMRS entities "as a resource to meet current and future needs."[75] However, due to the existence of the current application freeze, which took effect prior to the allocation of the five EMRS channels, we are unable to determine the extent of demand for these channels by EMRS eligibles. We believe that five 220 MHz non-nationwide channels should continue to be reserved for the EMRS in order to provide spectrum for licensees involved in the delivery of emergency medical services,[76] but ask for comment as to whether we should retain this separate allocation for EMRS users. We also ask comment as to whether we should combine the 10 Public Safety channels and five EMRS channels into a single 15-channel allocation and allow EMRS and all other Public Safety entities to be eligible for these 15 channels. If we were adopt a single 15-channel allocation for both EMRS and Public Safety eligibles, we ask further whether we should modify our current allocation scheme to designate Channels 171-180 as the Public Safety channels so that these channels would be contiguous with the EMRS channels.[77]

47. Also, we tentatively conclude that we should continue to authorize both the Public Safety and EMRS channels on a first-come, first-served basis, with stations authorized at a single location, and with stations protected in accordance with our 120-km co-channel separation criteria. We ask comment, however, as whether these channels should be assigned, instead, over Commission-defined areas that might be appropriate for Public Safety or EMRS operations.

48. Before accepting applications for the Public Safety and EMRS channels, we intend to act on a Petition for Reconsideration of our 1993 *EMRS Report and Order* establishing the Emergency Medical Radio Service.[78] This petition, filed by Dr. Michael Trahos, asks that we allow certain entities authorized in the Special Emergency Radio Service under Part 90 of our rules (*e.g.*, physicians, disaster relief organizations, etc.) to be eligible for licensing on the 10 Public Safety channels. We will address this petition in a

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[75] *EMRS Report and Order*, 8 FCC Rcd at 1459 (para. 28).

[76] Section 90.27(a) of the Commission's Rules, 47 C.F.R. § 90.27(a).

[77] If we were to designate the Public Safety channels as Channels 171-180, we would revise our Table in paragraph 66, *infra*, to indicate that Channels 161-170, rather than Channels 171-180, would be designated for Regional licensing.

[78] *EMRS Report and Order*, 8 FCC Rcd at 1454.

soon-to-be-released Memorandum Opinion and Order dealing with the various petitions for reconsideration of the *EMRS Report and Order.*

49. On March 2, 1994, the American Red Cross (ARC) filed a petition for rulemaking, which also seeks eligibility to use the 220 MHz Public Safety channels for disaster relief organizations, but also requests further modification of our rules to enable disaster relief organizations to use the Public Safety channels in ways not currently permitted under our rules. That is, our rules generally restrict use of these channels to communications relating to the immediate safety of life; the ARC asks that disaster relief organizations additionally be permitted to use the Public Safety channels for "the establishment and maintenance of temporary relief facilities," "for limited training exercises incidental to an emergency communications plan," etc. We therefore ask comment in this proceeding on the Petition for Rulemaking of the American Red Cross.

(3) Phase II Assignment of Data-Only Channels (Channels 186-200)

50. In Phase II of licensing, we propose to eliminate the current "data-only" designation for Channels 186-200. This designation, which includes "analog non-voice transmissions" or "any digital transmission, voice or non-voice," was established to create a spectrum home for data and digital technologies, which we believed would "provide great improvements in spectrum efficiency over voice technology in this band."[79] We provided this allocation in 1991 because we were concerned that without it, the band would likely be populated by analog voice operations.[80]

51. We continue to believe that equipment designers and manufacturers can achieve significant spectrum efficiencies by employing advanced digital modulation schemes on 5 kHz channels. Furthermore, in today's widely varying communications marketplace, there is an ever-increasing demand for non-voice communications, such as paging, and services using digital modulation for voice communication. We therefore expect that, because of the growing demand for these types of services, a significant number of Phase II licensees will, upon obtaining regional or nationwide 220 MHz authorizations, choose to implement data and digital systems.

52. We find, however, that it remains unnecessary for us to provide a permanent allocation exclusively for data and digital operations. Rather, we believe that the best use of the spectrum should be determined by the marketplace. We therefore propose to eliminate the current "data-only" channel allocation in Phase II of licensing and seek comment on this proposal. Also, we have no reason to believe that most of the over-300 Phase I licensees who requested and were granted authorization on the 10 available data-only channels will not

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[79] *220 MHz Report and Order*, 6 FCC Rcd at 2362 (paras. 40 and 43).

[80] *Id.*

construct and operate data and digital systems and that this will provide an excellent test-bed envisioned in the *220 MHz Report and Order* for manufacturers producing these types of systems. However, we do not believe that it is necessary to continue to mandate this use of these channels. Instead, we propose that Phase I licensees authorized on these channels be permitted to construct non-"data only" systems if they so choose. We seek comment on this proposal.

c. Proposals for Assignment of the Remaining 125 Non-Nationwide Channels

53. Having proposed to maintain the existing Public Safety and EMRS channel allocation, we now turn to the licensing of the remaining 125 non-nationwide channels (*i.e.*, the 100 channels currently allocated for five-channel trunked operations, Channels 171-180 and Channels 186-200).

(1) Comments in CMRS Proceeding Regarding the 220 MHz Service

54. In the comments received in response to the *CMRS Further Notice* relating to the 220 MHz band,[81] interested parties discussed matters of whether, when, and how we should proceed with the next phase of licensing the 220 MHz band. Among the significant issues raised were whether five-channel, stand-alone 220 MHz stations would be viable competitors to other mobile communications services and whether 220 MHz systems should be licensed on a regional basis. USM, for example, suggested that:[82]

> [G]iven the extremely small amount of spectrum granted each 220 MHz licensee and the economic realities of competition in today's communications marketplace, the only potential for successful utilization of a five-channel commercial narrowband license is as part of a multi-site system offering full market coverage, feature-rich equipment and a depth of channel capacity . . . . [G]enerally, a 5-channel stand-alone system is simply not economically feasible.

SunCom, in a Petition for Declaratory Ruling that was incorporated into the proceeding,[83] argued that "multiple license capacity and efficiencies are required for a competitive and cost-effective 220 MHz system," that multiple licenses are "required to assure competitive

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[81] The comments and reply comments are listed in Appendix B.

[82] USM Comments at 6.

[83] In its Request for Declaratory Ruling, SunCom sought permission to aggregate non-nationwide 220 MHz five-channel blocks on a regional basis so that it could provide multiple-market service on a single system. *See CMRS Further Notice*, 9 FCC Rcd at 2872 (para. 38).

220 MHz system coverage," and that 220 MHz system "capacity and coverage are needed to demonstrate viability and sustainability to prospective subscribers."[84] SmartLink, in its comments, "disagee[d] with SunCom's conclusion that 'five-channel trunked 220 MHz licenses . . . are simply not in themselves commercially viable'" and suggested that 5-channel systems "should be given the opportunity to develop their own market presence and become viable."[85]

55. SEA, in arguing against granting the relief requested by SunCom, stated that "at the present early stage in the development of the 220 MHz service, it is premature to revisit the fundamental channel allotment and licensing framework that has been adopted by the Commission" and that "that framework should be given an opportunity to prove itself in the marketplace before adoption of the kinds of fundamental changes sought by SunCom."[86] SEA further stated that "if, after a reasonable period of operation under the current rules, the Commission decides that the present [licensing approach] . . . is inadequate for some reason, then the Commission can set out to create a new nationwide or regional licensing framework."[87] Simrom, Inc. ("Simrom"), while supporting the relief requested by SunCom and stating that "it forms a valid basis for assisting the development of the 220 MHz industry," did not agree with SunCom's assessment that stand-alone five-channel 220 MHz system would not be viable, arguing that "the demand characteristics at the licensed location will determine the viability of each system."[88] Simrom further argued that interconnected 220 MHz CMRS service is substantially similar to narrowband PCS service and that the Commission should therefore adopt PCS-like area-based licensing for the 220 MHz CMRS service.[89] Finally, Simrom suggests that the Commission should "[purge] the database of unconstructed systems" after the expiration of the construction deadline for non-nationwide 220 MHz systems and then accept new applications for "BTA-wide, MTA-wide, regional or nationwide authorizations."[90]

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[84] SunCom Comments at 3, 4, 5.

[85] SmartLink Comments at 6, (*citing* SunCom Petition for Waiver at 12).

[86] SEA Comments at 10, 12.

[87] *Id.* at 16.

[88] Simrom Comments at 9 and n. 9.

[89] *Id.* at 7-8.

[90] *Id.*

(2) Initiation of Phase II Licensing

56. Some of the comments in response to the *CMRS Further Notice* contend that we should not proceed with the next phase of licensing the non-nationwide 220 MHz channels until the success of our existing licensing approach can be adequately assessed.[91] We could not undertake such an assessment, however, until some time after our existing non-nationwide licensees have begun operation and we have an opportunity to analyze whether, for example, commercial operations have been competitive in the mobile communications marketplace and whether the spectrum acquired by non-commercial entities was adequate to serve their internal communications needs. We believe that it would be inappropriate to continue to withhold the acceptance of new applications for 220 MHz spectrum for any additional time to allow us to evaluate extensively the success of our existing licensing scheme, even assuming that we could develop criteria and methodologies for such an evaluation. While our proposals for Phase II licensing of the 220 MHz band will not preclude the continued use of spectrally efficient 5 kHz technology, they will not mandate the types of technology that will be used and the services that will be offered. Thus, we believe that it is incumbent upon us to go forward with our Phase II plan so that such more widespread and varied 220 MHz services can be made available to the American public. We therefore tentatively conclude that we should initiate Phase II of licensing of the non-nationwide channels, and we ask for comment on this tentative conclusion.

(3) Eligibility

57. Currently, the 125 non-nationwide 220 MHz channels are available to applicants intending to provide subscriber-based services as well as applicants intending to use spectrum for their internal use. We propose in Phase II of licensing to continue to make these channels available on an equal basis to all such applicants. We request comment on this proposal and specifically ask whether this licensing method will provide sufficient spectrum for all types of applicants.

(4) Licensing Areas

58. Currently, most non-nationwide 220 MHz licensees are authorized on single-station, or "stand-alone," five-channel systems.[92] However, in this proceeding, we are proposing extensive changes in the types of operations that will be permitted in the 220 MHz band. These changes will allow a much broader array of communications offerings to be

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[91] *See, e.g.*, SEA Comments at 15-16.

[92] We refer here to the twenty five-channel trunked assignments. Approximately 80 percent of the Phase I licensees are assigned on these channels. The remaining "non-trunked" assignments may consist of between one and 10 channels.

provided, which could result in the 220 MHz service evolving into a service similar, for example, to the narrowband PCS or 900 MHz SMR services. In the *CMRS Third Report and Order*, we concluded that the 220 MHz service was potentially competitive and therefore substantially similar to other CMRS services[93] and this conclusion was based on the service as it existed at that time, *before* the adoption of our proposals herein to create a more expansive 220 MHz service. In the narrowband PCS and 900 MHz SMR services, we authorized spectrum over defined, geographic areas rather than on a single station basis to facilitate the efficient provision of a wide variety of communications services.[94] We agree with Simrom that the future of the 220 MHz service lies in "PCS-like area-based licensing"[95] and thus believe that Phase II non-nationwide 220 MHz spectrum also should be authorized within such areas.

59. We therefore propose that Phase II licensees on the 125 non-nationwide channels be permitted to provide service within the following prescribed geographic areas: (1) 172 geographic areas defined as "Economic Areas" ("EAs") by the Bureau of Economic Analysis (BEA), Department of Commerce ("EA licenses")[96] and, (2) in geographic areas defined by five large regions ("Regional licenses").[97] Licensees would be permitted to operate any number of base stations within their authorized area without being required to obtain a separate authorization for each station.

60. Our licensing proposal is based on a number of considerations. Specifically, if the 220 MHz service does remain primarily a dispatch service, then authorization over areas the size of EAs would still allow 220 MHz licensees to serve effectively customers who

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[93] *CMRS Third Report and Order*, 9 FCC Rcd at 8021 (para. 58), 8026 (para. 67), and 8031-33 (para. 74).

[94] *Id.* at 8050 (paras. 114-115); *Narrowband PCS Report and Order*, 8 FCC Rcd at 7166 (paras. 26-27).

[95] Simrom Comments at 8.

[96] The BEA has divided the Nation into regional economic areas that consist of metropolitan areas that are centers of economic activity and their economically-related surrounding counties. In February 1995, the BEA concluded a redefinition of the areas based on newly available information on commuting patterns and adopted a new configuration of 172 EAs. *See* Proposed Redefinition of the BEA Economic Areas, 59 Fed. Reg. 55,416-20 (Nov. 7, 1994) and Final Redefinition of the BEA Economic Areas, 60 Fed. Reg. 13,114-18 (March 10, 1995). *See also* Kenneth P. Johnson, "Redefinition of the BEA Economic Areas," *Survey of Current Business*, Feb. 1995, 75-81. We propose to adopt the BEA's list of 172 EAs to define the smallest geographic areas proposed for Phase II licenses because of the accuracy of the redefined list in reflecting the current major markets on a local regional basis. Appendix C includes the BEA's list of the newly defined 172 EAs with their assigned Codes and a map identifying the boundaries.

[97] Appendix D contains a list of the five proposed regions.

require communications capability extending over economically-linked areas such as EAs. Alternatively, if the service evolves into one where an increased variety of mobile and fixed services are provided, then the ability of 220 MHz licensees to operate over larger areas than currently provided under Phase I (*i.e.*, single stations with a service area of no more than 28 miles)[98] may be necessary to enable them to compete effectively with licensees in various other communications services authorized over similarly-sized areas (*e.g.*, MTA and BTA licensees authorized in the PCS and SMR services).

61. If we license Phase II 220 MHz systems in regions geographically similar to the five regions used by narrowband PCS licensees, the 220 MHz licensees may be able to compete effectively with their counterparts in that service. Also, in licensing the 220 MHz band in the EAs and Regions, we have created an overall licensing scheme for the 220 MHz Radio Service that provides for three different licensing areas, ranging in size from nationwide to EA. This will enable 220 MHz licensees to serve a wide variety of communications needs. Because EAs generally fall between BTAs and MTAs in size, we believe that licensing in EAs will generally allow licensees to provide the same types of service offered by licensees authorized in BTAs and MTAs in other wireless services. We ask comment, however, as to whether we should license the 220 MHz band in either BTAs or MTAs instead of, or in addition to EAs and Regions. Finally, we believe that licensing 220 MHz spectrum in EAs and Regions will also serve the needs of non-commercial entities, many of which may have communications requirements that span areas the size of EAs or larger. We seek comment on our proposal to employ EA and Regional licensing for the 220 MHz band.

(5) Channel Allocation

62. We now address how the 125 EA and Regional channels should be assigned within these geographic areas. The Phase I trunked channels are currently authorized in five-channel blocks.[99] With the 220 MHz service now only beginning to develop, it is difficult to determine, in Phase II of licensing, whether we should continue to authorize non-nationwide channels in this manner or whether we would better serve the needs of future 220 MHz licensees by licensing non-nationwide channels in different-sized blocks. With our proposal to license Phase II spectrum over much wider areas than provided for under Phase I (*i.e.*, EAs and Regions versus single station authorizations), we believe that it will generally be necessary to allocate more than five channels to each Phase II licensee. EAs will, on

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[98] *220 MHz Report and Order*, 6 FCC Rcd at 2371 (para. 115).

[99] Section 90.721 of the Commission's Rules, 47 C.F.R. § 90.721.

average, be eight times larger than the service area of a Phase I station,[100] and thus a five-channel allocation, amounting to a total of 25 kHz of spectrum (50 kHz when paired), may not serve the needs of 220 MHz licensees attempting to provide communications service to customers in areas the size of EAs. Also, if we adopt our proposals to allow Phase II licensees to aggregate their authorized 5 kHz channels or provide a wider variety of communications services, such as paging, such licensees will likely require more spectrum than is available through licensing on only five 5 kHz channels.

63. On the other hand, Phase II licenses, particularly those intending to use the spectrum for their internal purposes, may not need more than five channels, even if those channels are employed over an EA-sized area. To accommodate the potential needs of all EA licensees, including licensees who may wish to offer more diverse communications services, we propose to authorize Phase II EA licenses in five- and 10-channel blocks. We believe that Regional licensees, who will be offering communications services to a much larger population of users, should be authorized a larger number of channels and therefore propose that Regional licenses be assigned in 10-, 15- and 20-channel blocks. EA and Regional licensees needing less spectrum than provided through these particular authorizations could assign channels to other licensees in accordance with our partitioning proposals.[101] We request comment on these proposals.

64. The next matter to be addressed is whether the EA and Regional channel blocks should be composed of non-contiguous or contiguous channels. In the *220 MHz Notice*, we explored this issue and suggested that to "introduce [trunking] on contiguous narrowband channels may be less viable or desirable from both a technical and economic standpoint."[102] However, we noted that authorization of contiguous channel assignments would be the same concept we applied in channelizing the 900 MHz band.[103] In adopting this contiguous

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[100] The land area of the United States is approximately 3.5 million square miles and there are 172 EAs; therefore, the area of the average EA is approximately 20,000 square miles. The coverage area of a 220 MHz station operating at maximum power and antenna height (*i.e.*, with a 38 dBuv/m field strength contour at 28 miles) is approximately 2,500 square miles.

[101] *See* para. 176, *infra*.

[102] *220 MHz Notice*, 4 FCC Rcd at 8597 (para. 27).

[103] *Id.* at 8597 n. 49 (para. 27). In allocating the 896-901/935-940 MHz band for private land mobile use, we authorized 40 channel blocks, with each block composed of 10 contiguous 12.5 kHz channels. *See* Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, GEN Docket No. 84-1231, Amendment of Parts 2, 15 and 90 of the Commission's Rules and Regulations to Allocate Frequencies in the 900 MHz Reserve Band for Private Land Mobile Use, GEN Docket No. 84-1233, Amendment of Parts 2, 22, and 25 of the Commission's Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services, GEN Docket No. 84-1234, Report and Order, 2 FCC Rcd 1825 (1986)

channel assignment approach in the *900 MHz Allocation Order*, we observed that to do so could "provide increased flexibility to employ spectrum efficient digital systems that may become available in the near future."[104] In the *220 MHz Report and Order*, we ultimately decided that increasing spectrum efficiency was of prime importance and therefore adopted a non-contiguous channel assignment scheme because it would provide a "more proficient and economic way to integrate . . . [trunking] into the new narrowband technology."[105]

65. We continue to believe that trunking is an effective way of increasing spectrum efficiency. However, we now believe that the possible benefits that could be obtained from enabling licensees to employ contiguous channels, *e.g.*, the ability to employ spectrum efficient digital systems,[106] outweigh the potential technical or economic advantages of developing narrowband trunking systems. Further, as we observed in the *220 MHz Notice*, the use of contiguous channels in the 220 MHz band would by no means "preclude the use of trunking technology."[107] We thus propose that the spectrum assigned to EA and Regional licensees be composed of contiguous channels blocks. We seek comment on this proposal.

66. The following is our proposed allocation plan for the assignment of the non-nationwide 220 MHz channels:

NON-NATIONWIDE 220 MHz
PROPOSED CHANNEL ALLOCATION PLAN

EA BLOCK	CHANNELS
Channels 61-70	10
Channels 71-80	10
Channels 91-100	10

(900 MHz Allocation Order); Section 90.613 of the Commission's Rules, 47 C.F.R. § 90.613.

[104] *900 MHz Allocation Order*, 2 FCC Rcd at 1835 (para. 74). Digital systems that employ Time Division Multiple Access (TDMA) technology, for example, would require channels wider than 5 kHz of spectrum and thus the aggregation of 5 kHz channels would be necessary to enable this technology to be used.

[105] *220 MHz Report and Order*, 6 FCC Rcd at 2358 (para. 16).

[106] In the *220 MHz Report and Order*, one commenter suggested the adoption of 40 blocks of five contiguous 5 kHz channels each because of the spectrum efficiency that would result from digital radio systems. *Id.* at 2358 (para. 14, *citing* Dayton Comments).

[107] *220 MHz Notice*, 4 FCC Rcd at 8597 (para. 27).

Channels 101-110	10
Channels 121-125	5
Channels 126-130	5
Channels 131-135	5
Channels 136-140	5
TOTAL	60

REGIONAL BLOCK	CHANNELS
Channels 171-180	10
Channels 186-200	15
Channels 1-10	10
Channels 11-20	10
Channels 31-50	20
TOTAL	65

67. Our proposed selection of particular frequency blocks for EA and Regional assignments is a consequence of the unique spectrum allocation of the 220-222 MHz band. That is, due to the fact that the upper base transmitting channels in the 220-222 MHz band are situated immediately adjacent to the lower base receiving channels, we currently require licensees operating base stations in the upper 40 channel assignments (*i.e.*, Channels 161-200) to reduce power when located within certain distances of base station receivers of licensees operating on the adjoining Channels 1-40.[108] Due to this circumstance unique to the 220-222 MHz band,[109] we also limit the base station transmitter power for stations authorized on Channels 196-200 to two watts.

68. In our EA and Regional assignments, we have therefore proposed that all but 10 of the Regional channels assignments be made on frequencies affected by this condition because Regional licensees, operating over much larger areas, will likely have more flexibility than EA licensees to situate their base stations.[110] We propose that licensees on these channel blocks coordinate amongst themselves to locate their base stations to avoid

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[108] Section 90.723(d) of the Commission's Rules, 47 C.F.R. § 90.723(d).

[109] For example, in other land mobile bands where base and mobile frequencies are provided, such as the 800 MHz and 900 MHz SMR bands, the base and mobile channels are separated by 45 and 39 MHz, respectively.

[110] Regional assignments are proposed on Channel blocks 171-180, 186-200, 1-10, 11-20, and 31-50.

interference.[111] We also propose to allow licensees operating on Channels 196-200 to operate at power levels greater than 2 watts if such licensees obtain the concurrence of all Phase I and Phase II licensees operating in their Region or in adjoining Regions on Channels 1-40.

69. This proposed channelling plan, along with our existing and proposed assignment of 50 channels for nationwide licensing (*i.e.*, 20 nationwide channels in Phase I and 30 nationwide channels in Phase II) will allow for an even distribution of spectrum among the three Phase II service areas. We believe this approach in the 220 MHz band will enable different-sized communications systems to develop and provide services to different populations of users. We seek comment on this plan and ask whether some other distribution of channels for EA and Regional licenses would be more appropriate.

(6) Procedures for Assignment of the 125 Channels

(a) General

70. If we adopt our proposals to make the 125 channels available on an equal basis to licensees using the spectrum for subscriber-based services and licensees using the spectrum to meet their internal communications needs, we will not be able to determine in advance of authorization which of these types of licensees will acquire the spectrum, and thus we will not be able to conclude with absolute certainty the principal use of this spectrum. The *Competitive Bidding Second Report and Order* provides guidance for determining the likely principal use of a service[112] and, as we observed previously in this Notice,[113] it is reasonable to conclude from our database that the vast majority of the more than 59,000 applicants for 220 MHz non-nationwide systems appear to intend to use their spectrum for for-profit services.

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[111] This is in keeping with our decision adopting rules for the broadband PCS service, where we noted that co-channel PCS licensees operating in adjoining areas could interfere with each other and thus would be required to coordinate frequency use in their boundary regions. *See* Amendment of the Commission's Rules To Establish New Personal Communications Services, GEN Docket No. 90-314, Second Report and Order, 8 FCC Rcd 7700, 7777 (para. 177) (1993) (*Broadband PCS Order), recon.* Memorandum Opinion and Order, 9 FCC Rcd 5947 (1994) (*Broadband PCS Order on Reconsideration); recon.* Further Order on Reconsideration, 9 FCC Rcd 4441 (1994) (*Broadband PCS Further Order on Reconsideration).* Licensees for 220 MHz service should use as a guideline in locating their stations the geographic separations provided in the Table in Section 90.723(d) of the Commission's Rules (47 C.F.R. § 90.723(d)) for the 220 MHz service.

[112] *Competitive Bidding Second Report and Order,* 9 FCC Rcd at 2353-2354 (paras 30-36).

[113] *See* para. 36, *supra.*

71. Also, our current rules do not restrict non-nationwide 220 MHz licensees using spectrum for internal communications from leasing excess capacity on their systems to provide service to subscribers. We propose to continue this provision for licensees authorized on the 125 channels. Thus, any licensees using these channels for their internal use and choosing to lease excess capacity will contribute to the overall use of the spectrum for the transmission or reception of communications signals to subscribers for compensation. Thus, we tentatively conclude that the principal use of our Phase II non-nationwide spectrum on the 125 channels is likely to be for the transmission or reception of communications signals to subscribers for compensation. In accordance with Section 309(j)(2)(a) of the Communications Act, we further tentatively conclude that mutually exclusive applications for initial licensing of these channels should be assigned through competitive bidding. We ask comment on this tentative decision and request that those suggesting otherwise provide justification for any differing conclusion.

(b) Public Safety and EMRS Entities

72. We tentatively conclude that we should continue, in Phase II, to maintain the 10-channel allocation for the Public Safety Radio Services and the 5-channel allocation for the EMRS. We also tentatively conclude that we should continue to authorize these channels on a first-come, first-served basis, with stations authorized at a single location, and with stations protected in accordance with our 120-km co-channel separation criteria. Because these channels will not be used principally for the provision of subscriber-based services for compensation, in accordance with Section 309(j) of the Communications Act, we also conclude that they should be assigned through random selection procedures.

73. Our current rules, however, permit Public Safety entities, including those eligible in the EMRS, to apply for *all* of the non-nationwide 220 MHz channels, including the 125 channels. Thus, because we have tentatively concluded that the principal use of the 125 non-nationwide channels is likely to be for the provision of subscriber-based service for compensation and therefore to be assigned through competitive bidding, we tentatively conclude that Public Safety and EMRS entities seeking these channels will be required to obtain them, when mutually exclusive situations occur, through competitive bidding. However, because we only received three applications from Public Safety entities for authorization on the Public Safety channels in Phase I, we believe that Public Safety users will be adequately accommodated by the channels that will be reserved for their use. We seek comment on these tentative conclusions.

(c) Federal Government Users

74. Our current rules permit Federal Government entities to be authorized on any of the 140 Phase I non-nationwide channels on a co-equal basis with non-Government users. However, given that we received *no* applications from Federal Government entities for non-

nationwide 220 MHz spectrum during Phase I, we anticipate that demand for 220 MHz spectrum by the Government will be satisfactorily met through assignment on the 10 Public Safety and 5 EMRS channels. Assignment on these channels, we believe, will be of particular interest to Federal Government agencies responsible for public safety and emergency medical services because it will enable them to communicate with their counterparts at the State and local level. In the *220 MHz Report and Order*, we decided that mutually exclusive applications for 220 MHz channels involving Government and non-Government applicants would be resolved in a "single, unified lottery" in which all applicants "would have an equal probability of emerging as the tentative selectee."[114] We continue to believe that mutually exclusive applications for the 15 channels available to both Government and non-Government entities be assigned through a single unified lottery. We seek comment on these proposals and will coordinate them with the National Telecommunications Information Agency (NTIA).

(7) License Term

75. As proposed for the nationwide 220 MHz service, we similarly propose the adoption of 10-year license terms for both EA and Regional 220 MHz licensees. We believe that a 10-year license term will encourage investment in this service by EA and Regional licensees. This proposal is also in keeping with our decision in the *CMRS Third Report and Order*, where we indicated that existing CMRS licensees would, at renewal, be granted 10-year license terms.[115] We therefore propose a 10-year license term for EA and Regional 220 MHz authorizations and seek comment on this proposal. We also propose, to minimize the adminstrative burden on Public Safety and EMRS entities, to issue 10-year license terms for authorizations on the Public Safety and EMRS channels. We seek comment on this proposal.

C. Technical and Operational Rules

1. Fixed Operation for Phase I and Phase II Licensees

76. In our *220 MHz Allocation Order*, we reallocated the 220-222 MHz band for private land mobile radio to provide spectrum for the development of narrowband, spectrum efficient technologies.[116] Our rules for the 220 MHz service permit fixed operations only on

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[114] *220 MHz Report and Order*, 6 FCC Rcd at 2356 (para. 62).

[115] *CMRS Third Report and Order*, 9 FCC Rcd at 8157 (para. 386).

[116] *220 MHz Allocation Order*, 3 FCC Rcd at 5287 (para. 21).

an ancillary basis to primary land mobile operations[117] to encourage manufacturers to invest in the development of narrowband land mobile technologies.[118]

77. We continue to believe that 220 MHz band operations will play an important role in the provision of mobile communications services and that licensees in this service will provide a market for 5 kHz, narrowband radio technologies. However, we now tentatively conclude that our current restrictions on the use of fixed communications in the band are not necessary. To compete effectively with the growing number of competing services in the mobile communications marketplace (*e.g.*, the Domestic Public Cellular Radio Telecommunications Service, the narrowband and broadband Personal Communications Services, the 900 MHz SMR Service, and the 800 MHz SMR Service), 220 MHz licensees will need the ability to provide a wide array of communications services to the public. Lifting our current restriction on primary fixed use in the 220 MHz band would serve to broaden the array of services offered by these licensees and would thus benefit consumers. We tentatively conclude, therefore, that there is no longer a need to restrict the 220 MHz band to mobile operations. We thus propose to modify our current rule that allows fixed operations only on an ancillary basis to primary land mobile communications and permit such operations on a primary basis for 220 MHz licensees. The proposed removal of this prohibition would apply to both nationwide and non-nationwide non-Government and Government, Phase I and Phase II licensees and would apply both to licensees offering service to subscribers and licensees using spectrum for internal communications. We request comment on this proposal.

2. Secondary, Fixed Operations

78. We have before us a Petition for Rulemaking filed by Fairfield Industries, Inc. (Fairfield), requesting that individuals involved in geophysical telemetry be permitted to operate temporary, fixed 220 MHz facilities, on a secondary basis without the requirement that such operation be on an ancillary basis to the licensee's primary mobile operations.[119] Our current rules allow 220 MHz licensees to provide operational fixed facilities for "ancillary, signalling and data transmision" subject to certain requirements, such as that ancillary operations be on a secondary, non-interference basis to the primary mobile operation of any other licensee.[120] Fairfield points out that those performing geophysical telemetry would typically operate in remote, uninhabited areas and at relatively low power

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[117] Sections 90.731 and 90.733 of the Commission's Rules, 47 C.F.R. §§ 90.731, 90.733.

[118] *220 MHz Report and Order*, 6 FCC Rcd at 2368 (para. 88).

[119] The Commission sought comment regarding the petition, RM-8506, through release of a Public Notice on August 16, 1994, Report No. 2026. No comments were received.

[120] Section 90.731(a) of the Commission's Rules, 47 C.F.R. § 90.731(a).

levels (*i.e.*, two watts or less), thereby presenting little risk of interference to co-channel 220 MHz stations.

79. We find merit in Fairfield's request and we believe that it is in the public interest to allow the type of operation they propose.[121] We believe, however, that rather than limiting secondary, fixed use of 220 MHz spectrum only to licensees employing temporary facilities for geophysical telemetry operations, even greater use of the spectrum could be realized by allowing any and all types of secondary, fixed operations. In proposing to expand this permissible use of the spectrum, however, we believe that it is necessary to propose certain additional restrictions on this type of operation. Section 90.261 of our rules places a number of technical limitations (*e.g.*, power, antenna directivity) on licensees using the 450-470 MHz band for secondary, fixed operations. We propose similar restrictions on licensees operating secondary, fixed facilities in the 220 MHz band. Specifically, we propose that such operation be limited to a maximum of two watts ERP for licensees operating within 60 kilometers of the center of any of the urban areas listed in Section 90.741 of our rules[122] and a maximum of five watts ERP for licensees operating beyond 60 kilometers of these areas. Such limitations, we believe, will allow secondary, fixed operation with minimal likelihood for interference to regularly authorized Phase I and Phase II licensees that may be providing either mobile or fixed services. We propose to accept applications for authorization of secondary, fixed use of the 220 MHz band, without the requirement of frequency coordination, upon adoption of final rules in this proceeding. We request comment on these proposals, including any suggested changes to the technical restrictions proposed and any comment as to whether we should further restrict secondary, fixed use of the 220 MHz band to operations at strictly temporary locations, as provided for under Section 90.137 of our rules.[123]

3. Aggregation of Five kHz Channels

80. After reallocating the 220-222 MHz band, we adopted rules "to initiate the introduction of narrowband technology for private land mobile radio operations in the 220-222 MHz frequency band."[124] Since the adoption of the *220 MHz Report and Order*, we have granted nearly 3,800 authorizations to licensees to construct and operate stations

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[121] *See* Fairfield Petition at ii (use of spectrum to assist in the search for domestic oil and gas reserves).

[122] Section 90.741 of the Commission's Rules identifies the coordinates for the center of each of these areas. 47 C.F.R. § 90.741.

[123] Section 90.137 of the Commission's Rules provides, among other things, that temporary operation be limited to a period of no more than one year. 47 C.F.R. § 90.137.

[124] *220 MHz Report and Order*, 6 FCC Rcd at 2372 (para. 125).

employing five kHz channels. Various equipment manufacturers have developed and are now installing these five kHz narrowband systems nationwide. We therefore tentatively conclude that it is not necessary to continue to provide that 5 kHz technology be utilized in the 220 MHz band to the *exclusion* of all other technologies.

81. We believe that our current five kHz-wide channels unnecessarily restrict the array of services that can be provided in the 220 MHz band and prevent other, perhaps equally spectrum efficient, technologies from being employed in the band. For example, time-division technology used in other bands may be at least as spectrally efficient as 5 kHz channels. Such systems, however, employ wider channels than are authorized in the 220 MHz band (*e.g.*, cellular radio systems operate in 30 kHz channels and 800 MHz and 900 SMR systems operate on 25 kHz and 12.5 kHz channels, respectively). To allow licensees the flexibility to take advantage of these and other spectrum efficient technologies, it is necessary to remove the requirement of the use of five kHz channels in the 220 MHz band and allow licensees to aggregate their authorized frequencies to create wider bandwidth channels. Removing this restriction would, for example, allow Phase II licensees to aggregate the frequencies in the proposed 10-channel blocks to create 50 kHz blocks. This would enable 220 MHz licensees to use their limited amount of spectrum to employ the widest variety of technologies to best meet the communications requirements of consumers.

82. Allowing 220 MHz licensees to aggregate their channels is a significant departure from our original decision in the *220 MHz Report and Order*. In discussing the possible assignment of 220 MHz channel blocks on contiguous channels in the *220 MHz Notice*, we specifically declined to propose allowing 220 MHz licensees to "group narrowband channels to create a wideband voice channel."[125] However, in the *900 MHz Allocation Order*, allocating the 900 MHz private land mobile frequencies, we decided to adopt a contiguous channel assignment scheme to "provide increased flexibility to employ spectrum efficient digital systems,"[126] and decided to allow 900 MHz licensees to "combine contiguous channels."[127] We now tentatively conclude that the flexibility we sought for licensees in the 900 MHz band should be available to licensees in the 220 MHz band. We therefore propose that both Phase I and Phase II licensees be permitted to aggregate their contiguous channels to create wider bandwidth channels and we seek comment on this proposal.[128]

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[125] *220 MHz Notice*, 4 FCC Rcd at 8597 n. 49 (para. 27).

[126] *900 MHz Allocation Order*, 2 FCC Rcd at 1835 (para. 74).

[127] *Id.* at 1835 (para. 77). *See* Section 90.645(h) of the Commission's Rules, 47 C.F.R. § 90.645(h). Channels authorized in the 896-901/935-940 MHz band under Part 90 are assigned in blocks of 10 contiguous 12.5 kHz channels.

[128] We note also that while the nationwide Phase I channels were assigned in contiguous channel blocks, most of the non-nationwide Phase I channels were assigned on the 5-channel trunked assignments, which are composed of non-contiguous channels. Thus, only non-nationwide licensees

83. In allowing licensees to aggregate their five kHz channels, we are mindful of our original goal in reallocating the 220-222 MHz band and establishing the 220 MHz service -- *i.e.*, to encourage the development of spectrally efficient technologies. However, we recognize that in recent years spectrum efficiency has been achieved not only through the use of narrowband channelization but through the use of TDMA technologies employing advanced voice coder and digital modulation techniques. We therefore tentatively conclude that licensees choosing to aggregate channels must maintain a spectral efficiency at least equivalent to that obtained through five kHz channelization.[129] We ask, alternatively, whether our proposal to license through competitive bidding provides sufficient incentives for licensees to use their spectrum efficiently.

84. The effect of these proposals will be that 220 MHz licensees would no longer be required to adhere to the existing channel emission masks at the edge of each of their authorized five kHz channels. However, to prevent adjacent channel interference to licensees operating on channels outside their channel block, we propose that 220 MHz licensees be required to conform to the mask at the outer edge of their five-, 10-, 15-, or 20-channel blocks. Allowing licensees to refrain from complying with the emission masks of each of the "inside" channels in their block will result in licensees transmitting stronger signals, off-channel, than are currently permitted by our rules. We tentatively conclude, however, that because licensees, in constructing their base stations, must adhere to the required co-channel separation criteria with respect to all co-channel licensees in their area, the increased strength of off-channel signals will not result in any increased likelihood for harmful interference to co-channel licensees.[130] We seek comment on this tentative conclusion.

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authorized on the individual channels (*i.e.*, Channels 161-170, Channels 171-180, and Channels 186-195) would be able to take advantage of this option.

[129] Under this requirement, licensees who choose to aggregate their channels but do not intend to use TDMA technology could demonstrate spectral efficiency in other ways -- *e.g.*, by employing a data rate with a relatively high bit/hertz ratio.

[130] For example, if an EA licensee aggregates consecutive Channels 1 and 2 and does not adhere to the emission masks between these channels, then, because the Phase I licensees operating on both Channels 1 and 2 are situated at least 120 kilometers away from the EA licensee (the co-channel separation distance) the increased signal on spectrum between Channels 1 and 2 will not cause interference to either of these licensees. A factor that we believe further lessens the likelihood for interference in this situation is that the emission mask for 220 MHz channels currently provides for no signal attenuation at all within the authorized bandwidth (*i.e.*, $\pm$ two kHz from the center frequency). *See* Section 90.209(l) of the Commission's Rules, 47 C.F.R. § 90.209(1).

4. Paging Operations

85. In the *220 MHz Report and Order*, we decided not to authorize paging-only operations in the 220 MHz band because "there are other frequency bands available for paging operations."[131] We decided, instead, to permit paging only on an ancillary basis to a licensee's primary land mobile operations.[132] We have proposed to allow 220 MHz licensees to provide non-ancillary, fixed communications because, among other things, this would enable 220 MHz licensees to compete more effectively in the mobile communications marketplace with providers in other bands. We believe that these considerations also justify our allowing Phase II 220 MHz licensees to perform paging operations on a primary basis.

86. In recent years we have allocated or expressed the intention of allocating increasing amounts of spectrum for regional and nationwide paging operations. For example, we allocated the narrowband PCS spectrum, which will likely be used for advanced paging services.[133] We decided in the *CMRS Third Report and Order* that market-area licensing analagous to licensing for narrowband PCS would be considered for future licensing in both the private carrier and common carrier paging services.[134] Thus, the fact that there are many other spectrum bands where regional and nationwide paging operations will be authorized should lessen any concerns that removing the current restriction on paging could turn the 220 MHz band into a band used primarily for paging services and have a materially adverse effect on the development of the 5 kHz industry.

87. We continue to believe that the 220 MHz band is well suited to providing two-way land mobile services. In permitting paging on a primary basis in the 220 MHz band, we merely provide additional spectrum for this rapidly growing communications service. Also, by allowing 220 MHz licensees to offer this service, we enable such licensees to compete more effectively in the wireless marketplace. We therefore propose to remove the current restriction on paging operations for all Phase I and Phase II licensees, and we seek comment on this proposal.

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[131] *220 MHz Report and Order*, 6 FCC Rcd at 2368 (para. 89).

[132] *Id.*

[133] *Narrowband PCS Order*, 8 FCC Rcd at 7162.

[134] *CMRS Third Report and Order*, 9 FCC Rcd at 8026 (para. 67).

5. Construction Requirements

a. Nationwide Licensees

88. In adopting our rules for the 220 MHz service in 1991, we envisioned that 220 MHz radio systems would be designed and configured in the traditional manner of private land mobile radio systems, *i.e.*, through the construction and operation of single, high powered base stations providing signal coverage over an extended area. Our construction rules for nationwide 220 MHz licensees therefore reflected this type of system operation -- *i.e.*, requiring licensees to construct base stations in at least 70 different markets over an extended period of time.[135] Since 1991, we have allocated spectrum and adopted rules for other communications services, such as broadband and narrowband PCS, where less traditional forms of systems design are contemplated. In so doing, we have adopted construction requirements for authorizations based not on the construction of individual stations, but on the more flexible approach of requiring a licensee to provide a minimum amount of "coverage" within its authorized area of operation. We also indicated in the *CMRS Third Report and Order* that CMRS systems licensed on a wide-area basis should be afforded long construction periods combined with interim coverage requirements to ensure that licensees begin providing service to portions of their service area before their construction period expires.[136]

89. In this proceeding, we are proposing rules that will provide operational flexibility to enable future 220 MHz licensees to offer a wider variety of communications services than are currently permitted in the 220 MHz service. While the types of offerings envisioned for the 220 MHz service may not exactly parallel those of these other communications services, we believe that it is appropriate to adopt the same type of broad coverage requirements for the Phase II nationwide 220 MHz service as we have adopted for these other services. Our rules for the narrowband PCS service now require nationwide licensees to construct base stations that provide coverage to a composite area of 750,000 square kilometers or serve 37.5 percent of the United States population within five years of initial license grant and to provide coverage to 1,500,000 square kilometers or 75 percent of the population within 10 years of grant.[137] We believe that these standards are appropriate for the 220 MHz service

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[135] Section 90.725 of the Commission's Rules, 47 C.F.R. § 90.725. The rules provide that licensees granted commercial nationwide authorizations must meet construction benchmarks two, four, six, and ten years after initial license grant. Non-commercial nationwide licensees must construct and operate base stations in a minimum of 70 markets within five years of initial license grant.

[136] *CMRS Third Report and Order*, 9 FCC Rcd at 8076 (para. 179).

[137] Section 24.103 of the Commission's Rules, 47 C.F.R. § 24.103. The rules also indicate that in demonstrating compliance with the prescribed construction requirements, licensees must base their calculations on signal field strengths that ensure reliable service for the particular type of technology utilized and that they may use any service radius contour formula developed or generally used by

and therefore propose the adoption of the nationwide narrowband PCS coverage requirement for Phase II nationwide 220 MHz licensees. We seek comment on this proposal.

90. Additionally, because we propose to adopt rules that would permit future 220 MHz licensees to offer a variety of communications services, we are concerned that certain of these services, such as fixed, point-to-point operations, may not lend themselves to compliance with the strict construction requirement we have proposed.[138] We addressed this particular concern in our recently-adopted rules for the broadband PCS and 900 MHz SMR services. In the latter, we decided that a 900 MHz SMR licensee operating in an MTA would be permitted to meet its construction requirement by submitting a showing demonstrating that it is providing "substantial service."[139] We believe that such a showing of "substantial service" as an alternative to a coverage requirement is appropriate for nationwide Phase II 220 MHz licensees who, in implementing their systems, may not be able to meet our strict coverage standards, but may still be able to provide substantial, nationwide service to the public. We therefore propose to allow nationwide 220 MHz licensees, as an alternative to meeting the construction requirements as defined above, to submit showings demonstrating the provision of appropriate levels of substantial service to the public at the five-year and 10-year construction benchmarks. We seek comment on this proposal. We also ask commenters who would construct systems that would lend themselves to a demonstation of substantial service to indicate the types of "build-outs" that would be appropriate for their particular systems and what period of time should be required to achieve such build-outs.

91. Finally, consistent with our rules for the PCS services,[140] we propose that licensees be required to submit maps and other supporting documents to demonstrate compliance with the five-year and 10-year benchmarks, and that failure on the part of a nationwide licensee to meet either its five-year or 10-year construction requirement will result in forfeiture of its nationwide authorization. We seek comment on these proposals.

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industry, provided that such a formula is based on the technical considerations of its system.

[138] Fixed, point-to-point systems, for example, provide service in a linear manner, and thus a coverage "area" calculation is not applicable.

[139] *900 MHz Second Report and Order*, at para. 4. For the broadband PCS rules, see Section 24.203(b) of the Commission's Rules, 47 C.F.R. § 24.203(b).

[140] Sections 24.103(f) and (h) and 24.203(b) and (c) of the Commission's Rules, 47 C.F.R. §§ 24.103(f) and (h), 24.203(b) and (c).

b. EA and Regional Licensees

92. Our current rules require non-nationwide 220 MHz licensees to construct their stations within 12 months of initial authorization.[141] Phase I non-nationwide licensees, however, are authorized to operate a single base station at a single site. With the exception of licensees operating on channels in the Public Safety and EMRS pools, Phase II non-nationwide licensees will be authorized to operate any number of stations within their authorized EAs and Regions. In other wireless communications services licensed within Commission-defined areas (*e.g.*, narrowband and broadband PCS, 900 MHz SMR) we have adopted rules that require licensees to provide coverage to various percentages of the population or geographic area within their region at various, prescribed time intervals after initial authorization. For example, we require 900 MHz SMR (MTA) licensees to provide coverage to one-third of the population of their service area within three years of initial authorization and two-thirds of the population within five years, or permit licensees, at the five-year mark, to submit a showing demonstrating that they are providing "substantial service."[142] For regional narrowband PCS licensees, we require construction of base stations to provide coverage to a composite area of 150,000 square kilometers or serve 37.5 percent of the population of the Region within five years of initial authorization and provide coverage to 300,000 square kilometers or serve 75 percent of the Region within 10 years.[143]

93. In determining the most appropriate construction requirements for 220 MHz EA and Regional licensees, we must take into consideration: (1) the size of EAs and Regions compared to the size of the service areas established for the other wireless services; and (2) the fact that, in many instances, incumbent Phase I licensees will be operating on some or all of the EA and Regional licensee's authorized channels, and they will have to afford co-channel protection to these licensees. The communications service that resembles the 220 MHz service most closely in these respects is the 900 MHz SMR service.[144] We thus believe

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[141] The requirement that non-nationwide 220 MHz service licensees construct their stations and begin operation within eight months of initial authorization was adopted in the *220 MHz Report and Order*, 6 FCC Rcd at 2366 (para. 76). Subsequently, in the *CMRS Third Report and Order*, we decided that 220 MHz service licensees -- both CMRS and PMRS alike -- should be afforded a 12-month period to construct and operate their stations. *CMRS Third Report and Order*, 9 FCC Rcd at 8077 (para. 184).

[142] *900 MHz Second Report and Order*, at para. 40.

[143] Section 24.103(b) of the Commission's Rules, 47 C.F.R. § 24.103(b).

[144] In that service, we initially authorized 10-channel licenses to 20 licensees in and around each of the top 50 markets in the Nation and recently established rules for the licensing of this spectrum in the 51 MTAs surrounding these markets. In the 220 MHz service, we have similarly licensed spectrum use, mostly in the form of 20 five-channel trunked system authorizations, and, while we have not analyzed our database to determine the exact locations of these authorizations, we believe that it is reasonable to assume that the majority of 220 MHz station authorizations are situated in and

that it is appropriate to propose construction requirements for licensees in the 220 MHz band that parallel the three- and five-year construction requirements of the 900 MHz SMR service, but believe that licensees should meet these requirements five and ten years after initial authorization.

94. We therefore propose that EA and Regional licensees be required to construct base stations to provide coverage to one-third of the population of their EA or Region within five years of initial authorization and two-thirds of the population of their EA or Region within ten years. In keeping with our proposals for the nationwide 220 MHz service, we believe a showing of "substantial service" as an alternative to coverage requirements is acceptable because of the fact that certain EA and Regional licensees may ultimately provide communications services of the type that may not be conducive to meeting our strict coverage requirements but nevertheless provide what we would consider to be substantial service to the public in their authorized area. We therefore propose to allow EA and Regional licensees, as an alternative to meeting the construction requirements as defined above, to submit showings demonstrating the provision of appropriate levels of substantial service to the public at their interim and final construction benchmarks. We seek comment on this proposal. As discussed above for nationwide licensees, we also ask commenters who would construct EA and Regional systems that would lend themselves to a demonstation of substantial service to indicate the types of "build-outs" that would be appropriate for their particular systems and what period of time should be required to achieve such build-outs.

95. In proposing these coverage requirements, we acknowledge that Phase II licensees will have to provide co-channel protection to incumbent licensees and that this could inhibit their ability to meet the requirements. However, in our decison in the *900 MHz Second Report and Order*, we noted the presence of incumbent 900 MHz SMR licensees within the MTAs in which 900 MHz SMR (MTA) licensees would be authorized and decided that an MTA licensee would have to satisfy its coverage requirements "regardless of the extent of the presence of incumbents within its MTA block."[145] We also indicated that MTA licensees would "assume the responsibility of obtaining the right to use sufficient spectrum to provide coverage if such spectrum was not readily available" and could acquire this spectrum through "buyouts of incumbent licensees" or "through resale or other leasing arrangements with incumbents."[146] We similarly believe that Phase II 220 MHz licensees should have to meet their construction requirements, even if some or all of their channels are authorized to co-channel Phase I licensees in their area. We believe that these benchmarks are attainable, especially if Phase II licensees employ the various methods suggested for 900 MHz MTA licensees in satisfying their coverage requirements.

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around the Nation's major markets.

[145] *900 MHz Second Report and Order*, at para. 42.

[146] *Id.*

96. Finally, consistent with our proposals for the nationwide 220 MHz service, we propose that EA and Regional licensees be required to submit maps and other supporting documents to demonstrate compliance with their interim and final construction benchmarks, and that failure on the part of a licensee to meet either its interim or final construction requirement will result in forfeiture of its authorization. We seek comment on these various proposals.

c. Licensees on Public Safety and EMRS Channels

97. Because we tentatively conclude that the Public Safety and EMRS channels should continue to be authorized on a single-station basis, we propose to continue to require Phase II licensees operating on these channels to meet the existing 12-month construction requirement for non-nationwide 220 MHz licensees. We seek comment on this proposal.

6. Field Strength Limit at the EA and Regional Border

98. In the various wireless communications services we currently license within Commission-defined geographic areas (*e.g.*, Cellular, PCS, 900 MHz SMR) we prescribe limits on the strength of signals licensees may provide at the borders of their service areas.[147] In our existing rules for the 220 MHz service we do not define a particular "service area" for non-nationwide stations, but indicated in the *220 MHz Report and Order* that stations operating at maximum authorized power and antenna height would "provide a service area with a 38 dBu contour at about 45 kilometers (28 miles)."[148] We believe that, for effective operation, a Phase II licensee should be permitted to transmit a signal of at least 38 dBuV/m thoughout its area of service, and we therefore propose a field strength limit of 38 dBuV/m at the border for EA and Regional 220 MHz licensees.[149] To allow flexibility on the part of licensees to exceed this limit if necessary, we also propose that licensees be allowed to transmit signals greater than 38 dBuV/m at their border if all affected, co-channel EA and Regional licensees agree to the higher field strength. Under this proposal, if interference were to occur to transmissions at or near the border between co-channel licensees, licensees would be expected to coordinate with one another and modify their facilities as necessary to minimize interference. We seek comment on these proposals.

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[147] *See, e.g.*, Sections 24.236 and 90.671 of the Commission's Rules, 47 C.F.R. §§ 24.236, 90.671.

[148] *220 MHz Report and Order*, 6 FCC Rcd at 2371 (para. 115).

[149] In calculating the predicted 38 dBuV/m contour, licensees will use the F(50,50) field strength chart for Channels 7-13 in Section 73.699 of our Rules (Figure 10), with a 9 dB correction factor for antenna height differential.

7. Protection of Phase I Licensees

99. We have granted approximately 3,800 non-nationwide authorizations in Phase I of licensing. Most of these Phase I licensees are licensed on the channels we propose to assign to EA and Regional licensees in Phase II. To ensure that EA and Regional licensees will be able to construct their systems without causing interference to Phase I licensees, we propose to establish minimum co-channel separation criteria for stations operated by EA and Regional licensees. Specifically, we propose that EA and Regional licensees ordinarily not be permitted to construct their stations less than 120 kilometers from constructed and operating Phase I, co-channel stations. This 120-kilometer station separation criterion for co-channel 220 MHz stations is currently provided in our rules.[150] We also recognize that EA and Regional licensees may choose to employ low-power stations as part of their wide-area systems. Therefore, as provided in the rules, Phase II licensees will be permitted to operate less than 120 kilometers from co-channel stations if they provide us with a technical analysis demonstrating at least 10 dB protection to the 38 dBuV/m contour[151] of the existing licensee's station. We additionally propose that Phase II licensees be allowed to construct and operate stations less than 120 kilometers from existing co-channel stations or with less than 10 dB protection to an existing co-channel station's 38 dBuV/m contour if they obtain the consent of the affected co-channel licensees. We believe these proposed rules will adequately protect existing 220 MHz stations and will enable Phase II EA and Regional licensees to create viable systems within their regions. In the *CMRS Third Report and Order*, we indicated that 900 MHz MTA licensees could "negotiate mergers, buyouts, frequency swaps, or similar arrangments with incumbent systems" to minimize the need for providing this protection.[152] We believe that Phase II EA and Regional licensees could employ these same methods in developing their 220 MHz systems. We request comment on these proposals.

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[150] Section 90.723(f) of the Commission's Rules, 47 C.F.R. § 90.723(f).

[151] *Id.* This 10 dB of protection must be demonstrated by showing that the predicted signal from an EA or Regional licensee's station(s) does not exceed 28 dBuV/m at the predicted 38 dBuV/m contour of the Phase I licensee's station(s). The predicted signal from the EA or Regional licensee's station would be calculated using the F(50,10) field strength chart for Channels 7-13 in Section 73.699 of our Rules (Figure 10a), with a 9 dB correction factor for antenna height differential. The predicted signal(s) from the Phase I licensee's station would be calculated using the F(50,50) field strength chart for Channels 7-13 in Section 73.699 of our Rules (Figure 10), with a 9 dB correction factor for antenna height differential. We also propose to modify Section 90.723(f) to identify use of these field strength charts as the appropriate method for calculating the prescribed 10 dB protection a Phase I licensee must provide to another co-channel Phase I licensee.

[152] *CMRS Third Report and Order*, 9 FCC Rcd at 8052 (para. 118).

D. APPLICATION PROCEDURES

100. In the *CMRS Third Report and Order,* we adopted rules to govern the filing and processing of applications for Part 90 services reclassified as CMRS that are comparable to our rules and procedures for Part 22 services. In the *CMRS Third Report and Order,* however, we declined to consider definitions of initial applications and major or minor modifications and amendments until we more fully examined the 220 MHz service in this rulemaking proceeding. We address those definitions and other application issues below.

1. Initial Applications

101. The Budget Act directs the Commission to take steps to revise our rules to make mobile services subject to comparable regulatory requirements.[153] We therefore propose a definition of initial applications in the 220 MHz service that is similar to that adopted in the *CMRS Third Report and Order* for other mobile services. There, CMRS applicants that are licensed on a market or geographically-defined basis are "those that propose to construct and operate a new system in the relevant service."[154] The definition extends to existing licensees if they are applying for a geographic area that encompasses their existing facilities and would thus be able to extend existing services to other parts of the same market. Therefore, we propose to define an initial application for a 220 MHz license as an application for an EA, Regional, or nationwide license, regardless of whether the applicant is an incumbent 220 MHz licensee in the geographic area covered by the requested license. We seek comment on this proposal.

2. Amendment of Applications and Modification of Authorizations

102. With respect to Phase II initial applications and licenses, we propose to adopt rules consistent with other reclassified Part 90 services to govern amendments to applications and modification of Phase II licenses. As with the rules governing PCS service and proposed for 800 SMR service, applicants for the area-based licenses to be issued in Phase II would have a limited opportunity to cure minor defects in their short-form applications and are not allowed major amendments after the expiration of the short-form filing window.[155] As for modifications of the nationwide, EA, or Regional licenses, we have noted that because such licensing is based on blocks of spectrum rather than site-specific facilities, licensees generally

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[153] Budget Act, § 6002(d)(3).

[154] *CMRS Third Report and Order*, 9 FCC Rcd at 8145 (para. 355).

[155] Sections 24.422 and 24.822 of the Commission's Rules, 47 C.F.R. §§ 24.422 and 24.822.

would not seek major modification other than in the case of assignments or transfers of control.[156] We seek comment on these proposals.

103. With respect to Phase I licenses, no procedures exist under the current Part 90 rules to enable them to seek modification of their authorization to relocate their currently-authorized base stations. Because of the filing freeze established on May 24, 1991, on 220 MHz applications, licensees who have relocated their 220 MHz stations have done so under Special Temporary Authority (STA). Also, various commenters in the CMRS proceeding asked that they be permitted to file modification applications to cover existing operations under STAs before we accept initial applications in order to avoid mutual exclusivity situations with initial applicants.[157] We will propose, in separate proceeding, procedures for the expedited modification of Phase I licenses that addresses the needs of commenters to cover their STA-authorized services.

3. Special Temporary Authority

104. Under the *CMRS Second Report and Order*, we stated that all paging services and all private mobile licensees reclassified as CMRS and licensed to provide service as of August 10, 1993 were provided a three-year grandfathering period under the Part 90 PMRS rules.[158] In the *CMRS Third Report and Order*, we concluded that "licensee status before the August 10, 1993 deadline is the sole factor in determining whether the licensee will be treated as being in the PMRS until August 10, 1996."[159] We also noted that some reclassified PMRS providers had Part 90 STAs or conditional grants that were in effect. However, we concluded that such STAs or conditional grants would be extended only until August 10, 1996, when their reclassification as CMRS becomes effective.[160] Additionally, reclassified PMRS that were not grandfathered under the Part 90 rules and that had STAs or conditional grants only possessed such grants until the grants' scheduled expiration, or 60 days from the effective date of the *CMRS Third Report and Order*.[161] Such STAs could not

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[156] Amendment of Part 90 of the Commission's Rules To Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, RM-8117, RM-8030, RM-8029, and Implementation of Section 309(j) of the Communications Act - Competitive Bidding: 800 MHz SMR, PP Docket No. 93-253, Further Notice of Proposed Rule Making, 9 FCC Rcd 1647 (1994) (*800 MHz Further Notice*).

[157] *CMRS Third Report and Order*, 9 FCC Rcd at 8141, 8148 (paras. 344, 362).

[158] *CMRS Second Report and Order*, 9 FCC Rcd at 1512-14 (paras. 280-284).

[159] *CMRS Third Report and Order*, 9 FCC Rcd at 8166 (para. 409).

[160] *Id.* at 8156 (para. 384).

[161] *Id.*

quickly to those parties who value them most highly and who are thus most likely to introduce service rapidly to the public. Additionally, competitive bidding will recover for the public a portion of the value of the spectrum, as envisioned in Section 309(j)(3)(C), because the only direct monetary compensation the public currently receives for use of the spectrum is, with few exceptions, the application fee paid by most Commission applicants. Finally, in accordance with Section 309(j)(3)(B), we tentatively conclude that competitive bidding, in conjunction with our allocation and service rules, will promote access to new 220 MHz services and technologies, and disseminate licenses among a wide variety of applicants by encouraging participation by all qualified bidders. In this regard, we propose a set of open competitive bidding procedures, a wide variety of license types and sizes, and a menu of preferences designed to increase opportunities for small businesses who might otherwise face entry barriers.

109. We propose resolving mutually exclusive initial license applications for 220 MHz licenses of three different sizes: nationwide, regional, and EA. We propose to issue three nationwide licenses, each for 10 channels. We propose to issue 20 regional licenses covering 65 channels for regions that are similar to the five geographic regions that we adopted for narrowband PCS. We propose four different channel blocks: one twenty-channel block, one fifteen-channel block, and three ten-channel blocks. We additionally propose to issue 1,376 EA licenses, covering eight licenses in each of the 172 EAs. We propose to award eight licenses, four of which will be ten-channel licenses, and the remainder will be five-channel licenses. Under our auction authority at Section 309(j)(3), if mutually exclusive applications for a national, regional, or EA channel block are accepted for filing, we will award that license through competitive bidding. We request comment on specific bidding procedures, as set forth below. Commenters who oppose our proposal to use competitive bidding to assign licenses in this spectrum should suggest other assignment methods.

2. Competitive Bidding Design for 220 MHz

a. General Competitive Bidding Rules

110. In the *Competitive Bidding Second Report and Order* and its progeny, we established the criteria to be used in selecting from among auction methodologies to use for each particular auctionable service and prescribed rules and procedures for general and specific use.[170] Generally, we concluded that awarding licenses to those parties who value

[170] Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, Second Report and Order, 9 FCC Rcd 2348 (1994) (*Competitive Bidding Second Report and Order*); *recon.* Second Memorandum Opinion and Order, 9 FCC Rcd 7245 (1994) (*Competitive Bidding Second Memorandum Opinion and Order*); Third Report and Order, 9 FCC Rcd 2941 (1994) (*Competitive Bidding Third Report and Order*) (establishing rules for narrowband PCS); *recon.*, Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 10 FCC

them most highly would foster Congress's policy objectives. We noted there that, since a bidder's ability to introduce valuable new services and to deploy them quickly, intensively, and efficiently increases the value of a license to that bidder, an auction design that awards licenses to those bidders with the greatest willingness to pay tends to promote the development and rapid deployment of new services and the efficient and intensive use of the spectrum. We also found that: (1) licenses with strong value interdependencies should be auctioned simultaneously, and (2) multiple round auctions generally will yield more efficient allocations of licenses and higher revenues by providing bidders with information regarding other bidders' valuations of licenses, especially where there is substantial uncertainty as to value.[171] Thus, we concluded, where the licenses to be auctioned are interdependent and their value is expected to be high, simultaneous multiple round auctions would best achieve the Commission's goals for competitive bidding.[172]

b. Competitive Bidding Design for 220 MHz Licenses

111. Simultaneous Multiple Round Competitive Bidding. Based on the factors identified in the *Competitive Bidding Second Report and Order* and our prior auction experiences, we tentatively conclude that simultaneous multiple round auctions are appropriate for the 220 MHz service. Compared with other bidding mechanisms, simultaneous multiple round bidding will generate the most information about license values during the course of the auction and provide bidders with the most flexibility to pursue back-up strategies. As in the case of PCS,[173] the 220 MHz licenses are interdependent, and licensees likely will aggregate and substitute across spectrum blocks and geographic regions. Our experience to date is that simultaneous multiple round bidding is efficient and cost-effective. Additionally, simultaneous multiple round bidding is likely to generate the most information about license values during the course of the auction and facilitate efficient

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Rcd 175 (1995) (*Competitive Bidding Third Memorandum Opinion and Order*); *recon.*, Order On Reconsideration, 9 FCC Rcd 5306 (1994); Fourth Report and Order, 9 FCC Rec 2330 (1994) (establishing rules for Interactive Video and Data Service); Fifth Report and Order, 9 FCC Rcd 5532 (1994) (*Competitive Bidding Fifth Report and Order*) (establishing rules for broadband PCS); *recon.* Fourth Memorandum Opinion and Order, 9 FCC Rcd 6858 (1994) (*Competitive Bidding Fourth Memorandum Opinion and Order*); *recon.* Memorandum Opinion and Order, 9 FCC Rcd 7684 (1994); *recon.* Fifth Memorandum Opinion and Order, 10 FCC Rcd 403 (1995) (*Competitive Bidding Fifth Memorandum Opinion and Order*).

[171] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2360 (para. 69).

[172] *Id.* at 2366 (paras. 109-111).

[173] We adopted simultaneous multiple round auctions as the auction methodology for both broadband and narrowband licenses. *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5544 (paras. 31-32) (broadband PCS) and *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2947-2949 (paras. 17-21) (narrowband PCS).

aggregation of licenses across spectrum bands.[174] We seek comments on this tentative conclusion and on its impact on competitive bidding in the 220 MHz service.

112. Circumstances Leading to Choice of Other Designs. We propose to tailor the auction design to fit the characteristics of the licenses to be awarded.[175] While we tentatively conclude that simultaneous multiple round bidding is the most effective and efficient bidding design for the 220 MHz service, it is possible that another bidding method may be more appropriate for all licenses. Where there is less interdependence among licenses, there is also less benefit to auctioning them simultaneously.[176] When the values of particular licenses to be auctioned are low relative to the costs of conducting a simultaneous multiple round auction, we may need to consider auction designs that are relatively simple, with low administrative costs and minimal costs to auction participants. For example, with large numbers of low value licenses, we may decide that it is preferable to implement a low cost auction method such as single round sealed bidding to minimize cost and expedite the licensing process. [177] We may also wish to consider a single round of bidding in certain auctions where eligibility requirements limit participation to few bidders. [178] We additionally note that the presence of incumbents on certain channels could affect the relative desirability and value of otherwise identical licenses in ways we do not anticipate. We seek comments on any alternative bidding designs and their applicability as a competitive bidding method in the 220 MHz service.

113. Combinatorial Bidding. In general terms, combinatorial bidding allows bidders to bid for multiple licenses as "all or nothing" packages.[179] Combinatorial bidding can be implemented with either simultaneous or sequential auction designs.[180] While there are significant benefits associated with combinatorial bidding, especially in terms of efficient aggregation of licenses, we previously concluded that simultaneous multiple round auctions offer many of these same advantages without the same degree of administrative and

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[174] *See, e.g., Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2946 (para. 13).

[175] *Id.* at 2947 (para. 15).

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] In combinatorial bidding, if a bid for a group of licenses exceeds the sum of the highest bids for the individual licenses that comprise the package, then the package bid would win. We may wish to institute a premium so that the combinatorial bid would win only if it exceeded the sum of the bids for individual licenses by a set amount.

[180] *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2949-2950 (paras. 23-24).

operational complexity and without biasing auction outcomes in favor of combination bids.[181] However, since simultaneous multiple round bidding may potentially prove to be our preferred auction method for awarding 220 MHz licenses, we tentatively conclude that combinatorial bidding will be unnecessary in most 220 MHz auctions. While 220 MHz licenses are likely to be worth more to some bidders as a part of a package, we believe that simultaneous multiple round bidding will provide these bidders with ample opportunity to express the value of interdependent licenses. Moreover, we tentatively conclude that there will not be any extreme discontinuity in value if some licenses in a package are not obtained.[182] We believe that the opportunity to acquire licenses in post-auction transactions and the ability to withdraw bids (upon payment of the bid withdrawal penalty) will limit the risks associated with failing to successfully acquire all of the licenses in a desired package.[183] In circumstances where we do not use simultaneous multiple round bidding, however, we may permit combinatorial bidding. We seek comment on these proposals and tentative conclusions.

c. Bidding Procedures

114. Grouping of Licenses. The Commission determined in the *Competitive Bidding Second Report and Order* that in a multiple round auction, highly interdependent licenses should be grouped together and put up for bid at the same time because such grouping provides bidders with the most information about the pieces of complementary and substitutable licenses during the course of an auction.[184] We also determined that the greater the degree of interdependence among the licenses, the greater the benefit of auctioning a group of licenses together in a simultaneous multiple round auction.[185] Whether we use our preferred approach of a sequence of simultaneous multiple round auctions or sequential individual auctions, the Commission must choose which licenses will be auctioned together. The importance of the choice of license groupings increases with the degree of interdependence among the individual licenses or groups of licenses to be auctioned. Grouping interdependent licenses together and putting them up for bid at the same time will facilitate awarding licenses to bidders who value them the most highly by providing bidders with information about the prices of complementary and substitutable licenses during the

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[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2366 (paras. 106-107).

[185] *Id.* at 2363-2364 (paras. 89-94)

course of an auction.[186] Accordingly, we propose grouping 220 MHz licenses into the various simultaneous auctions by aggregating together those licenses exhibiting the greatest degree of interdependence so that there will be limited interdependence across groups.

115. Choosing which licenses to auction simultaneously requires a judgment about the degree of interdependence, *i.e.*, the extent to which the amount bidders are willing to pay for one license depends on the price of another.[187] Licenses may be interdependent either because they are substitutes or because they are complements. With substitutes, the lower the price of one license, the less a bidder will be willing to pay for another. With complementary licenses, on the other hand, the lower the price of one license, the more a bidder will be willing to pay for another. This is true because generally complementary licenses are worth more as part of a package than individually.[188] For example, bidders are likely to be willing to pay more for two geographically contiguous 220 MHz licenses than two equivalent non-contiguous licenses, and a single bidder may be willing to pay more for the two licenses than would two separate bidders.[189]

116. Based on the foregoing, we tentatively conclude that we will auction all 220 MHz nationwide, regional and EA licenses through a sequential series of simultaneous auctions. In each case, the licenses are complements as well as substitutes, and thus their values are highly interdependent. To maximize the information available to bidders and increase gradually the complexity of the 220 MHz auctions, we propose beginning by auctioning the nationwide licenses and the regional licenses in one simultaneous multiple round auction. After this auction is complete, we propose auctioning the EA licenses in one simultaneous multiple round auction. Our experience with the narrowband regional licenses is that a sizeable portion of auction winners pursued nationwide strategies, aggregating licenses in all regions. This practice would suggest a strong interdependence between nationwide and regional licenses, and the substitutability among licenses with the same amount of spectrum and covering the same geographic area.[190] We therefore believe that grouping the national and regional licenses together would allow bidders to pursue aggregate bidding strategies. We seek comment on these tentative conclusions. Should the nationwide and regional licenses be grouped together? Should the nationwide licenses be auctioned first, and then the regional and EA licenses auctioned together? Should we simply auction each type of license by itself, and then move on to the next size or group - *i.e.* nationwide, then regional, then EA? While we observe that, given the large number of licenses involved, it

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[186] *See, e.g., Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2951 (para. 26).

[187] *Id.*

[188] *Id.*

[189] *Id.*

[190] *Id.* at 2948 (paras. 17-19).

might be administratively impractical to auction nationwide, regional and EA licenses in a single auction, we ask nonetheless whether the interdependencies among all 220 MHz licenses are sufficiently strong that we should make every effort to have a single 220 MHz auction. We also specifically solicit comments on any alternative license groupings that would benefit bidders in ways not suggested by the above-proposed groupings.

117. Bid Increments. As with the rules we adopted for previous multiple round auctions for other services, we propose to establish minimum bid increments for bidding in each round of the auction, based on the same considerations in our prior orders.[191] Where we use simultaneous multiple round auctions, it is important to specify minimum bid increments. The bid increment is the amount or percentage by which the bid must be raised above the previous round's high bid in order to be accepted as a valid bid in the current bidding round.[192] The application of a minimum bid increment speeds the progress of the auction and, along with activity and stopping rules, helps to ensure that the auction comes to closure within a reasonable period of time.[193] Establishing an appropriate minimum bid increment is especially important in a simultaneous auction with a simultaneous closing rule. In that case, all markets remain open until there is no bidding on any license and a delay in closing one market will delay the closing of all markets.[194]

118. We propose to start the 220 MHz auction with relatively large bid increments, and adjust the increments as bidding activity indicates.[195] Because we tentatively propose to use simultaneous multiple round auctions for most 220 MHz licenses, we believe that it is necessary to impose a minimum bid increment to ensure that the 220 MHz auctions conclude within a reasonable period. We believe that it is important in establishing the amount of the minimum bid increment to express such increment in both a percentage and fixed dollar amount. This will ensure a timely completion of the auction even if bidding begins at a very low dollar amount.[196] Accordingly, we may impose a minimum bid increment of 5 percent of the high bid in the previous round or $0.01 per pop per MHz, whichever is greater, in 220 MHz auctions where multiple round bidding is used.[197] We believe that applying a $0.01 per pop per MHz minimum bid increment in addition to the percentage calculation is appropriate to provide flexibility for a wide range of different license values and will ensure

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[191] *Id.* at 2953 (paras. 30-32).

[192] *Id.* at 2953 (para. 30).

[193] *Id.*

[194] *Id.*

[195] *Id.*

[196] *Id.* at 2953 (para. 31).

[197] *Id.*; *see also 900 MHz Second Report and Order*, at para. 80.

timely closure of auctions, even where bidding begins at a very low dollar amount.[198] We also propose to retain the discretion to vary the minimum bid increments for individual licenses or groups of licenses at any time before or during the course of the auction, based on the number of bidders, bidding activity, and the aggregate high bid amounts. We propose to retain the discretion to keep an auction open if there is a round in which no bids or proactive waivers are submitted, as discussed in paragraph 125, *infra*. We seek comment on these proposals.

119. Stopping Rules for Multiple Round Auctions. In multiple round auctions, a stopping rule must be established for determining when the auction is over.[199] Three types of stopping rules exist that could be employed in simultaneous multiple round auctions: markets may close individually, simultaneously or a hybrid approach may be used.[200] Under a market-by-market approach, bidding closes on each license after one round passes in which no new acceptable bids are submitted for that particular license. With a simultaneous stopping rule, bidding remains open on all licenses until there is no bidding on any license.[201] Under this approach, all markets will close if a single round passes in which no new acceptable bids are submitted for any license. Using a hybrid approach, we may use a simultaneous stopping rule, along with an activity rule designed to bring the markets subject to the simultaneous stopping rule to a close within a reasonable period of time, for the higher value licenses. And for lower value licenses, where the loss from eliminating some back-up strategies is less, we may use simpler market-by-market closing. Such a hybrid approach might simplify and speed up the auction process without significantly sacrificing efficiency or expected revenue.[202]

120. For 220 MHz, we believe that a simultaneous stopping rule is preferable for the nationwide and regional licenses. These types of licenses are expected to have relatively high values and will be fewer in number than the EA licenses, which will reduce the complexity of implementing a simultaneous stopping rule. Since we may impose an activity rule, as discussed below, we believe that allowing simultaneous closings of all markets will

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[198] *900 MHz Second Report and Order,* at para. 81.

[199] *Id.; see also Competitive Bidding Fifth Report and Order,* 9 FCC Rcd at 5550 (para. 46); *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2954 (para. 33); and *MMDS Report and Order*, at paras. 114-123.

[200] *Competitive Bidding Third Report and Order,* 9 FCC Rcd at 2954 (para. 33); *see also 900 MHz Second Report and Order*, at para. 81.

[201] This approach has the advantage of providing bidders full flexibility to bid for any license as more information becomes available during the course of the auction, but it may lead to very long auctions, unless an activity rule is imposed. Furthermore, such a stopping rule may be vulnerable to strategic delay by bidders seeking to impede closure of the auction.

[202] *See, e.g., Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2954 (para. 33).

afford bidders flexibility to pursue back up strategies without running the risk that bidders will hold back their bidding until the final rounds.[203] Because of the large number of EA licenses, we may use either a hybrid stopping rule or allow markets to close individually in auctions for these licenses.[204] However, if we determine that a simultaneous stopping rule will be simpler to administer than either a hybrid or a market-by-market stopping rule, we may use a simultaneous stopping rule for the EA licenses as well. Conversely, if we conclude that a simultaneous stopping rule is too administratively complex, we may employ a market-by-market or hybrid stopping rule for the higher value 220 MHz licenses. We propose announcing by Public Notice before each auction the stopping rule that we will use. We seek comments on these proposals.

121. In the event we adopt a simultaneous stopping rule, we propose to retain the discretion to declare at any point in a simultaneous multiple round auction that the auction will end after one additional round or some other specified number of additional rounds. This will prevent bidders from strategically delaying an auction by bidding on one license in order to delay the closing of bidding on all licenses.[205] This proposal would also ensure ultimate Commission control over the duration of the auction. Moreover, we tentatively reserve the discretion to vary the duration of bidding rounds or the interval at which bids are accepted (*e.g.*, run two or more rounds per day rather than one), in order to move the auction toward closure more quickly.[206] If this mechanism is used, we would most likely shorten the duration and/or intervals between bidding rounds where there are relatively few licenses to be auctioned, where the value of the licenses is relatively low or in early rounds to speed the auction process. Where license values are expected to be high or where large numbers of licenses are being auctioned, we propose increasing the duration and/or intervals between bidding rounds.[207] We would announce by Public Notice, and may vary by announcement during an auction, the duration and intervals between bidding rounds. We seek comment on these proposals.

122. Activity Rules. As discussed above, in order to ensure that simultaneous auctions with simultaneous stopping rules close within a reasonable period, we believe that it may be necessary to impose an activity rule to prevent bidders from waiting until the end of the auction before participating. Because simultaneous stopping rules generally keep all markets open as long as anyone wishes to bid, they also create an incentive for bidders to hold back until prices approach equilibrium before making a bid and risking payment of a

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[203] *Id.* at 2954 (para. 34) and *900 MHz Second Report and Order*, at para. 82.

[204] *See, e.g., Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2954 n. 15 (para. 34).

[205] *Id.* at 2955 (para. 35).

[206] *Id.*

[207] *Id.*

penalty for withdrawing.[208] As noted above, this could lead to very long auctions. An activity rule is less important when markets close one-by-one because failure to participate in any given round may result in losing the opportunity to bid at all, if that round turns out to be the last.

123. In the *Competitive Bidding Second Report and Order*, we adopted the Milgrom-Wilson activity rule as our preferred activity rule where a simultaneous stopping rule is used.[209] We have subsequently adopted or proposed the Milgrom-Wilson rule in each of our simultaneous multiple round auctions.[210] The Milgrom-Wilson approach encourages bidders to participate in early rounds by limiting their maximum participation to some multiple of their minimum participation level.[211] Bidders are required to declare their maximum eligibility in terms of pops-MHz, and make an upfront payment equal to $0.02 per MHz-pop.[212] That is, bidders will be limited to bidding on licenses encompassing no more than the number of MHz-pops covered by their upfront payment. Licenses on which a bidder is the high bidder from the previous round, as well as licenses on which a new valid bid is place, count toward this MHz-pop limit. Under this approach, bidders will have the flexibility to shift their bids among any licenses for which they have applied so long as the total MHz-pops encompassed by those licenses does not exceed the number for which they made an upfront payment. Moreover, bidders will be able to secure the freedom to participate at whatever level they deem appropriate by making a sufficient upfront payment. To preserve their maximum eligibility, however, bidders would be required to maintain some minimum activity level during each round of the auction.

124. Under the Milgrom-Wilson proposal, the minimum activity level, measured as a fraction of the self declared maximum eligibility, will increase during the course of the auction. For this purpose, Milgrom and Wilson divide the auction into three stages.[213] During the first stage of the auction, a bidder is required to be active on licenses

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[208] *Id.* at 2955 (para. 36); *see also 900 MHz Second Report and Order*, at para. 83.

[209] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2372-2373 (paras. 144-145).

[210] *900 MHz Second Report and Order*, at para. 88; *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2955-2957 (paras. 36-40); and *MMDS Report and Order*, at paras. 114-123.

[211] *See, e.g., Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2955 (para. 37).

[212] *See* para. 135, *infra*, for discussion of upfront payments.

[213] The auction would move from stage one to stage two when, after three rounds of bidding, the high bid has changed on five percent or fewer of the licenses (measured in terms of MHz-pops) being auctioned. Stage three would begin when the high bid has changed on two percent or fewer licenses (measured in terms of MHz-pops) over three rounds. We retain the discretion to modify this method and announce such modification by Public Notice. *See, e.g., Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2956 n. 16 (para. 38).

encompassing one-third of the MHz-pops for which it is eligible. The penalty for falling below that activity level is a reduction in eligibility.[214] At this stage, bidders would lose three MHz-pops in maximum eligibility for each MHz-pop below the minimum required activity level. In other words, each bidder would retain eligibility for three times the MHz-pops for which it is an active bidder, up to the MHz-pops covered by the bidder's upfront payment.[215] In the second stage, bidders are required to be active on two-thirds of the MHz-pops for which they are eligible. The penalty for falling below that activity level would be a loss of 1.5 MHz-pops in eligibility for each MHz-pop below the minimum required activity level. In the third stage, bidders are required to be active on licenses encompassing all of the MHz-pops for which they are eligible.[216] The penalty for falling below that activity level is a loss of one MHz-pop in eligibility for each MHz-pop below the minimum required activity level. Each bidder thus retains eligibility equal to its current activity level (1 times the MHz-pops for which it is an active bidder). We seek comment on this proposed activity rule.

125. Finally, to avoid the consequences of clerical errors and to compensate for unusual circumstances that might delay a bidder's bid preparation or submission on a particular day, we propose permitting each bidder to request and automatically receive a waiver of the activity rule once every three rounds.[217] In the *Competitive Bidding Fourth Memorandum Opinion and Order*, we stated that the Commission retained the discretion to modify the method and timing of submitting waivers and to allow for two types of waivers - "proactive" and "automatic."[218] As explained therein, proactive waivers invoked in a round in which there are no new valid bids will keep an auction open, while an automatic waiver submitted in a round in which no other bidding activity occurs will not keep an auction open.[219] Proactive waivers are submitted by the bidder, while automatic waivers would be submitted automatically for a bidder whenever a bidder's eligibility would be reduced because of insufficient bidding activity and a waiver is available unless the bidder specifically chooses not to have the automatic waiver apply.[220] Automatic activity rule waivers would be automatically applied by the bidding system in any round where a bidder's activity is below the requested activity level as long as the bidder has waivers remaining.

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[214] *Id.* at 2956 (para. 38).

[215] *Id.*

[216] *Id.*

[217] *Id.* at 2956 (para. 39).

[218] *Competitive Bidding Fourth Memorandum Opinion and Order*, 9 FCC Rcd at 6861 (para. 15).

[219] *Id.*

[220] *Id.*

126. Under this proposal, we would announce by Public Notice how many waivers bidders would receive. A waiver would permit a bidder to maintain its eligibility at the same level as in the round for which the waiver is applied. A waiver, however, could not be used to correct an error in the amount bid. This would ensure that bidders are not arbitrarily penalized by having their eligibility reduced due to an accidental act or circumstances not under the bidder's control. We seek comments on these proposals.

127. We tentatively conclude that the Milgrom-Wilson approach will best achieve the Commission's goals of affording bidders flexibility to pursue back up strategies, while at the same time ensuring that simultaneous auctions are concluded within a reasonable period of time. Accordingly, we propose imposing such an activity rule in conjunction with a simultaneous stopping rule to award higher value 220 MHz licenses. We propose, however, to use a simplified waiver procedure whereby bidders will be permitted five automatic waivers from the activity rule during the course of an auction.[221] With respect to the EA licenses to be awarded by simultaneous auction, we may determine that a market-by-market stopping rule is more appropriate, in which case no activity rule will be necessary. However, if a simultaneous stopping rule is used for these licenses we may select one of the available simpler activity rules. Moreover, we may determine that the Milgrom-Wilson activity rule is too complicated or costly to administer, and then may want to alternatively impose one of these less complex activity rules in auctions for larger 220 MHz licenses as well. Under this proposal, we would announce by Public Notice before each auction the activity rule that will be employed in that particular auction.[222] We seek comment on each of these proposals.

128. While we are proposing the adoption of the Milgrom-Wilson activity rule by this Further Notice, we also retain the discretion to use an alternative activity rule for 220 MHz if we determine that the Milgrom-Wilson rule is too complicated or costly to administer, as stated above. Any such change would be announced by Public Notice before commencement of the auction. We seek comment on this proposal.

129. Duration of Bidding Rounds. We propose to reserve the discretion to vary the duration of bidding rounds or the interval at which bids are accepted (*e.g.*, run more than

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[221] *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2956-2957 (para. 40).

[222] Our rules allow the Commission to make any such modifications to activity rules as appropriate for a particular auction. We here propose to retain the discretion to choose among the following other activity rules on a case-by-case basis: (1) a Milgrom-Wilson rule with one or two stages rather than three, (2) a requirement that bidders be active on a single license in each round, (3) a rule that a bidder's activity level remain within a single range throughout the auction (*i.e.*, remain active on some percentage of the total pops-MHz covered by the upfront payment), (4) a rule that replaces the maximum allowed bidding levels in the Milgrom-Wilson rule with a bidding premium for exceeding those maximums, or (5) a combination of the foregoing rules. *Id.* at 2957 n. 17.

one round per day) in order to move the auction toward closure more quickly.[223] Under this proposal, we would announce any changes to the duration of and intervals between bidding rounds either by public notice prior to the auction or by announcement during the auction. We seek comment on this issue.

3. Procedural and Payment Issues

a. Pre-Auction Application Procedures

130. In this section we propose general competitive bidding rules and procedures. These rules are structured to ensure that bidders and licensees are qualified and will be able to construct systems quickly and offer service to the public.[224] By ensuring that bidders and license winners are serious, qualified applicants, these rules will minimize the need to re-auction licenses and prevent delays in the provision of 220 MHz service to the public. In addition, we propose adopting general procedural and processing rules based on the rules governing PCS in Part 24 of the Commission's rules.[225] In the *CMRS Third Report and Order*, we concluded that for purposes of determining whether CMRS services are substantially similar, 220 MHz offerings have the potential to compete with other commercial mobile offerings as technology evolves and the offerings begin to gain commercial acceptance.[226] For purposes of this Notice, we are presumptively treating 220 MHz services as CMRS offerings. We thus believe it is appropriate to propose to base our procedural and processing rules on the Part 24 PCS rules, as PCS is substantially similar to the 220 MHz service.[227]

131. In the *Competitive Bidding Second Report and Order*, the Commission established general competitive bidding rules and procedures that may be modified on a service-specific basis.[228] We propose following the procedural and payment rules established in the *Competitive Bidding Second Report and Order* with certain minor modifications designed to address particular characteristics of the 220 MHz service.

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[223] *See, e.g., 900 MHz Second Report and Order*, at para. 86.

[224] *Id.* at para. 97; *see also Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2957 (para. 41).

[225] Subparts F and H of Part 24 of the Commission's Rules, 47 C.F.R Part 24, Subparts F and H.

[226] *CMRS Third Report and Order*, 9 FCC Rcd at 8026 (para. 67).

[227] *See* paras. 32-34, 58-61 and 88-91, *supra*, for comparisons of 220 MHz service with PCS.

[228] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2375-2376 n. 120 (paras. 160-164) (adopting Sections 1.2105-1.2109 of the Commission's Rules, 47 C.F.R. §§ 1.2105-1.2109).

132. Short Form Applications. In the *Competitive Bidding Second Report and Order*, we determined that we should require only a short-form application prior to competitive bidding, and that only winning bidders should be required to submit a long-form license application after the auction.[229] We have previously determined that such a procedure would fulfill the statutory requirements and objectives and adequately protect the public interest.[230] Accordingly, we propose to extend the application of these rules to the competitive bidding process for 220 MHz licenses.

133. We propose that, before each 220 MHz auction, the Wireless Telecommunications Bureau will release an initial Public Notice announcing the auction. These initial Public Notices would specify the licenses to be auctioned and the time, place and method of competitive bidding to be used, including applicable bid submission procedures, bid withdrawal procedures and penalties, stopping rules and activity rules and other important information.[231] These initial Public Notices will also specify the filing window for short-form applications.

134. Amendments and Modifications. Under this proposal, all bidders would be required to submit short-form applications on FCC Form 175 by the date specified in the applicable initial Public Notice. If the Commission receives only one application that is acceptable for filing for a particular license, and thus there is no mutual exclusivity, the Commission would by Public Notice cancel the auction for this license and establish a date for the filing of a long-form application, the acceptance of which will trigger the procedures permitting petitions to deny.[232] To encourage maximum bidder participation, we propose to provide applicants with an opportunity to correct minor defects in their short-form applications prior to the auction. On the date set for submission of corrected applications, applicants that on their own discover minor errors in their applications (*e.g.*, typographical errors, incorrect license designations) also would be permitted to file corrected applications. Recently, the Commission waived the *ex parte* rules as they applied to the submission of amended short-form applications for the A and B blocks of the broadband PCS auctions, to maximize applicants' opportunities to seek Commission staff advice on making such amendments.[233] We propose to apply the same principles to the 220 MHz auctions. Under our proposal, applicants would not be permitted to make any major modifications to their

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[229] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2376 (para. 165).

[230] *Id.* at 2375-2376 (paras. 161-164).

[231] *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2958 (para. 42).

[232] *Id.* at 2958 (para. 43); *see also 900 MHz Second Report and Order*, at paras. 105-106.

[233] Public Notice, Commission Announces that Mutually Exclusive "Short Form" Applications (Form 175) to Participate in Competitive Bidding Process ("Auctions") Are Treated as Exempt for *Ex Parte* Purposes, 9 FCC Rcd 6760 (1994).

applications, including changes in markets and changes in control of the applicant, or additions of other bidders into the bidding consortia, until after the auction. Applicants could modify their short-form applications to reflect formation of consortia or changes in ownership at any time before or during an auction, provided such changes would not result in a change in control of the applicant, and provided that the parties forming consortia or entering into ownership agreements have not applied for licenses in any of the same geographic license areas.[234] In addition, applications that are not signed would be dismissed as unacceptable. After reviewing the corrected applications, a Public Notice would be released, announcing the names of all applicants whose applications have been accepted for filing. Applicants identified in the Public Notice would then be required to submit the full amount of their upfront payment, as defined below, to the Commission's lock-box bank by the date specified in the Public Notice, which generally will be no later than 14 days before the scheduled auction. After the Commission receives from its lock-box bank the names of all applicants who have submitted timely upfront payments, the Commission would then issue a Public Notice announcing the names of all applicants that have been determined to be qualified to bid. An applicant who fails to submit a sufficient upfront payment to qualify it to bid on any license being auctioned will not be identified on this Public Notice as a qualified bidder. Each applicant listed on this fourth Public Notice will be issued a bidder identification number and further information and instructions regarding the auction procedures. We seek comments on these proposals.

b. Upfront Payment

135. We propose to require all auction participants to tender in advance to the Commission a substantial upfront payment as a condition of bidding in order to ensure that only serious, qualified bidders participate in auctions and to ensure payment of the penalty[235] in the event of bid withdrawal or default. We propose an upfront payment formula of $2,500 or $0.02 per pop per MHz for the largest combination of MHz-pops, whichever is greater,[236] and seek comment as to whether this upfront payment will discourage frivolous or insincere bidders.[237] This upfront payment calculation will define the upper bound of MHz-pops on which a bidder will be permitted to bid in any round, and so should be calculated by bidders to reflect the maximum MHz-pops from any combination of licenses on which they

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[234] *Competitive Bidding Second Memorandum Opinion and Order*, 9 FCC Rcd at 7254 (para. 52).

[235] *See* para. 139, *infra*, for discussion of the payment.

[236] We specified in the *Competitive Bidding Second Report and Order* that, while generally approving a formula of $0.02 per pop per MHz, we reserved the right to revise or waive the upfront payment in appropriate circumstances. *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2378 (para. 172).

[237] *Id.* at 2378 (para. 171)

may want to bid in a single round.[238] We believe that this formula is appropriate for 220 MHz services. Using this formula will provide bidders with the flexibility to change their strategy during an auction and to bid on a larger number of smaller licenses or a smaller number of larger licenses, so long as the total MHz-pops combination does not exceed that amount covered by the upfront payment. If licenses covering the nation are being auctioned simultaneously, a bidder would not be required to file an upfront payment representing national coverage unless it intends to bid on licenses covering the entire nation in any single bidding round. Under this proposal, we would announce the upfront payment amount for each license in a Public Notice issued prior to the auction. We seek comments on these proposals.

136. Upfront payments generally will be due no later than 14 days before a scheduled auction.[239] This period should be sufficient to allow the Commission sufficient time to process upfront payment data and release a Public Notice listing all qualified bidders. The specific procedures to be followed in the tendering and processing of upfront payments are set forth in Section 1.2106 of the Commission's rules.

c. Down Payment and Full Payment

137. In the *Competitive Bidding Second Report and Order*, we established a 20 percent down payment requirement for winning bidders to discourage default between the auction and licensing and to ensure payment of the penalty if such default occurs.[240] We concluded that a 20 percent down payment was appropriate to ensure that auction winners have the necessary financial capabilities to complete payment for the license and to pay for the costs of constructing a system, while not being so onerous as to hinder growth or diminish access.[241] We also determined that this amount was appropriate for the broadband PCS auctions.[242] We believe that the reasoning employed is equally applicable to the 220 MHz service. Thus, we tentatively conclude that, with the exception of small businesses eligible for installment payments,[243] winning bidders in 220 MHz auctions must supplement their upfront payments with a down payment sufficient to bring their total deposits up to 20

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[238] As discussed *infra*, however, we would retain the flexibility to consider using a simpler payment requirement if circumstances warrant. The upfront payment amount would be announced by Public Notice before each auction.

[239] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2380-2381 (para. 188).

[240] *Id.* at 2381 (para. 190).

[241] *Id.*

[242] *See Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5563 (para. 73).

[243] *See* paras. 166-169, *infra*, for discussion.

percent of their winning bid(s). Under this proposal, if the upfront payment already tendered by a winning bidder, after deducting any bid withdrawal and default penalties due, amounts to 20 percent or more of its winning bids, no additional deposit would be required. If the upfront payment amount on deposit is greater than 20 percent of the winning bid amount after deducting any bid withdrawal and default penalties due, the additional monies would be refunded. If a bidder has withdrawn a bid or defaulted but the amount of the penalty cannot yet be determined, the bidder would be required to make a deposit of 20 percent of the amount bid on such licenses.[244] When it becomes possible to calculate and assess the penalty, any excess deposit would be refunded. Upfront payments would be applied to such deposits and to bid withdrawal and default penalties due before being applied toward the bidder's down payment on licenses the bidder has won and seeks to acquire.[245] We seek comment on these proposals.

138. We propose to require winning bidders to submit the required down payment by cashier's check or wire transfer to our lock-box bank by a date to be specified by Public Notice, generally within five (5) business days following the close of bidding.[246] All auction winners generally would be required to make full payment of the balance of their winning bids within five (5) business days following Public Notice that the license is ready for grant. Under this proposal, the Commission would grant the license within ten (10) business days after receiving full payment.[247] We seek comment on this proposal.

d. Bid Withdrawal, Default and Disqualification

139. In either a sequential or simultaneous auction, it is critically important that potential bidders understand that there will be a substantial payment assessed if they withdraw a high bid, are found not to be qualified to hold licenses or are unable to pay a balance due.[248] We therefore propose the following withdrawal, default and disqualification rules. Any bidder who withdraws a high bid during an auction before the Commission declares bidding closed, or defaults by failing to remit the required down payment within the prescribed time, would be required to reimburse the Commission in the amount of the difference between its high bid and the amount of the winning bid the next time the license is

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[244] *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2960 (para. 48).

[245] *Id.*

[246] Additionally, we propose adopting an installment payment option for small businesses that are winning bidders in the 220 MHz auction in paragraphs 166-169, *infra*.

[247] *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2960 (para. 48).

[248] *Id.* at 2960-61 (para. 49).

offered by the Commission, if the subsequent winning bid is lower.[249] After bidding closes, a defaulting auction winner would be assessed an additional payment of three percent of the subsequent winning bid or three percent of the amount of the defaulting bid, whichever is less.[250] The additional three percent payment is designed to encourage bidders desiring to withdraw their bids, to do so before bidding ceases. This additional payment would also apply if an auction winner were disqualified or failed to remit the balance of its winning bid after having made the required down payment. We would hold deposits made by defaulting or disqualified auction winners until full payment of the additional assessment.[251] We believe that these payments will discourage default and ensure that bidders have adequate financing and that they meet all eligibility and qualification requirements. A defaulting auction winner is ineligible to participate in any reduction which includes the license on which it defaulted. In addition, if a default or disqualification involves gross misconduct, misrepresentation or bad faith by an applicant, the Commission would also retain the ability to declare the applicant and its principals ineligible to bid in future auctions, and would be able to take any other action that it deemed necessary, including institution of proceedings to revoke any existing licenses held by the applicant. We seek comments on these proposed default rules.

140. In the event that an auction winner defaults or is otherwise disqualified after an auction is closed, an issue arises as to whether the Commission should hold a new auction or simply offer the license to the second-highest bidder. We believe that, as a general rule, when an auction winner defaults or is otherwise disqualified after having made the required down payment, the best course of action is to re-auction the license either to existing or new applicants.[252] Although we recognize that this may cause a brief delay in the initiation of service to the public, during the time between the original auction and the disqualification circumstances may have changed so significantly as to alter the value of the license to auction

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[249] In the unlikely event that there is more than one bid withdrawal on the same license, we would hold each withdrawing bidder responsible only for the difference between its withdrawn bid and the amount of the winning bid the next time the license is offered by the Commission. This procedure would ensure that each bidder who withdraws is responsible for its bid.

[250] Sections 1.2104(g) and 1.2109 of the Commission's Rules, 47 C.F.R. §§ 1.2104(g), 1.2109. If a license is re-offered by auction, the "winning bid" refers to the high bid in the auction in which the license is re-offered. If a license which is the subject of withdrawal or default is instead offered to the highest losing bidders in the initial auction, the "winning bid" refers to the bid of the highest bidder who accepts the offer. Losing bidders would not be required to accept the offer, *i.e.*, they may decline without penalty. We wish to encourage losing bidders in simultaneous multiple round auctions to bid on other licenses, and therefore would not hold them to their losing bids on a license for which a bidder has withdrawn a bid or on which a bidder has defaulted.

[251] In rare cases in which it would be inequitable to retain a down payment, we will entertain requests for waiver of this provision.

[252] *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2962 (paras. 51-52).

participants as well as to parties who did not participate.[253] In this situation, we believe that awarding licenses to the parties that value them most highly can best be assured though a re-auction.[254] However, if the default occurs within five (5) businesses days after bidding has closed, the Commission would retain the discretion to offer the license to the second highest bidder at its final bid level, or if that bidder declines the offer, to offer the license to other bidders (in descending order of their bid amounts) at their final bid levels. If only a small number of relatively low value licenses are to be re-auctioned, the Commission may choose to offer the license to the highest losing bidders since the cost of running an auction may not exceed the benefits. We invite comments on these proposals.

141. If a new auction becomes necessary because of default or disqualification more than five (5) business days after bidding has ended, we propose allowing the Commission to afford new parties an opportunity to file applications because so much time is likely to have passed that different parties may be interested in bidding and existing applicants may have different valuations of the license. One of our primary goals in conducting auctions is to assure that all serious interested bidders are in the pool of qualified bidders at any re-auction.[255] We believe that achievement of this goal outweighs the short delay that we recognize may result from allowing new applications in a re-auction. Indeed, if we were not to allow new applicants in a re-auction, interested parties may be forced into a post-auction transaction to obtain the license, which would itself delay service to the public and deny recovery by the government of a reasonable portion of the value of the spectrum. We seek comment on this proposal.

142. Under our proposal, if the winning bidder makes the down payment in a timely manner, a long-form application filed on FCC Form 600 (as modified) would be required to be filed by a specified date, generally within ten (10) business days after the close of the auction.[256] After the Commission receives the winning bidder's down payment and the long-form application, we would review the long-form application to determine if it is acceptable for filing.[257] Upon acceptance for filing of the long-form application, the Commission would release a Public Notice announcing this fact, triggering the filing window for petitions to deny. If the Commission denies all petitions to deny, and is otherwise satisfied that the applicant is qualified, a Public Notice announcing the grants will be issued. Winning bidders would have five (5) business days after the issuance of the Public Notice to complete

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[253] *Id.*

[254] *Id.*

[255] *Id.*

[256] *Id.* at 2962 (para. 53).

[257] *Id.*

payment of their licenses. The Commission would then have ten (10) business days to grant the licenses. We seek comment on this proposal.

143. We propose to adopt a modified version of the application processing rules contained in Part 22 of the Commission's rules for 220 MHz.[258] These rules would govern application filing and content requirements, waiver procedures, procedures for return of defective applications, regulations regarding modification of applications, and general application processing rules. We also propose adopting petition to deny procedures based on Section 22.30 of the Commission's rules.[259] In addition, we propose to adopt rules similar to Section 22.943 of our existing rules[260] to prevent the filing of speculative applications and pleadings designed to extract money from sincere 220 MHz applicants.[261] In this regard, we would limit the consideration that an applicant or petitioner is permitted to receive for agreeing to withdraw a petition to deny or an application to the legitimate and prudent expenses of the withdrawing applicant or petitioner. We seek comments on these proposals.

144. In the *Competitive Bidding Third Report and Order* auction rules, we concluded that the Commission need not conduct a hearing before denial if it determines that an applicant is not qualified and no substantial issue of fact exists concerning that determination.[262] We propose extending that conclusion to this service. In the event that the Commission identifies substantial and material issues of fact in need of resolution, Section 309(i)(2) of the Communications Act permits in any hearing the submission of all or part of evidence in written form and allows employees other than administrative law judges to preside over the taking of written evidence. We propose incorporating these principles into our 220 MHz procedural rules. We seek comment on these proposals.

4. Regulatory Safeguards

a. Transfer Disclosures and Anti-Trafficking Provisions

145. The Communications Act, as amended by the 1993 Budget Act, directs the Commission to "require such transfer disclosures and anti-trafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the

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[258] *Id.* at 2963 (para. 55).

[259] *Id.*

[260] 47 C.F.R. § 22.943.

[261] *Id.*

[262] *Id.* at 2964 (para. 57).

methods employed to issue licenses and permits."[263] In the *Competitive Bidding Second Report and Order*, the Commission adopted safeguards designed to ensure that the requirements of Section 309(j)(4)(E) are satisfied.[264] We propose applying specific rules governing unjust enrichment by small businesses, which are discussed below. In addition, we propose applying the transfer disclosure requirements contained in Section 1.2111 (a) of our rules to all 220 MHz licenses obtained through the competitive bidding process. Generally, applicants transferring their licenses within three years after the initial license grant will be required to file, together with their transfer application, the associated contracts for sale, option agreements, management agreements, and all other documents disclosing the total consideration received in return for the transfer of its license. We propose giving particular scrutiny to auction winners who have not yet begun commercial service and who seek approval for a transfer of control or assignment of their licenses after the initial license grant, in order to determine if any unforeseen problems relating to unjust enrichment have arisen outside the small business context. In addition, this reporting requirement will provide the Commission with valuable information that will enable us to evaluate how well the various auction methods have achieved our objectives. We seek comment on this proposal.

b. Performance Requirements

146. The Communications Act requires the Commission to "include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services."[265] In this Notice, we are proposing specific performance requirements at Part IV(C)(5), *supra,* and seeking comment on them. We believe these proposed requirements, if adopted, would be sufficient to comply with the performance requirements of the Act. Accordingly, we propose not adopting any additional performance requirements in this section. We seek comment on this proposal.

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[263] 47 C.F.R. § 22.943.

[264] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2384-2388 (paras. 210-226) and at 2394-2395 (paras. 258-265).

[265] Communications Act, § 309(j)(4)(B), 47 U.S.C. § 309(j)(4)(B).

c. Rules Prohibiting Collusion

147. In the *Competitive Bidding Second Report and Order* we adopted special rules prohibiting collusive conduct in the context of competitive bidding.[266] We indicated that such rules would serve the objectives of the Budget Act by preventing parties, especially the largest firms, from agreeing in advance to bidding strategies that divide the market according to their strategic interests and disadvantage other bidders. We propose applying these rules to all auctionable services, including the 220 MHz service. The rule prohibits bidders from communicating with one another after short-form applications have been filed regarding the substance of their bids or bidding strategies, and also prohibits bidders from entering into consortium arrangements or joint bidding agreements after the deadline for short-form applications has passed.[267] In the *Competitive Bidding Second Report and Order*, we modified the rule so that bidders who have not filed Form 175 applications for licenses in any of the same geographic markets may enter into such discussions, consortia, or arrangements, or add equity partners, during the course of an auction, because of the low risk of anticompetitive conduct among bidders that have not applied for licenses in any of the same geographic areas.[268] Further, in the *Competitive Bidding Fourth Memorandum Opinion and Order*, we noted that communications among bidders concerning matters unrelated to the license auctions would be permitted.[269] We seek comment on this proposal.

148. In addition, bidders would be required to identify on their Form 175 applications all parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements or understandings which relate to the competitive bidding process.[270] Bidders will also be required to certify that they have not entered and will not enter into any explicit or implicit agreements, arrangements or understandings with any parties, other than those identified, regarding the amount of their bid, bidding strategies or the particular properties on which they will or will not bid. After the short-form applications are filed and prior to the time that the winning bidder has made its required down payment, all bidders will be prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies with other bidders,

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[266] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2386-88 (paras. 221-226) (adopting Section 1.2105(c) of the Commission's Rules, 47 C.F.R. § 1.2105(c)).

[267] Section 1.2105(c)(1) of the Commission's Rules, 47 C.F.R. § 1.2015(c)(1).

[268] Section 1.2105(c)(3) of the Commission's Rules, 47 C.F.R. § 1.2105(c)(3).

[269] *Competitive Bidding Fourth Memorandum Opinion and Order*, 9 FCC Rcd at 6869 (para. 59). *See also* Letter from R. Allen, Acting Chief, Commercial Radio Division to R. M. Senkowski (Dec. 1, 1994) (discussions that indirectly provide information that affects bidding strategy are also precluded by anti-collusion rules).

[270] *See., e.g., 900 MHz Second Report and Order*, at para. 95; *see also Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2967 (para. 64).

unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application.[271] We seek comment on this proposal.

149. We also propose requiring winning bidders to attach as an exhibit to the Form 600 application a detailed explanation of the terms and conditions and parties involved in any bidding consortia, joint venture, partnership or other agreement or arrangement they had entered into relating to the competitive bidding process prior to the close of bidding.[272] All such arrangements must have been entered into prior to the filing of short-form applications. Where specific instances of collusion in the competitive bidding process are alleged during the petition to deny process, the Commission would be able to conduct an investigation or refer such complaints to the United States Department of Justice for investigation.[273] Bidders who are found to have violated the antitrust laws, in addition to any penalties they incur under the antitrust laws, or who are found to have violated the Commission's rules in connection with participation in the auction process may be subject to a variety of sanctions, including forfeiture of their down payment or their full bid amount, revocation of their license(s), and may be prohibited from participating in future auctions. We seek comment on the applicability of these rules to licenses in the 220 MHz service.

5. Designated Entity Provisions

a. Introduction

150. The Communications Act, as amended by the 1993 Budget Act, directs the Commission to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services."[274] The statute requires the FCC to "consider the use of tax certificates, bidding preferences, and other procedures" in order to achieve this congressional goal. In addition, Section 309(j)(3)(B) provides that in establishing eligibility criteria and bidding methodologies the Commission shall promote "economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."[275] Finally,

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[271] *Id.*

[272] *900 MHz Second Report and Order*, at para. 96.

[273] *Id.*

[274] 47 U.S.C. § 309(j)(4)(D).

[275] 47 U.S.C. § 309(j)(3)(B).

Section 309(j)(4)(A) provides that to promote these objectives the Commission shall consider alternative payment schedules including lump sums or guaranteed installment payments.

151. In instructing the Commission to ensure the opportunity for these "designated entities" to participate in auctions and spectrum-based services, Congress was well aware of the problems that they would have in competing against large, well-capitalized companies in auctions and the difficulties they encounter in obtaining capital. For example, the legislative history accompanying our grant of auction authority states generally that the Commission's regulations "must promote economic opportunity and competition," and "[t]he Commission will realize these goals by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses and businesses owned by members of minority groups and women."[276] The *House Report* states that the House Committee was concerned that, "unless the Commission is sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications industries."[277] More specifically, the House Committee was concerned that adoption of competitive bidding should not have the effect of "excluding" small businesses from the Commission's licensing procedures, and anticipated that the Commission would adopt regulations to ensure that small businesses would "continue to have opportunities to become licensees."[278]

152. Consistent with Congress's concern that auctions not operate to exclude small businesses, the provisions relating to installment payments were clearly intended to assist small businesses. The House Report states that these related provisions were drafted to "ensure that all small businesses will be covered by the Commission's regulations."[279] It also states that the provisions in section 309(j)(4)(A) relating to installment payments were intended to promote economic opportunity by ensuring that competitive bidding does not inadvertently favor incumbents with "deep pockets" "over new companies or start-ups."[280]

153. In addition, with regard to access to capital, Congress made specific findings in the Small Business Credit and Business Opportunity Enhancement Act of 1992, that "small business concerns, which represent higher degrees of risk in financial markets than do large businesses, are experiencing increased difficulties in obtaining credit."[281] As a result of

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[276] H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. 259-60, at 254 (*House Report*).

[277] *Id.*

[278] *Id.* at 255.

[279] *Id.*

[280] *Id.*

[281] Small Business Credit and Business Opportunity Enhancement Act of 1992, § 331(a)(3), Pub. Law 102-366, Sept. 4, 1992.

these difficulties, Congress resolved to consider carefully legislation and regulations "to ensure that small business concerns are not negatively impacted" and to give priority to passage of "legislation and regulations that enhance the viability of small business concerns."[282]

154. In our initial implementation of Section 309(j) of the Communications Act, we established in the *Competitive Bidding Second Report and Order* eligibility criteria and general rules that would govern the special measures for designated entities, including small businesses. We also identified several measures, including installment payments, spectrum set-asides, bidding credits and tax certificates, from which we could choose in establishing rules for auctionable spectrum-based services. We stated that we would decide whether and how to use these special provisions, or others, when we developed specific competitive bidding rules for particular services. In addition, we set forth rules designed to prevent unjust enrichment by designated entities who transfer ownership in licenses obtained through the use of these special measures or who otherwise lose their designated entity status.

155. We have employed a wide range of special provisions and eligibility criteria designed to meet the statutory objectives of providing opportunities to designated entities in other spectrum-based services. For instance, minority-owned and women-owned businesses in the nationwide narrowband PCS auction received a 25 percent bidding credit on certain channels;[283] in the regional narrowband PCS auction women-owned and minority-owned businesses received a 40 percent bidding credit on certain channels and small businesses were eligible for installment payments on all channels;[284] and in the broadband PCS auction, we established separate entrepreneurs' blocks with varying degrees of installment payments.[285] In the multi-channel multi-point distribution service (MMDS), we established bidding credits and installment payments for small businesses.[286] The measures adopted thus far for each service were established after closely examining the specific characteristics of the service and determining whether any particular barriers to accessing capital stood in the way of designated entity opportunities. After examining the record in the competitive bidding proceeding in PP Docket 93-253, we established provisions necessary to enable small

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[282] *Id.* at § 331(b)(2),(3).

[283] *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2970 (para. 72).

[284] *Competitive Bidding Third Memorandum Opinion and Order*, 10 FCC Rcd at 201 (para. 58).

[285] *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 459 (para. 103); *see also* Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Amendment of the Commission's Cellular PCS Cross-Ownership Rule, PP Docket No. 93-253, GN Docket No. 90-314, Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Further Notice of Proposed Rulemaking, FCC 95-263, released June 23, 1995, (*Cellular PCS Further Notice*).

[286] *MMDS Report and Order*, at paras. 182-189.

businesses to overcome the barriers to accessing capital in each particular service. Moreover, the measures we adopted also were designed to increase the likelihood that small businesses who win licenses in the auctions become strong competitors in the provision of wireless services.

156. In response to many comments explaining how we should implement Congress's mandate, we adopted several rules designed to encourage the participation of women and minorities in broadband PCS by addressing greater difficulties these groups experience in accessing capital. We analyzed these special provisions for minorities and women under the "intermediate scrutiny" standard established in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 564-565 (1990) and determined that they were constitutional.[287]

157. However, on June 12, 1995, the Supreme Court decided in *Adarand Constructors, Inc. v. Pena*[288] (*Adarand*) that "all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny."[289] The Court ruled that any federal program that makes distinctions on the basis of race must serve a compelling governmental interest and must be narrowly tailored to serve that interest.[290]

158. The holding in *Adarand* would apply to any proposal to incorporate race-based measures into our 220 MHz auction rules. At this time, we may not have developed a record sufficient to sustain race-based measures in the 220 MHz service based on the standard established by *Adarand*.[291] We therefore propose to limit special provisions initially to small businesses in the 220 MHz service. As discussed below, we propose to define small business in a way that would increase the likelihood of women- and minority-owned businesses establishing eligibility for special provisions. We do, however, believe that race-based measures could survive strict scrutiny from the courts. Moreover, we do not concede that any of our auction rules are unconstitutional. We simply believe that auction rules we develop must now be evaluated under a stricter constitutional standard than had been previously relied upon, and that at a minimum, this requires us to build a record concerning the participation of minorities and women in spectrum-based services before we adopt race- and gender-based measures.

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[287] *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5571-5580 (paras. 93-112).

[288] 63 U.S.L.W., No. 93-1841 (U.S. June 12, 1995).

[289] 63 U.S.L.W. at 4530. The Court overruled *Metro Broadcasting* to the extent it was inconsistent with *Adarand*.

[290] *Id.* at 4533.

[291] *See, e.g., Cellular PCS Further Notice,* FCC 95-263, released June 23, 1995.

159. *Adarand* thus introduces an additional level of complexity in implementing Congress' mandate to ensure that businesses owned by minorities and women are provided "the opportunity to participate in the provisions of spectrum-based services." 47 U.S.C. § 309(j)(4)(D). Although *Adarand* did not address gender-based preferences, we have included them here in an effort to seek the broadest possible comment.[292] We welcome comment as to the appropriateness of our approach. Accordingly, we seek comment on how we can best promote opportunities for businesses owned by minorities and women in the provision of 220 MHz services in light of *Adarand*. We seek the broadest possible comments including, but not limited to, responses to the following questions:

1. Does the Commission have a compelling interest in establishing opportunity-enhancing measures in the provision of 220 MHz services specifically for minority- and women-owned businesses? If so, what is that compelling interest? Are there characteristics specific to the 220 MHz service that demonstrate that race- and/or gender-based measures are needed to satisfy the mandate of 47 U.S.C. § 309(j)(3)(A)?

2. What evidence (statistical, documentary, anecdotal or otherwise) can be marshalled to support the proposed compelling interest?

3. What techniques could the Commission employ that would be narrowly tailored to further the proposed compelling interest? Would such techniques include bidding credits and installment payments? Are race-conscious or gender-conscious measures necessary, or are there race-or gender-neutral measures that would be effective?

Commenters are encouraged to provide the Commission as much evidence as possible with regard to past discrimination, continuing discrimination, discrimination in access to capital, underrepresentation and other significant barriers facing businesses owned by minorities and women in 220 MHz services and in licensed communications services generally.

160. As in other auctionable services, we fully intend in the 220 MHz service to meet the statutory objectives of promoting economic opportunity and competition, of avoiding excessive concentration of licenses, and of ensuring access to new and innovative technologies by disseminating licenses among a wide variety of applicants, including small businesses. Accordingly, in balancing the congressional objectives set forth in the auction statute, we tentatively conclude that bidding credits, reduced down payments and installment payments should be made available to small businesses on all 220 MHz channel blocks in the national, regional and EA channel groups.

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[292] *See* Telephone Electronics Corp v. FCC, No. 95-1015 (D.C. Cir. March 15, 1995) (discussing Commission's rules establishing both gender and race-specific preferences for broadband PCS).

b. Bidding Credits

161. Bidding credits allow eligible small businesses to receive a payment discount for their winning bid in an auction. In the *Competitive Bidding Second Report and Order*, we determined that competitive bidding rules applicable to individual services would specify the designated entities[293] eligible for bidding credits and the amounts of the available bidding credits for that particular service.[294] In the *Competitive Bidding Third Report and Order*,[295] we determined that eligible designated entities in the nationwide narrowband PCS auction would receive a 25 percent bidding credit. In the regional narrowband PCS auction, small businesses receive a 40 percent bidding credit.[296] In the *900 MHz Second Report and Order*, we proposed allowing small businesses a 10 percent bidding credit.[297] In the *MMDS Report and Order*, we allowed small businesses a 15 percent bidding credit.[298]

162. The proposals set forth today are a hybrid of those bidding credits and installment payment options offered to small businesses in the *900 MHz Second Report and Order* and the *Competitive Bidding Third Report and Order*. For narrowband PCS, we began by offering a 25 percent bidding credit for women- and minority-owned businesses on two of six channel blocks.[299] However, no women- or minority-owned businesses won a nationwide PCS narrowband license. Therefore, in the *Competitive Bidding Third Memorandum Opinion and Order*, we increased this bidding credit from 25 to 40 percent for the regional license blocks, speculating that a higher bidding credit may be needed due to the nationwide licenses' very high values.[300] Due to the special provisions offered to small businesses, four of the nine winning bidders for regional licenses were small businesses owned by women and minorities.[301] Since we believe that the nationwide and regional 220 MHz licenses will be

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[293] The designated entities consisted of small businesses, minority- and female-owned businesses, and rural telephone companies. *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2395-2398 (paras. 266-288).

[294] *Id.* at 2391 (para. 241).

[295] *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2970 (para. 72).

[296] *Competitive Bidding Third Memorandum Opinion and Order*, 10 FCC Rcd at 201 (para. 58).

[297] *900 MHz Second Report and Order*, at paras. 129-131.

[298] *MMDS Report and Order*, at para. 188.

[299] *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2970-2975 (paras. 72-80).

[300] *Competitive Bidding Third Memorandum Opinion and Order*, 10 FCC Rcd at 201 (para. 58).

[301] Public Notice, FCC Announces the Receipt of Downpayments from the High Bidders in the Auction of 30 Regional Narrowband PCS, Mimeo No. 50867 (Nov. 29, 1994).

similar in value to the nationwide and regional PCS narrowband licenses, we propose offering a 40 percent bidding credit to qualified designated entities. We propose offering this bidding credit on one of the four nationwide channel blocks, the block encompassing Channels 51-60, as all three blocks are equal in size and equally unencumbered. In the *900 MHz Second Report and Order*, we offered qualified small businesses a 10 percent bidding credit on any of the ten-channel blocks within each MTA.[302] We stated that due to the large number of licenses available in the service and large number of incumbents on all blocks, we believed that small businesses should be able to bid on all blocks.[303] Since we believe that the 220 MHz EA licenses are similar to the 900 MHz licenses in their number and in the presence of incumbents, we propose offering a 10 percent bidding credit to qualified designated entities on all EA licenses. Additionally, we note that the regional and EA licenses are of varying sizes, and do not know which of the sizes of the regional channel blocks would be more or less desirable for small businesses. We therefore believe that small businesses should receive bidding credits on all of the 220 MHz regional and EA channel blocks.

163. We seek comment on these proposals. Specifically, is a 40 percent credit appropriate to provide meaningful bidding opportunities for small businesses on the nationwide and regional blocks? Is a ten percent credit sufficient to enhance opportunities for small businesses in the EAs? Also, how should the presence of incumbents on the channel blocks affect the availability of bidding credits on all blocks?

164. In the event that we adopt our proposal to limit bidding credits to small businesses, should we also limit availability of the credit to the channel blocks with the fewest incumbents? We are concerned this limitation might dilute the effectiveness of a small business credit as a means of attracting broad designated entity participation in the 220 MHz service? We seek comment on the ramifications of each proposal for the incumbents in each block. If bidding credits were limited to only certain regional and EA licenses, we ask commenters to identify the licenses where bidding credits should be made available, and provide a rationale for selection of particular licenses.

165. We seek comment on whether the above bidding credit proposals satisfy the mandate of Section 309(j)(4)(D) of the Act to ensure that businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services. We ask commenters who believe that the above bidding credit proposals do not satisfy Section 309(j)(4)(D) to make specific alternative proposals. Also, to the extent such proposals are not race- and gender-neutral, we ask such commenters to address how their proposals can be reconciled with *Adarand*.

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[302] *900 MHz Second Report and Order*, at para. 130.

[303] *Id.*

c. Installment Payments

166. We additionally propose adopting installment payments for small businesses bidding for any of the 220 MHz nationwide, regional and EA licenses. We have previously concluded that installment payments are an effective means to address the inability of small businesses to obtain financing and will enable these entities to compete more effectively for the auctioned spectrum.[304] As with our proposals for bidding credits, the proposals for the 220 MHz licenses are a hybrid of those offered to small businesses in the *Competitive Bidding Third Report and Order* and proposed in the *900 MHz Second Report and Order*. In the *900 MHz Second Report and Order*, we proposed that small businesses eligible for installment payments be required to pay half of the down payment (10 percent of the winning bid, as opposed to 20 percent) five days after the auction closes, with the remaining 10 percent payment deferred until five days after grant of the license.[305] We also indicated that installment payments should be made available to small businesses at an interest rate equal to the rate for U.S. Treasury obligations.[306] In the *Competitive Bidding Third Report and Order*, we offered installment payments with similar terms and conditions to small businesses bidding only on the smaller spectrum blocks, specifically the BTA, MTA and regional licenses.[307]

167. For the 220 MHz licenses, we tentatively conclude that installment payments are an appropriate preference for small businesses bidding on all license blocks. In this respect, installment payments will provide financial assistance to all small businesses. By allowing payment in installments, the government is in effect extending credit to licensees, thus reducing the amount of private financing needed prior to the auction. Such low cost government financing will promote participation by small businesses, which, because of their size, lack access to capital needed to participate in new spectrum opportunities such as 220 MHz. We seek comments on these proposals.

168. Under our proposal, the installment payment option will enable all small businesses to pay the full amount of their winning bid in installments, less the upfront payment, which must be paid in full, and the down payment, half of which is due five days after the auction closes and the other half five days after the application is granted. Generally, the terms and conditions of the installment payments would be the same as those provided in the general rules -- interest charges will be fixed at the time of licensing at a rate equal to the rate for ten-year U.S. Treasury obligations. Payments of interest only would be due for the first two years. Principal and interest payments would be amortized over the

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[304] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2389 (paras. 231-232).

[305] *900 MHz Second Report and Order*, at para. 133-134.

[306] *Id.*

[307] *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2978-2979 (paras. 87-88).

remaining years of the license. Timely payment of all installments would be a condition of the license grant and failure to make such timely payment will be grounds for revocation of the license. We seek comments on these proposals.

169. We seek comment on whether the above installment payment proposals satisfy the mandate of Section 309(j)(4)(D) of the Act to ensure that businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services. We ask commenters who believe that the above installment payment proposals do not satisfy Section 309(j)(4)(D) to make specific alternative proposals. Also, to the extent such proposals are not race- and gender-neutral, we ask such commenters to address how their proposals can be reconciled with *Adarand*.

d. Eligibility for Bidding Credits, Installment Payments and Reduced Down Payments

170. We propose to limit eligibility for bidding credits, installment payments and reduced down payments to small businesses. As discussed below, for those companies wanting to bid on EA licenses, we propose to define small businesses as those entities with less than $6 million in average annual gross revenues for the preceding three years. For companies seeking to bid on regional or nationwide licenses, we propose to define small businesses as entities with less than $15 million in average annual gross revenues for the preceding three years.

171. Small Business Definition. In the *Competitive Bidding Second Memorandum Opinion and Order*, we stated we would define eligibility requirements for small businesses on a service-specific basis, taking into account the capital requirements and other characteristics of each particular service in establishing the appropriate threshold.[308] In the *Competitive Bidding Second Report and Order*, we stated that a proper threshold for small businesses was $6 million of average gross income.[309] For regional narrowband PCS, we affirmed this $6 million threshold for small businesses as those businesses eligible to receive bidding credits.[310] We specified that narrowband PCS involved relatively low capital entry requirements.[311] However, for the broadband PCS auctions, we believed that build-out and operational costs would be much higher than for narrowband PCS, and therefore modified

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[308] *Competitive Bidding Second Memorandum Opinion and Order*, 9 FCC Rcd at 7269 (para. 145).

[309] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2396 (para. 271).

[310] *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2968-2969 (para. 68).

[311] *Id.* at 2969 (para. 69).

the small business threshold to be $40 million.[312] We believe that 220 MHz services encompass a smaller amount of spectrum than PCS and less area than regional narrowband PCS. For the EA licenses, we believe that the number of licenses available (1,401) and construction and build-out costs will be relatively low. We also believe that the 220 MHz EA channel groups are similar to those channels offered in the PCS narrowband auction, and therefore we propose defining a small business in the same way. That is, for purposes of bidding on a EA license, a small business is an entity that has average annual gross revenues for the three proceeding years of $6 million or less.

172. On the other hand, we believe that the nationwide and regional 220 MHz licenses will have higher build-out and operational costs than will the EA licenses. Additionally, based on our experiences with prior auctions, we believe it is likely that bidders will attempt to aggregate licenses across regions.[313] Capital costs are likely to be higher than for EA licenses. Therefore, for purposes of bidding on the nationwide and regional 220 MHz licenses, we propose to define a small business as an entity that, together with affiliates and attributable investors, has average gross revenues for the three preceding years of $15 million or less.

173. We therefore seek comment on our proposed small business definition. Are $6 million and $15 appropriate thresholds? Should the thresholds be higher or lower, based on the types of companies that are likely to benefit from the special provisions proposed here? Also, should different definitions of small businesses be used for the different services? For example, should the threshold for nationwide channels be higher than the threshold for regional and EA channels? We also tentatively conclude that we will consider the revenues of affiliates and certain investors, and we propose to apply the 25 percent attribution threshold and affiliation rules similar to those used in the PCS auction rules.[314] In other words, we will not attribute the gross revenues of investors that hold less than a 25 percent interest in the applicant, but we will include the gross revenues of the applicant's affiliates and investors with ownership interests of 25 percent or more in the applicant in determining whether an applicant qualifies as a small business. Is a different attribution threshold warranted for the 220 MHz service? We seek comment on these issues.

174. We also ask for comment on how we should attribute the gross revenues and assets of a small business and its investors, affiliates, and principals, for purposes of our 220

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[312] *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5609-5610 (paras. 176-180).

[313] *See, e.g.*, United States Small Business Administration Comments at 8, filed May 24, 1995, in response to the *900 MHz Report and Order*, FCC 95-159, released April 17, 1995 (advocating a small business threshold of $15 million due to potential aggregation of spectrum blocks and correspondingly high capital costs, acquisition costs, and general financial requirements).

[314] Sections 24.320(b)(2)(iv) and 24.720(j)(1) of the Commission's Rules, 47 C.F.R. §§ 24.320(b)(2)(iv), 24.720(j)(1).

MHz small business definition. Specifically, we ask for comment on the following options. Should we count revenues and assets of the entity, all investors in the entity, and all affiliates of both? Should we count revenues and assets of the entity, all attributable investors in the entity, and all affiliates of both? If so, what should the attribution threshold be? We believe that 5 percent may be an appropriate attribution threshold and we seek specific comment on this proposed threshold. Should we count revenues and assets of the entity, all controlling principals in the entity, and all affiliates of both? We seek comment on all of these issues.

175. Rural Telephone Company Partitioning. Congress directed the Commission to ensure that, together with other small businesses, rural telephone companies have the opportunity to participate in the provision of spectrum-based services. Rural areas, because of their more dispersed populations, tend to be less profitable to serve than more densely populated urban areas. Therefore, service to these areas may not be a priority or economically feasible for many licensees.[315] Rural telephone companies, however, are well positioned because of their existing infrastructure to serve these areas. Therefore, we propose a geographic partitioning scheme similar to that adopted in broadband PCS[316] and proposed in 900 MHz,[317] which we believe will encourage participation by rural telephone companies, thereby increasing the likelihood of rapid introduction of service to rural areas.

176. Our proposed partitioning scheme would prevent rural telephone companies from having to bid on the entire nationwide, regional or EA license or licenses covering their wireline service areas. In addition, partitioning would provide rural telephone companies with the flexibility to be able to serve areas in which they already provide service, while the remainder of the service area could be served by other providers.[318] Under this proposal, rural telephone companies would be permitted to acquire partitioned 220 MHz licenses in either of two ways: (1) they may form bidding consortia consisting entirely of rural telephone companies to participate in auctions, and then partition the licenses won among consortia participants; and (2) they may acquire partitioned 220 MHz licenses from other licensees through private negotiation and agreement either before or after the auction.[319] We would also require that partitioned areas conform to established geopolitical boundaries and that each area include all portions of the wireline service area of the rural telephone company applicant that lies within the service area.[320] We also propose to use the definition for rural

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[315] *See, e.g., 900 MHz Second Report and Order*, at paras. 144-145.

[316] *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5598-5599 (para. 150).

[317] *900 MHz Second Report and Order*, at paras. 144-145.

[318] *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5598-5599 (para. 151).

[319] *Id.*

[320] *Id.*

telephone companies implemented in the *Competitive Bidding Fifth Report and Order* for broadband PCS.[321] Rural telephone companies would be defined as local exchange carriers having 100,000 or fewer access lines, including all affiliates.[322]

177. We also consider whether we should allow Phase II licensees to assign their channels within their EA or region to other licensees. These licensees would operate in licensee-defined "sub-areas" within the EA or region (*i.e.*, "geographic partitioning").[323] We consider, too, whether we should allow Phase II licensees to assign a portion of their channels to other licensees within their EA or Region (*i.e.*, "channel disaggregation." In the recent *MMDS Report and Order,*[324] we did not limit availability of partitioning to rural telephone companies and instead decided to make it broadly available to any interested applicants. We ask for comment on whether the 220 MHz service would also benefit from the broad availability of partitioning and/or disaggregation. In particular, we ask whether very small entities or, for example, private mobile radio service eligibles, would benefit from the ability to be licensed for portions of EAs, or to form consortia in order to bid on EAs. We also ask commenters to indicate how channel disaggregation and/or geographic partitioning of EAs or regions would be implemented from a logistic and administrative standpoint. For instance, we ask how the construction requirements we propose in Section C.5, *supra,* should be enforced. Specifically, 1) would the EA or regional licensee be responsible for ensuring that construction benchmarks would be met and 2) if the requirements are not met, would all of the licensees within the EA or region lose their authorizations? We also ask whether partitioning and/or disaggregation should be permitted immediately upon the assignment of the EA or regional license or whether, *e.g.*, it should not be allowed until after the licensee meets its initial construction benchmark.

e. Transfer Restrictions and Unjust Enrichment Provisions

178. In the *Competitive Bidding Third Report and Order,* licensees that received bidding credits and installment payments, and also chose to transfer their licenses to entities not eligible for these benefits, were required to repay the amount of the bidding credit on a graduated basis until no repayment would be required six years after the license grant. In addition, the ineligible transferee would not have the benefit of installment payments, and

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[321] *Id.* at 5615 (para. 193).

[322] *Id.*

[323] We would treat geographic partitioning as any other assignment, *i.e.*, the parties would be required to file an application containing the appropriate information for a licensing decision, and the Commission would, upon review, either grant or deny the application. *See, e.g.*, Section 22.922 of the Commission's Rules, 47 C.F.R. § 22.922.

[324] *MMDS Report and Order,* at paras. 176-181.

principal and accrued interest would come due. For the 900 MHz service, we proposed to impose a holding period of three years after the license grant, in which the small business is prohibited from voluntarily assigning or transferring its license to any other entity. After the holding period had expired, we proposed to allow a voluntary transfer in years four and five of the license term to other eligible small businesses.[325] In the *Competitive Bidding Fifth Report and Order*, we adopted restrictions on the transfer or assignment of broadband PCS entrepreneur's block licenses to ensure that designated entities do not take advantage of special provisions by immediately assigning or transferring control of their licenses.[326]

179. Permitting an immediate transfer of a discounted license to an entity that is not a small business could undermine our basis for offering special provisions to small businesses, but we note that in services with no entrepreneur's block, we have limited unjust enrichment to repayment of bidding credits or installment payments.[327] We therefore seek comment on whether, in services such as 220 MHz, where there is no entrepreneur's block to further restrict the class of entities eligible for substantial governmental benefits, we would better serve the public interest by adopting an approach similar to that used in the narrowband PCS context, in which bidding credits and installment payments immediately became due upon transfer to an ineligible entity. We also seek comment on whether an approach to unjust enrichment similar to that proposed for the 900 MHz SMR service, in which a holding period was imposed, would be optimal for the 220 MHz service,.

f. Other Provisions

180. Reduced Upfront Payments. We propose not to adopt a reduced upfront payment option in the 220 MHz service for small businesses. Considering the MHz-per-pop formula we propose to utilize, we believe a reduced upfront payment option is unnecessary and may be too costly to administer in the 220 MHz service. Moreover, we want to ensure sincere bidding by all parties. We seek comment on this proposal.

181. Set-aside Spectrum. In the *Competitive Bidding Fifth Report and Order* we established entrepreneurs' blocks on which only qualified entrepreneurs, including small businesses, could bid.[328] We tentatively conclude not to adopt an entrepreneurs' block for the 220 MHz auction for several reasons. First, the relatively large numbers of licenses

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[325] *900 MHz Second Report and Order*, at para. 141.

[326] *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5588 (para. 128).

[327] *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2975-2976 (para. 80).

[328] *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5580-5586 (paras. 113-123). These rules were further refined in the *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403 (1995). *See also* Section 24.709 of the Commission's Rules, 47 C.F.R. § 24.709.

available and relatively small spectrum allocations in the 220 MHz service should allow for extensive small business participation. Second, unlike broadband PCS, we do not believe that the effectiveness of bidding credits, reduced down payments and installment payments will be diluted, due to the smaller capital outlay anticipated for this service. We request comment on this proposal. Specifically, are the capital requirements of this service anticipated to be so substantial that we should insulate certain blocks from very large bidders in order to provide meaningful opportunities for small businesses?

6. Conclusion

182. We believe that the competitive bidding rules we adopt for 220 MHz, in conjunction with our spectrum allocation rules, will promote the public policy objectives set forth by Congress. Our rules will encourage economic growth and enhance access to 220 MHz services for consumers, producers, and new entrants. Structuring our rules to promote opportunity and competition should result in the rapid implementation of new PCS services and encourage efficient spectrum use. The preferences we adopt for small businesses will help to promote access to 220 MHz services by ensuring that these groups will have genuine opportunities to participate in the auctions and in provision of service.

V. SECOND MEMORANDUM OPINION AND ORDER

A. PETITIONS

1. Petition for Reconsideration of Request for Declaratory Ruling filed by SunCom Mobile & Data, Inc.

183. In the *CMRS Third Report and Order* we denied the Request For Declaratory Ruling filed by SunCom Mobile & Data, Inc. (SunCom) on February 1, 1994.[329] In that filing, SunCom asked our approval of a plan to aggregate non-nationwide 220 MHz five-channel blocks on a regional basis to provide multiple-market service on a single system. The request dealt with Section 90.739 of our rules, which provides that no 220 MHz licensee may be authorized to operate a station in a particular service category (*e.g.*, the 5-channel non-trunked, non-nationwide category) within 40 miles of an existing system authorized to that licensee in the same category unless "the licensee can demonstrate that the additional system is justified on the basis of its communications requirements." [330] In addressing SunCom's request, we observed that we had indicated in the *220 MHz Report and Order* that a request for authorization of multiple licenses within 40 miles under the provisions of

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[329] *CMRS Third Report and Order,* 9 FCC Rcd at 8056 (paras. 128-129).

[330] Section 90.739 of the Commission's Rules, 47 C.F.R. § 90.739.

Section 90.739 would have to be "supported by documentation of the need for additional capacity and/or an expanded service area, based on customer demand for additional channel capacity or economic factors."[331] We also noted that in the *220 MHz Report and Order* we had stated that "any applicant that seeks to justify a need for additional channels prior to construction of a first system in a geographic area will face a heavy burden of proof."[332] We decided that we would continue to "permit licensees who have already constructed and commenced operations to aggregate channels based on appropriate showing of need under Section 90.739," but that we would "generally not allow aggregation of channels by 220 MHz licensees who have not completed initial construction of facilities."[333] Our decision to deny SunCom's Request for Declaratory Ruling was thus based on the fact that SunCom sought to "aggregate channels assigned to licensees who have not yet competed construction."[334]

184. SunCom has filed a Petition For Reconsideration of our denial of its Request for Declaratory Ruling, arguing that we had "failed to address the specific question that Suncom posed -- whether channels could be aggregated *after* licensees had constructed their 220 MHz facilities."[335] SunCom further states that our denial of its request was based on "the erroneous belief that SunCom proposed the pre-construction aggregation of channels," noting that in their Request for Declaratory Ruling it had in fact "proposed post-construction aggregation."[336] Finally, SunCom states that it "does not plan to ask the Commission to issue any authorizations for additional systems or channels", but merely "seeks Commission consent to the assignment of licenses for already authorized and constructed systems."[337]

185. Section 90.739 of our Rules provides that no nationwide 220 MHz licensee may hold more than one nationwide authorization and that no local 220 MHz licensee may be authorized at two locations less than 40 miles away from one another on channels in the

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[331] *220 MHz Report and Order*, 6 FCC Rcd at 2364 n. 126 (para. 59).

[332] *Id.* at 2364 (para. 59).

[333] *CMRS Third Report and Order*, 9 FCC Rcd at 8056 (para. 129).

[334] *Id.*

[335] SunCom, Petition for Reconsideration, filed December 21, 1994, at 3. SunCom also filed on the same date a Petition to Sever its Requests for Declaratory Ruling and for Waiver from GN Docket No. 93-252 and from reconsideration with other petitions for reconsideration of the *CMRS Third Report and Order*. SunCom asks that we act expeditiously on its Petition for Reconsideration. We are incorporating SunCom's Petition for Reconsideration for disposition in this proceeding, and its Petition to Sever is therefore granted.

[336] SunCom Petition for Reconsideration at 5 n. 8.

[337] *Id.* at 6.

same category without "demonstrating that the additional system is justified on the basis of its communications requirements."[338] The comparable "40-mile" rule contained in Subpart S at Section 90.627(b)[339] was designed to prevent licensees from acquiring additional amounts of spectrum in a given geographic area without demonstrating the need for such spectrum. We enabled licensees authorized under Subpart S to demonstrate that need by showing that their channels were "loaded" to a particular level. In the *220 MHz Report and Order*, we declined to adopt such a loading requirement to justify additional 220 MHz spectrum[340] but, instead, provided for the acquisition of additional spectrum by a licensee if it could "demonstrate that its communications needs warrant additional channels or channel groups."[341] In offering guidance as to how a licensee could adequately justify its need for additional spectrum, we said that it could make a submission that could include, but not be limited to, information relating to "loading on assigned channels, [an] explanation of the geographic coverage required, and documentation of the additional number of mobiles/portables needed, including, for commercial systems, the number of outstanding requests for communications service."[342] By this statement, we intended that licensees using 220 MHz spectrum for their internal communications needs would have to demonstrate how their current spectrum was insufficient to meet their needs, and that licensees using the spectrum for commercial purposes would have to demonstrate that they had more demand for service (*i.e.*, customers) than could be accommodated on their authorized spectrum.

186. We believe that the request by SunCom does not provide the required demonstrations. SunCom supports its Request for Declaratory Ruling by asserting that "five narrowband channels does not provide sufficient spectrum capacity to obtain enough subscribers to justify the high costs of establishing and operating a quality system . . . ,"[343] that the 220 MHz service "will require multiple sites per market to achieve competitive coverage [with other mobile communications services],"[344] and that "without the levels of capacity and coverage obtainable only via multiple licenses per market, the 220 [MHz] industry, will not be able to project itself as a long-term successful alternative to SMR,

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[338] Section 90.739 of the Commission's Rules, 47 C.F.R. § 90.739.

[339] Section 90.627(b) of the Commission's Rules, 47 C.F.R. § 90.627(b). This rule was modified in the *CMRS Third Report and Order* to apply to non-SMR licensees only. *CMRS Third Report and Order*, 9 FCC Rcd at 8251 (para. 37).

[340] *220 MHz Report and Order*, 6 FCC Rcd at 2367 (para. 81).

[341] *Id.* at 2364 (para. 59).

[342] *Id.* at 2364 n. 126 (para. 59).

[343] SunCom Petition for Reconsideration at 3.

[344] *Id.* at 4.

ESMR, cellular, etc.''[345] These arguments do not form the basis for relief under Section 90.739. Specifically, in the *220 MHz Report and Order* we indicate that an adequate showing of need under Section 90.739 could be granted to commercial entities such as SunCom through a showing of ''outstanding requests for communications service.''[346] By so indicating, we clearly intended that 220 MHz licensees providing commercial services first construct their stations, begin operation and, at some point *after* operation was underway, submit their request for relief of the ''40-mile'' rule providing empirical evidence that customer demand for communications service in their area of operation could not be met without authorization for multiple licenses in that area of operation. What SunCom has asked for in its Request for Declaratory Ruling is a current decision that, upon completion of construction of its stations five years hence, it would be permitted to aggregate these licenses under Section 90.739 to form a regional network. However, we cannot be certain that the conditions which might justify SunCom's need for additional spectrum capacity to meet ''the number of outstanding requests for communications service'' will exist at the time it completes construction. We therefore can only view SunCom's request as premature. We thus again deny SunCom's Request for Declaratory Ruling.[347]

2. Request for Rule Waiver of Section 90.739 Filed by Wireless Plus, Inc.

187. Wireless Plus, Inc. (Wireless Plus), a company that manages a network of five-channel trunked stations in Northern and Southern California, has filed a Request for Rule Waiver also requesting relief under Section 90.739 of our rules to permit it to hold authorizations for more than one station per market.[348] Wireless Plus states that ''all of the stations in its network are either constructed and operating or will be contructed by the appropriate deadline''[349] and indicates that, in order to provide the blanket coverage desired by its customers, it is necessary for its stations to be less than 40 miles apart.[350] Wireless Plus seeks relief under Section 90.739 because it claims that ''in order . . . to attract the capital necessary for the continuation and expansion of the system, it must be able to secure authorizations in its own name rather than be subject to the uncertainties associated with

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[345] *Id.* at 5.

[346] *220 MHz Report and Order,* 6 FCC Rcd at 2364 n. 126 (para. 59).

[347] We note that SunCom may request relief under Section 90.739 of the Commission's Rules in accordance with the provisions of footnote 126 of the *220 MHz Report and Order* at some point *after* it has begun operations of its stations and can effectively evaluate the need for additional spectrum in its areas of operation.

[348] Wireless Plus, Inc., Request for Rule Waiver, filed Feb 8, 1995, at 1.

[349] *Id.* at 5.

[350] *Id.* at 4.

having stations licensed to many entities and affiliated with Wireless Plus only through management contract."[351] A further benefit of holding the authorizations of the stations in their network, Wireless Plus claims, will be to allow Wireless Plus to "provide service to end [users] with greater efficiency and greater certainty than if each of the associated facilities continued to be operated under [separate] management contracts," which will "increase Wireless Plus' administrative burdens, ultimately resulting in higher costs to customers."[352] Wireless Plus concludes that consolidating the licenses in its name "will promote the efficiency of the system and ultimately result in improved service and lower costs to the public."[353]

188. In determining whether to grant Wireless Plus relief under Section 90.739, we must, as we did in addressing SunCom's request, return to the *220 MHz Report and Order* for guidance. The *220 MHz Report and Order* states that relief for commercial systems would be granted through a showing of "outstanding requests for communications service."[354] Wireless Plus has not provided such a showing and we must therefore deny its request.

3. Petition for Reconsideration of Request for Rule Waiver of Section 90.725 Filed by SunCom

189. At the time SunCom filed its Request for Declaratory Ruling on February 1, 1994, seeking relief under Section 90.739, it also filed a Request for Rule Waiver of Section 90.725(f) of our Rules.[355] Section 90.725(f) requires licensees authorized non-nationwide systems to construct their systems and place their systems in operation within eight months of the initial license grant date.[356] In its waiver request SunCom stated that the "scope and complexity" of "constructing a Network comprised of multiple, five-channel licenses per market . . . require[s] an extended period of time."[357] It further indicated that its network would require extensive "re-engineering," and that relocation of stations will be necessary "in order to satisfy market demand." Because of the additional need to undertake this system "redesign" on a wide-area, regional basis, SunCom requested an extended

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[351] *Id.*

[352] *Id.*

[353] *Id.* at 5.

[354] *220 MHz Report and Order*, 6 FCC Rcd at 2364 n. 126 (para. 59).

[355] SunCom, Request for Rule Waiver, filed February 1, 1994.

[356] Section 90.725(f) of the Commission's Rules, 47 C.F.R. § 90.725(f).

[357] SunCom Request for Rule Waiver at 9.

implementation period of eight years to complete the construction of its network.[358] Finally, SunCom pointed out that its waiver request was "fully consistent with Commission waiver grants to other, similarly situated entities proposing to construct complex [SMR and ESMR] networks."[359] In addressing SunCom's waiver request in the *CMRS Third Report and Order*, we found that SunCom had not "demonstrated the existence of extraordinary circumstances that would justify grant of an extended implementation construction period to licensees who agree to become part of SunCom's network," and, therefore, we denied its request for waiver of our construction rules.[360]

190. The Petition for Reconsideration filed by SunCom also seeks reconsideration of our denial of its waiver request, asserting that we had not given its request the required "'hard look.'"[361] SunCom observed that for a number of years we had "followed a waiver policy under which the construction of large-scale, spectrally efficient and technologically complex networks constitutes a 'unique' circumstance that makes Part 90 construction schedules inappropriate"[362] and that in our 1991 decision addressing a request for waiver filed by Fleet Call, Inc. (Fleet Call), we indicated that we would continue to apply the waiver policy adopted in that proceeding "so as to avoid discrimination."[363] SunCom claimed that its filing of a waiver request that "mirrored requests granted in the past was sufficient to entitle SunCom to a reasoned decision under process principles."[364]

191. In granting the waiver request of Fleet Call for extended implementation, we indicated that our decision followed existing policies for dealing with requests for extended implementation by other Part 90 licensees, and that we intended to "continue to apply" the policies established in those decisions to future requests "in a similar fashion."[365] Since then, we have acted on a number of requests by SMR entities wishing to provide wide-area

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[358] In its comments subsequently filed on June 20, 1994, in response to the request for comments in the *CMRS Further Notice* (9 FCC Rcd 2863 (1994)), SunCom revised its waiver request to reduce its construction schedule to five years.

[359] SunCom Request for Rule Waiver at 1.

[360] *CMRS Third Report and Order*, 9 FCC Rcd at 8056 (para. 129).

[361] SunCom Petition for Reconsideration at 7.

[362] *Id.* at 8.

[363] *Id.* at 9, *citing* Request of Fleet Call, Inc., for Waiver and Other Relief to Permit Creation of Enhanced Specialized Mobile Radio Systems in Six Markets, Memorandum Opinion and Order, 6 FCC Rcd 1533, 1536 (para. 27) (1991) (*Fleet Call Order*) .

[364] *Id.*

[365] *Fleet Call Order*, 6 FCC Rcd at 1536 (para. 27).

service similar to that proposed by Fleet Call. In 1993, we modified Subpart S of Part 90 of our Rules governing the Part 90 services above 800 MHz to outline a specific procedure for SMR applicants to follow in requesting extended implementation authority.[366]

192. SunCom argues that, because their request for extended implementation is similar to those of various SMRs applicants, we should deal with their request in a similar manner. Many of those applications, however, were processed in accordance with Section 90.629 of our rules, as it applies to SMRs,[367] and there is no such provision in our rules for providing extended implementation for commercial applicants in the 220 MHz service.[368] In addition, the fact that we indicated in the *Fleet Call Order* that we were adopting a waiver policy for SMR applicants such as Fleet Call that would "'prevent discriminatory application' of our waiver policy and 'put future parties on notice as to its operation' "[369] was not intended to provide a waiver policy that would apply in perpetuity and to applicants in all Part 90 services. The 220 MHz service is not the 800 MHz SMR service. Our decision to outline an extended implementation policy for *SMR* applicants in the *Fleet Call Order* and the fact that we have processed requests by SMRs based on that policy is not governing in deciding whether to process SunCom's request. To the contrary, in the *CMRS Third Report and Order*, we decided not to relax our existing Part 90 rules with respect to obtaining extensions of the standard construction period, stating that extensions would only be granted "if the licensee can demonstrate unique circumstances beyond its control that justify an extension."[370] We further stated that all CMRS licensees, in justifying an

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[366] Amendment of Part 90 of the Commission's Rules Governing Extended Implementation Periods, PR Docket No. 92-210, Report and Order, 8 FCC Rcd 3975 (1993) (*Extended Implementation Report and Order*); Section 90.629 of the Commission's Rules, 47 C.F.R. § 90.629. In the *Extended Implementation Report and Order*, we indicated that, "an increasing number of SMR applicants have expressed interest in operating technically innovative, wide area system" and that "to fully implement their systems, SMR applicants are . . . often in need of an extended implementation period." *Id.* 8 FCC Rcd at 3976 (para. 5).

[367] Section 90.629 of the Commission's Rules, 47 C.F.R. § 90.629.

[368] The only provision for extended implementation for 220 MHz service applicants under our rules is provided in Section 90.727, which permits certain *non-commercial* 220 MHz service applicants to seek extended implementation. 47 C.F.R. § 90.727. This rule does not allow *commercial* 220 MHz entities, such as SunCom, to obtain extended implementation authority. With regard to Section 90.629 itself, we are now proposing, in our *800 MHz SMR Further Notice of Proposed Rulemaking*, to *eliminate* the rule, stating that to do so would "protect against channels being underutilized for long periods." *800 MHz SMR Further Notice of Proposed Rulemaking*, 9 FCC Rcd 1647 (paras. 24-26)

[369] *Fleet Call Order*, 6 FCC Rcd at 1536 (para. 27).

[370] *CMRS Third Report and Order*, 9 FCC at 8074-75 (para. 177).

extension, would be required to adhere to the showing provided in Section 22.43(b) of our Rules and formerly applicable only to Part 22 licensees. Section 22.42(b) states that no extension will be granted for delays caused by lack of financing, lack of site availability, for the assignment or transfer of control of an authorization, or for failure to order equipment in a timely manner.[371] As we indicated in deciding not to grant SunCom's request in the *CMRS Third Report and Order*, SunCom has not demonstrated the prescribed circumstances necessary to justify the extended construction period. We therefore deny SunCom's Petition for Reconsideration.

4. Request for Rule Clarification or Waiver of Section 90.719 Filed by the 220 MHz QO Coalition

193. The 220 MHz QO Coalition (Coalition) filed a request for clarification of Section 90.719 of our rules[372] to confirm that licensees of Channels 171-180 may trunk their channels or, alternatively, seeks waiver of this rule to permit its members to trunk their authorized Channels 171-180.[373] We deny the Coalition's requested clarification and waiver request for the following reasons.

194. First, the Coalition refers to our discussion in paragraph 40 of the *220 MHz Report and Order* regarding Channels 161-200 as being a set aside for "non-trunked local use," and asks whether channels are "restricted to non-trunked use only" or whether they "can be used in either trunked or non-trunked systems."[374] We see no lack of clarity in our discussion in the *220 MHz Report and Order* as to whether these channels were intended to be used for trunked or non-trunked operation. As the Coalition points out, we referred to these channels as being "non-trunked" channels[375] and this reference accurately indicates our intended use for these frequencies.

195. Second, the Coalition refers to Section 90.719 of our Rules, which states that the "Channels 171-180 are available for any use consistent with this subpart"[376] and suggests

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[371] Section 22.43(b) of the Commission's Rules, 47 C.F.R. § 22.43(b).

[372] Section 90.719 of the Commisison's Rules, 47 C.F.R. § 90.719.

[373] Request of 220 MHz QO Coalition for Clarification of the Rules or, in the Alternative, for Waiver of the Rules, filed June 10, 1994.

[374] Coalition Request at 3.

[375] *220 MHz Report and Order*, 6 FCC Rcd at 2362 (para. 40).

[376] Section 90.719 of the Commission's Rules, 47 C.F.R. § 90.719.

that this language is ambiguous as to whether "any use" includes trunking of these channels.[377] In the *220 MHz Report and Order*, we indicated in Table 2 of paragraph 16 that the Channels 171-180 channels would be assigned for "any use." Our use of the term "any use" in this Table, however, was meant to distinuguish Channels 171-180 from the Channels 181-200, which were designated in the Table as being for "data-only" use. Our designation of "any use" for the Channels 171-180 was not meant to be an indication of the type of transmission *technology* that licensees of these channels could or could not employ.

5. Petition for Rule Waiver of Section 90.719 Filed by the Northeast Florida Telephone Company

196. A second petition requesting waiver of Section 90.719 of our Rules to permit trunked operation on Channels 171-180 was filed by the Northeast Florida Telephone Company (NTFC).[378] NFTC points out that the five channels on which it is authorized are to be used "solely to provide for the internal communications needs of the company's telephone business as the primary system used to facitilate phone maintenance and repair" and seeks permission to trunk its channels "in order to increase systems efficiency and meet the expanding communications needs of its company."[379] NFTC, like the Coalition, questions[380] whether we had expressly prohibited trunked operation on the Channels 171-180 in the *220 MHz Report and Order*. For the reasons stated above with regard to the Petition for Waiver of the 220 MHz QO Coalition, we deny the NFTC Petition for Rule Waiver.

B. LICENSEES AUTHORIZED NEAR CANADIAN BORDER

197. Commission staff is currently involved in negotiations with the Canadian government to determine how 220-220 MHz spectrum near the U.S.-Canadian border will be shared between the two countries. The eventual agreement could result in certain 220 MHz channels currently authorized to U.S. licensees being designated for primary Canadian use and, if this were to occur, the authorizations of 220 MHz licensees operating on those channels could be subject to cancellation. The authorizations of all non-nationwide 220 MHz licensees situated within Line A[381] of the border have been conditioned on the outcome of these negotiations. Given that licensees located within Line A could, after beginning

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[377] Coalition Request at 5.

[378] NFTC, Petition for Rule Waiver, filed September 30, 1994.

[379] NFTC Petition at 2.

[380] *Id.* at 2-3.

[381] Section 90.7 of the Commission's Rules, 47 C.F.R. § 90.7.

operation, could lose their authorizations, we understand their possible reluctance to commit resources for the construction of their facilities.

198. We believe that the uncertainties surrounding the future of 220 MHz licenses near the Canadian border warrant Commission action. We will therefore extend the deadline for non-nationwide 220 MHz licensees authorized within Line A of the border to construct and operate their stations to a date 12 months after the date the terms of an agreement with Canada are released.

VI. PROCEDURAL MATTERS

199. Pursuant to applicable procedures set forth in Section 1.415 and 1.419 of the Commission's Rules,[382] interested parties may file comments on or before **September 27, 1995**, and reply comments on or before **October 12, 1995**. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Reference Center of the Federal Communications Commission, 1919 M Street, N.W., Room 239, Washington, D.C. 20054.

200. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission Rules.[383]

201. As required by the Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of this expected impact on small entities of the proposals suggested in this document. The IFRA is set forth in Appendix A of this document. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act.[384]

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[382] 47 C.F.R. §§ 1.415, 1.419.

[383] Sections 1.1202, 1.1203, and 1.1206(a) of the Commission's Rules, 47 C.F.R. §§ 1.1202, 1.1203, 1.1206(a).

[384] Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1980).

202. For further information concerning this proceeding, contact Martin Liebman at (202) 418-1310 or Rhonda Lien at (202) 418-0620 of the Wireless Telecommunications Bureau.

VII. ORDERING CLAUSES

203. Authority for issuance of this Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking is contained in Sections 4(i), 303(r), 309(j), and 332 of the Communications Act of 1934, as amended; 47 U.S.C. §§ 154(i), 303(r), 309(j), and 332.

204. Accordingly, IT IS ORDERED that the Petition for Rulemaking in RM-8506 filed by Fairfield Industries, Inc., IS GRANTED to the extent indicated herein.

205. IT IS FURTHER ORDERED that the Petition to Sever filed by SunCom Mobile & Data, Inc., IS GRANTED.

206. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by SunCom Mobile & Data, Inc., IS DENIED.

207. IT IS FURTHER ORDERED that the Request for Rule Waiver filed by Wireless Plus, Inc., IS DENIED.

208. IT IS FURTHER ORDERED that the Request for Rule Waiver filed by the 220 MHz QO Coalition IS DENIED.

209. IT IS FURTHER ORDERED that the Petition for Rule Waiver filed by Northeast Florida Telephone Company IS DENIED.

210. IT IS FURTHER ORDERED that the deadline for non-nationwide 220 MHz licensees authorized within Line A of the Canadian border to construct and operate their stations is extended to a date 12 months after the date that the terms of an agreement with Canada are released.

FEDERAL COMMUNICATIONS COMMISSON

William F. Caton
Acting Secretary

APPENDIX A

INITIAL REGULATORY FLEXIBILITY ANALYSIS

I. Reason for Action:

The action is taken to propose a new framework for the licensing and operation of the 220 MHz service, and as part of the Commission's continuing implementation of Congress's revisions to Sections 3(n) and 332 of the Communications Act in the Omnibus Budget Reconciliation Act of 1993.

II. Objectives of this Action:

The Commission's primary goal is to establish a flexible regulatory scheme that will allow for more efficient licensing, eliminate unnecessary regulatory burdens on both existing and future licensees, and enhance the competitive potential of 220 MHz services in the mobile marketplace.

III. Legal Basis:

The proposed action is authorized under Sections 4(i), 303(r), 309(j) and 332 of the Communications Act of 1934, as amended.

IV. Description, Potential Impact and Number of Small Entities Affected:

There are approximately 3,800 non-nationwide licensees in the 220 MHz band. The potential impact of the proposals contained in this Notice on small businesses is hard to predict without the benefit of comment, and the actual impact will depend on the final action taken. The intention of this action is to provide licensees with more flexibility, with a minimum increased burden. Thus, the Commission, in drafting these proposals tried to balance the needs of all licensees and potential licensees. For example, to afford licensees increased flexibility to meet consumer demand and to increase their ability to compete with other CMRS licensees, the Commission has proposed that 220 MHz licensees be permitted to operate paging and fixed systems on a primary basis and to aggregate their 5 kHz channels to operate on channels of wider bandwidth.

V. Reporting, Recordkeeping and Other Compliance Requirements:

The Commission is proposing to generally decrease the burden on licensees. For example, rather than being required to obtain separate authorization for each of their base stations, non-nationwide, Phase II licensees will be permitted to operate over Commission-defined geographic areas (EAs and 220 MHz Regions) and will be allowed to construct and operate base stations anywhere within their authorized area as long as signals from those stations do not exceed a prescibed level. On the other hand, Phase II licensees who desire to operate less than 120 kilometers from Phase I co-channel stations will be required to submit

a technical analysis demonstrating at least 10 dB protection to the 38 dbuV/m contour of such licensees, and all Phase II licensees will be required to submit maps and other supporting documents to demonstrate compliance with interim and final construction benchmarks.

VI. Federal Rules which Overlap, Duplicate, or Conflict with these Proposals:

None.

VII. Significant Alternatives:

The Commission believes that the proposals contained in this decision represent the best balance of providing licensees with the most flexibility and the least regulatory burden possible, while ensuring that license are granted to those who value the spectrum most high and will maximize its use to provide the best quality and variety of service to consumers.

APPENDIX B

LIST OF PARTIES FILING COMMENTS AND REPLY COMMENTS GN DOCKET NO. 93-252

The following is the list of parties filing comments and reply comments on issues relating to 220-222 MHz service in response to the request for such comments in the *CMRS Further Notice*, 9 FCC Rcd 2863 (1994):

COMMENTS

American Mobile Telecommunications Association, Inc. (AMTA)
E. F. Johnson Company (E. F. Johnson)
Global Cellular Communications, Inc. and Jean M. Warren (Global and Warren)
National Association of Business and Educational Radio, Inc. (NABER)
The RF Technologies Group (RF Technologies)
SEA, Inc. (SEA)
Simrom, Inc. (Simrom)
SmartLink Development Limited Partnership (SmartLink)
SunCom Mobile & Data, Inc. (SunCom)
US MobilComm, Inc. (USM)

REPLY COMMENTS

AMTA
E. F. Johnson
Global
NABER
RF Technologies
SEA
SunCom
Uniden America Corporation (Uniden)

APPENDIX C

CODES AND NAMES FOR ECONOMIC AREAS (EAs)

Codes from 001 to 172 are assigned to the new EAs in approximate geographic order, beginning with 001 in northern Maine, continuing south to Florida, then north to the Great Lakes, and continuing in a serpentine pattern to the West Coast. Except for the Western Oklahoma EA (126), the Northern Michigan EA (058), and the 17 EAs that mainly correspond to consolidated metropolitan statistical areas (CMSAs), each EA is named for the metropolitan area or city that is the node of its largest component economic area (CEA) and that is usually, but not always, the largest metropolitan area or city in the EA. Each CEA consists of a single economic node and the surrounding counties that are economically related to the node. The following list provides EA codes and names. EA boundaries and codes are shown on the map following the list.

EA Code	Name
001	Bangor, ME
002	Portland, ME
003	Boston-Worcester-Lawrence-Lowell-Brockton, MA-NH
004	Burlington, VT
005	Albany-Schenectady-Troy, NY
006	Syracuse, NY
007	Rochester, NY
008	Buffalo-Niagara Falls, NY
009	State College, PA
010	New York-No. New Jersey-Long Island, NY-NJ-CT-PA
011	Harrisburg-Lebanon-Carlisle, PA
012	Philadelphia-Wilmington-Atlantic City, PA-NJ-DE-MD
013	Washington-Baltimore, DC-MD-VA-WV
014	Salisbury, MD
015	Richmond-Petersburg, VA
016	Staunton, VA
017	Roanoke, VA
018	Greensboro-Winston-Salem-High Point, NC
019	Raleigh-Durham-Chapel Hill, NC
020	Norfolk-Virginia Beach-Newport News, VA-NC
021	Greenville, NC
022	Fayetteville, NC
023	Charlotte-Gastonia-Rock Hill, NC-SC
024	Columbia, SC
025	Wilmington, NC
026	Charleston-North Charleston, SC

027 Augusta-Aiken, GA-SC
028 Savannah, GA
029 Jacksonville, FL
030 Orlando, FL
031 Miami-Fort Lauderdale, FL
032 Fort Myers-Cape Coral, FL
033 Sarasota-Bradenton, FL
034 Tampa-St. Petersburg-Clearwater, FL
035 Tallahassee, FL
036 Dothan, AL
037 Albany, GA
038 Macon, GA
039 Columbus, GA-AL
040 Atlanta, GA
041 Greenville-Spartanburg-Anderson, SC
042 Asheville, NC
043 Chattanooga, TN-GA
044 Knoxville, TN
045 Johnson City-Kingsport-Bristol, TN-VA
046 Hickory-Morganton, NC
047 Lexington, KY
048 Charleston, WV
049 Cincinnati-Hamilton, OH-KY-IN
050 Dayton-Springfield, OH
051 Columbus, OH
052 Wheeling, WV-OH
053 Pittsburgh, PA
054 Erie, PA
055 Cleveland-Akron, OH
056 Toledo, OH
057 Detroit-Ann Arbor-Flint, MI
058 Northern Michigan, MI
059 Green Bay, WI
060 Appleton-Oshkosh-Neenah, WI
061 Traverse City, MI
062 Grand Rapids-Muskegon-Holland, MI
063 Milwaukee-Racine, WI
064 Chicago-Gary-Kenosha, IL-IN-WI
065 Elkhart-Goshen, IN
066 Fort Wayne, IN
067 Indianapolis, IN
068 Champaign-Urbana, IL
069 Evansville-Henderson, IN-KY
070 Louisville, KY-IN

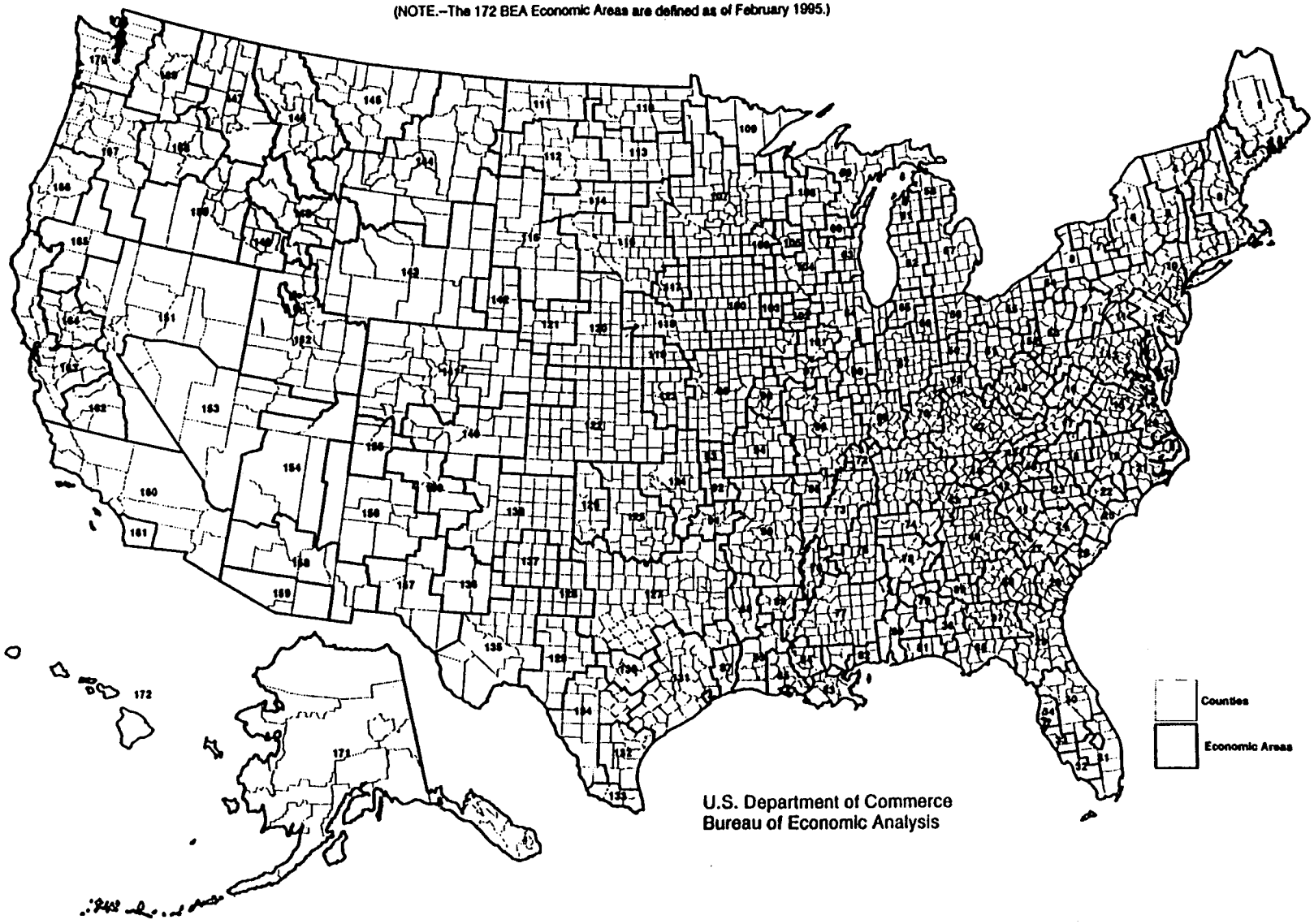
071 Nashville, TN
072 Paducah, KY
073 Memphis, TN-AR-MS
074 Huntsville, AL
075 Tupelo, MS
076 Greenville, MS
077 Jackson, MS
078 Birmingham, AL
079 Montgomery, AL
080 Mobile, AL
081 Pensacola, FL
082 Biloxi-Gulfport-Pascagoula, MS
083 New Orleans, LA
084 Baton Rouge, LA
085 Lafayette, LA
086 Lake Charles, LA
087 Beaumont-Port Arthur, TX
088 Shreveport-Bossier City, LA
089 Monroe, LA
090 Little Rock-North Little Rock, AR
091 Fort Smith, AR-OK
092 Fayetteville-Springdale-Rogers, AR
093 Joplin, MO
094 Springfield, MO
095 Jonesboro, AR
096 St. Louis, MO-IL
097 Springfield, IL
098 Columbia, MO
099 Kansas City, MO-KS
100 Des Moines, IA
101 Peoria-Pekin, IL
102 Davenport-Moline-Rock Island, IA-IL
103 Cedar Rapids, IA
104 Madison, WI
105 La Crosse, WI-MN
106 Rochester, MN
107 Minneapolis-St. Paul, MN-WI
108 Wausau, WI
109 Duluth-Superior, MN-WI
110 Grand Forks, ND-MN
111 Minot, ND
112 Bismarck, ND
113 Fargo-Moorhead, ND-MN
114 Aberdeen, SD

115 Rapid City, SD
116 Sioux Falls, SD
117 Sioux City, IA-NE
118 Omaha, NE-IA
119 Lincoln, NE
120 Grand Island, NE
121 North Platte, NE
122 Wichita, KS
123 Topeka, KS
124 Tulsa, OK
125 Oklahoma City, OK
126 Western Oklahoma, OK
127 Dallas-Fort Worth, TX
128 Abilene, TX
129 San Angelo, TX
130 Austin-San Marcos, TX
131 Houston-Galveston-Brazoria, TX
132 Corpus Christi, TX
133 McAllen-Edinburg-Mission, TX
134 San Antonio, TX
135 Odessa-Midland, TX
136 Hobbs, NM
137 Lubbock, TX
138 Amarillo, TX
139 Santa Fe, NM
140 Pueblo, CO
141 Denver-Boulder-Greeley, CO
142 Scottsbluff, NE
143 Casper, WY
144 Billings, MT
145 Great Falls, MT
146 Missoula, MT
147 Spokane, WA
148 Idaho Falls, ID
149 Twin Falls, ID
150 Boise City, ID
151 Reno, NV
152 Salt Lake City-Ogden, UT
153 Las Vegas, NV-AZ
154 Flagstaff, AZ
155 Farmington, NM
156 Albuquerque, NM
157 El Paso, TX
158 Phoenix-Mesa, AZ

159 Tucson, AZ
160 Los Angeles-Riverside-Orange County, CA
161 San Diego, CA
162 Fresno, CA
163 San Francisco-Oakland-San Jose, CA
164 Sacramento-Yolo, CA
165 Redding, CA
166 Eugene-Springfield, OR
167 Portland-Salem, OR-WA
168 Pendleton, OR
169 Richland-Kennewick-Pasco, WA
170 Seattle-Tacoma-Bremerton, WA
171 Anchorage, AK
172 Honolulu, HI

BEA Economic Areas, 1-172

(NOTE.--The 172 BEA Economic Areas are defined as of February 1995.)



APPENDIX D

220 MHZ REGIONS

The 220 MHz Regions are defined as follows:

Region 1: Region 1 consists of the following EAs: EA 001 (Bangor, ME) through EA 021 (Greenville, NC).

Region 2: Region 2 consists of the following EAs: EA 022 (Fayetteville, NC) through EA 046 (Hickory-Morganton, NC), Puerto Rico, and the United States Virgin Islands.

Region 3: Region 3 consists of the following EAs: EA 047 (Lexington, KY) through EA 099 (Kansas City, MO-KS).

Region 4: Region 4 consists of the following EAs: EA 100 (Des Moines, IA) through EA 139 (Santa Fe, NM).

Region 5: Region 5 consists of the following EAs: EA 140 (Pueblo, CO) through 172 (Honolulu, HI).

Separate Statement
of
Commissioner James H. Quello

Released: July 28, 1995

Re: Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Frequency Band by the Private Land Mobile Radio Service (PR Docket No. 89-552); Implementation of Sections 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services (GN Docket No. 93-252) and Implementation of Section 309(j) of the Communications Act -- Competitive Bidding 220-222 MHz (PP Docket No. 93-253)

This item is the result of a very long, very contentious proceeding. The Wireless Bureau has made several proposals in an effort to encourage the growth of the long-delayed mobile communications services in the 220 MHz band. Once again, however, the most contentious matter is the issue of auctions versus lotteries for pending applications. That is, how to treat fairly the comparative handful of pending applications -- thirty-three in this proceeding -- in a mobile service that already has existing licensees determined by lottery, has since been reclassified as a Commercial Mobile Radio Service (CMRS) and, therefore, is potentially subject to competitive bidding.

This Commission has repeatedly faced this issue during the on-going transition phase from Private Radio licensing by lottery to CMRS licensing by auction. I do not dispute the utility of auctions for new applicants in new services but I continue to believe -- as I have stated each time before[1] -- that Congress intended for us to exercise discretion[2] to weigh the equities on a service by service basis rather than to reflexively use auctions in each and every case.

The indisputable fact is that these few remaining applications have been on file far too long through no fault, action, or inaction on the part of the applicants. Instead, it is this Commission that has failed to take the requisite action. In this case, the FCC has failed to request the financial data that would "complete" the applications. Had we done so in a timely manner, these few remaining applications would have been processed by lottery as were the existing four commercial nationwide licenses and the 3,800 licenses for non-nationwide stations.

This Commission must consider carefully the projected revenues foregone as we decide whether to lottery or auction pending applications. We do not, however, have reliable data upon which to draw. The auction proponents have strained mightily to make these licenses appear to be similar to nationwide narrowband PCS so as to maximize projected

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[1] *See, e.g., MO&O,* Cellular Unserved Areas, 9 FCC Rcd 7383 (1994); *Report and Order,* Amendment of Parts 21 and 74 . . . in the Multipoint Distribution Service (MDS), __ FCC Rcd __, 60 Fed.Reg. 36524 (July 17, 1995).

[2] *See* 47 U.S.C. §§ 309 (i)&(j); Budget Act, Pub. L. No. 103-66, § 6002(e) (Special Rule) 107 Stat. 312, 397 (1993); See also H.R. Rep. 103-213, 103d Cong., 1st Sess. 498-499 (1993) (Conf. Rep.).

revenues but their efforts are unconvincing. The NPRM is replete with references to "substantial" revisions in this service but the truth is that 220 MHz band services will remain essentially what they were, albeit with wide-area licenses distributed by auctions that have a few minor categorical restrictions such as paging and trunking restrictions removed. These strike me as distinctions in an evolving service not substantial differences. We could have done as much by reconsideration without the churn and attendant uncertainty of a protracted rulemaking proceeding were it not for the goal of auctioning whatever spectrum resources remain unlicensed.

Overall, I believe that the proposals have much to commend them and I support this Commission's efforts to transition to an auction licensing methodology. It was while I was Chairman that Congress granted the FCC auctioning authority. I do not think, however, that the worthy goal of licensing by auction should be at the expense of long-standing applicants that have been subjected to administrative delay and indecision through no fault of their own. It is this Commission that created the regulatory limbo of pending applications. It seems to me the height of bureaucratic inequity that this Commission would not only impose on this handful of applicants the costs of a four-year delay in processing their applications, but then increase these costs by requiring them to bid at auction because of the delay.

One of the considerations enunciated in the Budget Act for this Commission to weigh in exercising the Congressionally granted discretion to determine how to process pending applications is the relative speed of service to the public. I continue to believe that lotteries are the most expeditious means to license the very few remaining applicants and, thereby, authorize timely service to the American consumer.

Although this Commission has become quite proficient at conducting auctions, they remain labor- and time-intensive events. There is an ever lengthening queue of services being sent to the line-up for auctions. Before we send yet another service to the auction block, I believe that we should clean up the backlog so that pending and future applicants to this Commission will continue to believe in the stability of the licensing process by having their expectations adjudged under the regulations extant at the time of filing, absent a truly significant revision in the service such as reallocation of the band for other services that are different in kind and not merely ancillary to those for which they applied.

As difficult as it may be for this Commission to repeatedly face the same issue, I believe it is now clear that there exists a genuine and material difference of opinion among the Commissioners on the issue of lotteries versus auctions for pending applications. This is not cause for reticence or recrimination. It is, in fact, how policy is actually made by a regulatory body composed of members with differing backgrounds, skills, and opinions. It is, indeed, the essence of regulatory decision-making. Collegial bodies should be able to disagree without becoming disagreeable. For my part, I would face the matter squarely and tentatively conclude in this item at this time that pending applications should be subject to lotteries and future applicants to auctions.