

**Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 95-395
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment 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 896-901 MHz and the 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
)	
Implementation of Sections 3(n) and 322 of the Communications Act)	GN Docket No. 93-252
)	

SECOND ORDER ON RECONSIDERATION AND SEVENTH REPORT AND ORDER

Adopted: September 14, 1995

Released: September 14, 1995

By the Commission: Commissioner Barrett issuing a statement.

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I. INTRODUCTION

1. In this *Second Order on Reconsideration and Seventh Report and Order*, we adopt final auction rules for the 900 MHz SMR service and address reconsideration petitions concerning the service rules adopted in the *Second Report and Order and Second Further Notice of Proposed Rule Making* ("*Second R&O and Second Further Notice*").¹ The rules adopted and the policies set forth herein will permit licensing the 900 MHz SMR service in a fast, fair and efficient manner, and will promote competition. At the same time, they will protect incumbents' current services to the public while providing such incumbents with a more flexible environment in which to expand their systems.

II. EXECUTIVE SUMMARY

2. The following paragraphs summarize the principal decisions made in this *Second Order on Reconsideration* regarding service rules, and those made in the *Seventh Report and Order* regarding auction rules.

A. Second Order on Reconsideration: Service Rules

3. As decided in the *CMRS Third Report & Order*,² the 900 MHz SMR band will be divided into 20 ten-channel blocks in each of 51 service areas based on Major Trading Areas ("MTAs"), which match the blocks previously licensed for the Designated Filing Areas ("DFAs"). Each MTA license will authorize the licensee to operate throughout the MTA on the designated channels except where a co-channel incumbent licensee already is operating. MTA licensees also will be allowed to aggregate multiple blocks within an MTA and to aggregate blocks geographically in multiple MTAs.

4. As decided in the *Second R&O and Second Further Notice*, MTA licensees in this service will be required to meet coverage requirements of one-third of the population in the service area within three years of the initial license grant and two-thirds of the population

¹ Amendment 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 896-901 MHz and 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, *Second Report and Order and Second Further Notice of Proposed Rule Making*, PR Docket No. 89-553, PP Docket No. 93-253, GN Docket No. 93-252, FCC 95-159, released April 17, 1995, 60 FR 21987, 22023 (May 4, 1995).

² Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services, *Third Report and Order*, GN Docket No. 93-252, 9 FCC Rcd 7988 (1994) (*CMRS Third Report & Order*).

within five years. Alternatively, a licensee may make a showing at five years that it is providing "substantial service." The Commission denies reconsideration of these benchmarks, and reiterates that MTA licensees must satisfy these requirements regardless of the area or percentage of the MTA population that is served by incumbent licensees. We clarify that MTA licensees may use options such as resale or management agreements³ to fulfill the coverage requirements.

5. To ensure that incumbent licensees receive protection from interference by MTA licensees, the *Second R&O and Second Further Notice* provides that MTA licensees either must maintain a minimum 113 kilometer (70 mile) geographic separation or comply with our short-spacing rules with respect to all incumbent facilities in their service area or in adjacent MTAs. We affirm our intention to allow MTA licensees to use short-spacing rules to comply with interference protection standards, and do not believe it will result in a plethora of interference disputes at the Commission. We also affirm our adoption of the 40 dBu median field strength contour as the protected service area in which incumbents may modify or add facilities, and reject petitioners' requests to use the 22 dBu contour instead. We will allow, however, incumbents to negotiate with wide area licensees to expand the incumbents' service areas. We also will reissue a single "partitioned" license to incumbents who are not successful bidders for the MTAs in which they are currently operating in exchange for their multiple site licenses.

6. As decided in the *Second R&O & Second Further Notice*, no secondary site licenses will be granted once an MTA licensee has been selected. We believe it is important to provide some degree of reliability to potential MTA bidders that the spectrum upon which they are bidding will not become subsequently encumbered with secondary sites. We clarify that all pending finders' preference requests for 900 MHz SMR licenses will be processed, but we are eliminating future finders' preference for the 900 MHz SMR service. As provided by our rules, any stations licensed to incumbents that are not constructed or placed in operation will revert automatically to the MTA licensee for that channel block.

7. We deny further reconsideration of our decisions in the *CMRS Third Report & Order* and the *Second R&O and Second Further Notice* with respect to loading requirements in the 900 MHz service, as petitioners have raised no new arguments that would merit reconsideration. Consequently, incumbent 900 MHz SMR licensees will continue to be subject to the loading requirements that were in effect when they were licensed.

8. We clarify that our amended rule regarding discontinuance of operation (Section 90.631(f)), which provides that stations taken out of service for 90 consecutive days are considered permanently discontinued, applies only to stations that were taken out of service after June 5, 1995 (the effective date of the rule). The former rule provided that stations

³ Management agreements should not result in a *de facto* transfer of control. See In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, *Fourth Report and Order*, 9 FCC Rcd 7123 (1994) at ¶¶ 20-28.

taken out of service for 12 months were considered permanently discontinued. Consequently, stations that were taken out of service prior to June 5, 1995, are entitled to stay out of service for the remainder of the original 12 months provided in the former rule, before they will be considered permanently discontinued. Those stations taken out of service on or after June 5, 1995, will be considered permanently discontinued after 90 days. With regard to wide-area SMR licensees that are replacing high power analog sites with low power digital sites, however, we will deem all the base stations "in operation" if the system meets the standards and conditions set out in *Fleet Call, Inc.*⁴

B. Seventh Report and Order

1. Auction Rules

9. A total of 1,020 MTA licenses⁵ will be awarded in the 900 MHz SMR service. We will use a single simultaneous multiple round auction to award these licenses, because the licenses are interdependent, and licensees are likely to aggregate and/or substitute across spectrum blocks and geographic areas. Both incumbents and new entrants are eligible to bid for all MTA licenses subject only to the spectrum cap in Section 20.6 of the Commission's Rules.⁶ All applicants for MTA licenses are treated as initial applicants for public notice, application processing, and auction purposes. The Wireless Telecommunications Bureau will announce the time and place of the auction and provide additional information to bidders by future public notice.

10. Applicants will apply for the 900 MHz SMR auction by filing a short-form application (FCC Form 175) and paying an upfront payment. We adopt the standard upfront payment formula of \$0.02 per pop-MHz, based on the number of 10-channel blocks in each MTA identified on the applicant's Form 175 and the total MTA population. The Wireless Telecommunications Bureau will announce, by public notice, the population calculation of each block in the MTA, using a formula that takes into account incumbents within the MTA. We also adopt the Milgrom-Wilson activity rule used in previous multiple-round simultaneous auctions, which requires bidders to declare their maximum eligibility in terms of MHz-pops and limits them to bidding on licenses encompassing no more than the MHz-pops covered by their upfront payment.

11. Each applicant will be required to specify on its FCC Form 175 its classification,

⁴ *Fleet Call, Inc., Memorandum Opinion and Order*, 6 FCC Rcd 1533 (1991), *recon. dismissed*, 6 FCC Rcd 6989 (1991).

⁵ 51 MTAs times 20 licenses in each MTA.

⁶ Broadband PCS, cellular, and SMR licensees may have attributable interests in no more than 45 MHz of licensed broadband PCS, cellular, and SMR spectrum regulated as CMRS with significant overlap in any geographic area. See 47 C.F.R. § 20.6.

status as a designated entity (if applicable), markets and frequency blocks for which it applied,⁷ and persons authorized to place or withdraw bids. Applicants must identify any arrangements or agreements with other parties relating to the licenses that are being auctioned and certify that there are no arrangements other than those specified. Applicants may correct minor defects in their short-form applications prior to the auction, but may not make any major modifications to their applications, including geographic license area changes, cognizable ownership changes or changes in the identification of parties to bidding consortia, until after the auction. Applicants may 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 do 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. In instances where only a single applicant has applied for a particular MTA channel block, the Commission will cancel the auction for that block and establish a deadline for filing of the applicant's long-form application. In all instances where mutually exclusive applications are filed, the MTA channel block will be included in the auction.

12. The timing and duration of auction rounds will be determined by the Wireless Telecommunications Bureau and announced by public notice. As in prior auctions, we expect to start the auction with relatively large bid increments and reduce increments as bidding activity falls. We will use a simultaneous stopping rule for this auction to afford bidders flexibility to pursue back-up strategies, and to ensure that bidders will not hold back bids until the final round. During the auction, we will retain the discretion to declare that the auction will end after a specified number of additional rounds.

13. We will specify bid increments, *i.e.*, 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. The application of a minimum bid increment helps to ensure that the auction closes within a reasonable period and is expressed in both a percentage and fixed dollar amount. We may impose a minimum bid increment of five percent or \$0.02 per pop-MHz, whichever is greater,⁸ but we also retain the discretion to set, vary and announce, before or during the auction, the minimum bid increments for licenses over the course of an auction.

14. We will use bid withdrawal and default rules for this auction similar to those used in prior auctions. Under these rules, any bidder that withdraws a high bid during an auction before the Commission declares bidding closed must reimburse the Commission for the difference between the amount of the ultimate winning bid and the withdrawn bid if the winning bid is lower than the withdrawn bid. An auction winner defaulting after the close of

⁷ The Commission modifies the tables in 47 C.F.R. §§ 90.617 and 90.619 to assign block letters to frequency block numbers.

⁸ See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Fifth Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 5532 (1994) at ¶ 44 (*Competitive Bidding Fifth Report & Order*).

the auction will have to make an additional payment equal to the lesser of three percent of the subsequent winning bid or three percent of the amount of the defaulting bid. In the event that an auction winner defaults or is disqualified, or if its license is revoked or terminated, the Commission will re-auction the license, except that we may offer the license to the second highest bidder if the default occurs within five days after the auction closes.

15. At the conclusion of the auction, winning bidders must supplement their upfront payments and file their long-form applications (FCC Form 600). The upfront payment must be supplemented in an amount sufficient to bring the winning bidder's deposit up to 20 percent of its winning bid within five days after the close of the auction. Designated entities eligible for installment payments, however, must bring their deposits up to five percent of the winning bid within five days after the close of the auction. Once each applicant has filed its long form and submitted its down payment, the Wireless Telecommunications Bureau will issue a public notice announcing the application's acceptance for filing and open a 30-day window for filing petitions to deny.

16. The 900 MHz SMR auction will be subject to the same regulatory safeguards as prior auctions to prevent applicants from colluding during the auction or obtaining unjust enrichment from subsequent transfer of the license. To prevent collusion, bidders who have applied for licenses in any of the same geographic license areas on their short-form applications may not cooperate, collaborate, discuss, or disclose the substance of their bids or strategies with other bidders except pursuant to a consortium or arrangement identified in the short-form application. Bidders also must attach an exhibit to the Form 600 explaining the terms, conditions, and parties involved in any bidding arrangement. With respect to transfers, licensees transferring their licenses within three years of the initial license grant must disclose to the Commission all contracts and other documentation associated with the transfer.

2. Designated Entities

17. Because of the large number of available licenses and the presence of incumbents throughout the 900 MHz SMR band, we will not create an entrepreneurs' block in this service. Nevertheless, we adopt several provisions for bidding in the 900 MHz auction by small businesses. Taking commenters' suggestions into account, we define two categories of small businesses: (1) an entity that, together with affiliates, has average gross revenues for the three preceding years of \$3 million or less; and (2) an entity that, together with affiliates, has average gross revenues for the three preceding years of \$15 million or less. We will define any investor in the applicant with a 20 percent or greater interest to be attributable for purposes of determining small business status. The 20 percent attribution threshold is derived from the measure of SMR attribution for purposes of applying the CMRS spectrum cap. In sum, we will consider the gross revenues of the entity and its affiliates and its attributable investors and affiliates.

18. Under this "tiered" approach, small businesses falling under the \$3 million benchmark are eligible for a 15 percent bidding credit on any MTA license; those falling

under the \$15 million benchmark are eligible for a 10 percent bidding credit. All small businesses may make a reduced down payment (five percent of the winning bid following the close of the auction, with the balance of the down payment paid five days after a Public Notice announcing that the Commission is prepared to grant the license), and are entitled to pay the bid balance in quarterly installments over the remaining license term. Small businesses falling under the \$3 million benchmark will be able to make interest-only payments for the first five years of the license term; small businesses falling under the \$15 million benchmark will be able to make interest-only payments for the first two years of the license term. We believe that broadening the scope of opportunities for small businesses, particularly on a tiered basis, will result in substantial participation by women and minorities, and we believe that the expected capital outlay for the 900 MHz service will not present the same type of obstacles for those entities as a more costly spectrum-based service like PCS.

19. We do not adopt reduced upfront payments for small businesses in the 900 MHz service but will allow partitioning for rural telephone companies, similar to those that we have applied to broadband PCS.

20. Small businesses entitled to special provisions in the 900 MHz SMR service seeking to transfer their licenses, as a condition to approval of the transfer, must remit to the government a payment equal to a portion of the total value of the benefit conferred by the government. Thus, a small business that received bidding credits which seeks transfer or assignment of a license to an entity that is not a small business or does not qualify as a smaller business under Section 90.814(b)(1), will be required to reimburse the government for the amount of the bidding credit, plus interest at the rate imposed for installment financing at the time the license was awarded, before transfer will be permitted. The amount of this reimbursement will be reduced over time as follows: a transfer in the first two years of the license term will result in a reimbursement of 100 percent of the value of the bidding credit; in year three of the license term the payment will be 75 percent; in year four the payment will be 50 percent and in year five the payment will be 25 percent, after which there will be no assessment. If a small business under the \$3 million definition seeks to transfer or assign a license to a small business under the \$15 million definition, for the purposes of determining the amount of payment, the value of the bidding credit is 5 percent, the difference between the 10 and 15 percent bidding credits. The 5 percent difference will be subject to the same percentage reductions over time as specified above. These reimbursements must be paid back to the U.S. Treasury as a condition of approval of the assignment or transfer.⁹

21. If a licensee that was awarded installment payments seeks to assign or transfer control of its license to an entity that is not a small business under Section 90.814(b)(1) during the term of the license, we will require payment of the remaining principal and any interest accrued through the date of assignment as a condition of the license assignment or

⁹ See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Third Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2941 (1994) at ¶ 80. (*Competitive Bidding Third Report and Order*).

transfer. Moreover, if a small business under the \$3 million definition seeks to assign or transfer control of a license to a small business under the \$15 million definition (that does not qualify for as favorable an installment payment plan), the installment payment plan for which the acquiring entity qualifies will become effective immediately upon transfer. However, a licensee may not switch its payment plan to a more favorable plan. If an investor subsequently purchases an "attributable" interest in the businesses during the first five years of the license term and, as a result, the gross revenues or total assets of the business exceed the applicable financial cap, thereby requiring the applicant to forfeit eligibility for an installment payment scheme, unjust enrichment provisions also will apply.

III. BACKGROUND

22. The 900 MHz SMR service was established in 1986, when the Commission allocated 200 channel pairs in the 896-901 MHz and 935-940 MHz bands for SMRs in order to alleviate congestion in the 800 MHz SMR band.¹⁰ To expedite service in major markets where demand for SMR service was greatest, the Commission used a two-phase licensing process. In Phase I, licenses were assigned in 46 "Designated Filing Areas" ("DFAs") comprised of the top 50 markets. Following Phase I, the Commission envisioned licensing facilities in areas outside these markets in Phase II. In the meantime, however, licensing outside the DFAs was frozen after 1986, when the Commission opened its filing window for the DFAs.¹¹

23. In 1989, the Commission adopted a *Notice of Proposed Rule Making* in PR Docket 89-553¹² ("*NPRM*"), proposing to begin Phase II licensing of 900 MHz SMR facilities nationwide. The *NPRM* contained proposals intended to add flexibility to 900 MHz SMR systems. The Commission continued its freeze on licensing outside the DFAs while the rule making was pending, but did license 900 MHz providers on a secondary basis (*i.e.*, facilities that may not cause interference to primary licensees and must accept interference from primary licensees) outside their DFAs to meet growing demand for regional service.

¹⁰ 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) (*900 MHz SMR Report & Order*).

¹¹ Public Notice, Private Land Mobile Application Procedures for Spectrum in the 896-901 MHz and 935-940 MHz Bands, rel. Nov. 4, 1986, 1 FCC Rcd 543 (1986) (Public Notice of Nov. 4, 1986).

¹² Amendment 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 896-901 MHz and 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, *Notice of Proposed Rule Making*, PR Docket No. 89-553, 4 FCC Rcd 8673 (1989).

24. In 1993, the Commission adopted a *First Report & Order and Further Notice of Proposed Rule Making* in PR Docket 89-553,¹³ modifying its Phase II proposal and seeking comment on whether to license the 900 MHz SMR band to a combination of nationwide, regional, and local systems. Shortly after the *First Report & Order/Further Notice*, Congress amended the Communications Act to reclassify most SMR licensees as Commercial Mobile Radio Service (CMRS) providers, and to establish the Commission's authority to use competitive bidding to select from among mutually exclusive applicants for certain licensed services.¹⁴ Accordingly, the Commission deferred further consideration of Phase II and incorporated the 900 MHz docket (as well as the companion docket relating to 800 MHz SMR)¹⁵, into its *CMRS* proceeding to ensure that the regulation of all SMRs would be consistent with the regulation of competing CMRS services, such as cellular and PCS,¹⁶ and to consider the impact of auction authority on the record of the pending 900 MHz proceeding.¹⁷

25. In the *CMRS Third Report and Order*, the Commission further revised its Phase II proposals and established the broad outlines for the completion of licensing in the 900 MHz SMR band. The Commission concluded that (1) the 900 MHz SMR band will be licensed in 20 ten-channel blocks using MTAs as service areas; (2) licensing of mutually exclusive applicants for this spectrum will be based on competitive bidding; and (3) incumbent licensees in the band will retain the right to operate under their existing authorizations, but will be required to obtain the relevant MTA license (or obtain the consent of the MTA licensee) to be able to expand their systems.¹⁸ The Commission noted that some licensees had been granted secondary authorizations to construct facilities outside of the DFAs, so they could link

¹³ Amendment 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 896-901 MHz and 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, *First Report and Order and Further Notice of Proposed Rule Making*, PR Docket No. 89-553, 8 FCC Rcd 1469 (1993) (*Phase II First Report & Order & Further Notice*).

¹⁴ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 (Budget Act), § 6002(b), 107 Stat. 312, 392 (1993) (codified at 47 U.S.C. §§ 309(j) and 332).

¹⁵ Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *Further Notice of Proposed Rule Making*, PR Docket No. 83-144, FCC 94-271, rel. Nov. 4, 1994, 59 Fed. Reg. 60,111 (Nov. 22, 1994) (*800 MHz Further Notice*).

¹⁶ See Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services, *Second Report and Order*, 9 FCC Rcd 1411 (1994) (*CMRS Second Report & Order*); Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services, *Third Report and Order*, GN Docket No. 93-252, 9 FCC Rcd 7988 (1994) (*CMRS Third Report & Order*).

¹⁷ Due to the passage of the Budget Act, the issues raised in the 1993 *Phase II First Report & Order*. (e.g., primary status of secondary sites; license terms, eligibility for nationwide or regional licenses; limitation on number of licenses controlled by single licensee), were addressed in the *CMRS Third Report & Order*.

¹⁸ *CMRS Third Report & Order* at ¶ 119.

facilities in different markets. With respect to those unprotected sites (*i.e.*, "secondary sites"),¹⁹ the Commission stated that those that were licensed on or before August 9, 1994, would be entitled to primary site protection.²⁰ The Commission also eliminated loading requirements for future MTA licensees, but retained them for incumbent 900 MHz SMR licensees that do not obtain MTA licenses.²¹

26. While the *CMRS Third Report & Order* established the framework for 900 MHz licensing, the Commission left the adoption of specific auction and service rules for the Phase II Order. In the *Second Report and Order and Second Further Notice of Proposed Rule Making*, we adopted final service rules, and requested comment on proposed auction rules. We established technical and operational rules for the new MTA licensees, and also defined the rights of incumbent SMR licensees already operating in the 900 MHz band. We also addressed issues raised on reconsideration of the *CMRS Third Report & Order* pertaining specifically to the 900 MHz SMR service.²² The *Further Notice* requested comment on further aspects of the Commission's decision in the *CMRS Third Report & Order* to license the 900 MHz band on an MTA basis, and to use competitive bidding to select from among mutually exclusive applicants. We set forth proposals for new licensing rules and auction procedures for the service, including provisions for designated entities. We later issued a Public Notice requesting further comment on the impact of the Supreme Court's subsequent decision in *Adarand Constructors Inc. v. Peña*²³ on our proposed treatment of designated entities in the *Second R&O and Second Further Notice*.²⁴

IV. SECOND ORDER ON RECONSIDERATION

A. Coverage Requirements

27. Background. In the *Second R&O and Second Further Notice*, the Commission adopted Section 90.665(c), which requires 900 MHz MTA licensees to provide coverage to one-third of the population of their service area within three years of initial license grant and to two-thirds of the population of their service area within five years or, at the five year mark,

¹⁹ See 47 C.F.R. § 90.7 (defining "secondary operation").

²⁰ *CMRS Third Report & Order* at ¶ 119.

²¹ *Id.* at ¶ 194.

²² Petitions for Reconsideration of the *CMRS Third Report & Order* that raise general CMRS issues, or specific issues pertaining to other CMRS services, will be addressed in a separate Order.

²³ 115 S.Ct. 2097 (1995).

²⁴ Request for Comments in 900 MHz SMR Proceeding, *Public Notice*, PR Docket No. 89-553, DA 95-1479, released June 30, 1995.

to submit a showing of substantial service.²⁵ We stated that this requirement fits squarely between the 10 MHz broadband PCS rules (one-fourth population coverage at five years or substantial service) and the narrowband PCS rules (one-fourth population coverage at five years, three-fourths population coverage at 10 years).²⁶

28. Petitions. By and large, petitioners request that we both amend the coverage requirements and clarify certain aspects of the rule. Several petitioners request that the Commission adopt a less stringent coverage requirement than that contained in Section 90.665(c).²⁷ In particular, Personal Communications Industry Association ("PCIA") and Advanced Mobilecomm, Inc. ("AMI") contend that it will be difficult for an MTA licensee to meet these coverage requirements unless it can establish a relationship with the incumbent licensee which may already cover significantly populated areas of an MTA.²⁸ Both petitioners point to the Los Angeles-San Diego MTA as an example of an anomaly created by the rule. AMI states that, if a San Diego incumbent wishes to obtain an MTA license to expand its San Diego offering, it would have to reach an agreement with the incumbent Los Angeles licensees in order to meet the MTA coverage requirement, as well as those in Las Vegas. As AMI notes, there is little roaming crossover, as Las Vegas was not one of the DFAs that was licensed in 1987.²⁹ Conversely, PCIA points out that, if a potential applicant wishes to serve only Las Vegas, it would have to reach agreements with the Los Angeles and San Diego incumbents to meet coverage requirements.³⁰ AMI elaborates that the problem with establishing such a relationship is that the equipment with which each licensee already has constructed may be totally incompatible with that of the potential MTA licensee.³¹

29. Both RAM and Geotek request that the Commission clarify Section 90.665(b) and (d) to indicate that an incumbent licensee who becomes the MTA licensee, then fails to satisfy the coverage requirements, does not forfeit the entire MTA license but, retains those facilities

²⁵ 47 C.F.R. § 90.665(c); *Second R&O and Second Further Notice, supra*, at ¶ 40.

²⁶ *Second R&O and Second Further Notice* at ¶ 40; 47 C.F.R. §§ 24.203(b) and 24.103(c).

²⁷ Comments of RAM Mobile Data USA Limited on Petition for Reconsideration & Clarification, filed July 27, 1995 at 4.

²⁸ Petition for Partial Reconsideration of the Personal Communications Industry Association, filed June 5, 1995, at 6-7; Petition for Partial Reconsideration of the Advanced Mobilecomm, Inc., filed June 5, 1995, at 2-3.

²⁹ AMI Petition at 3; See Public Notice, Private Land Mobile Application Procedures for Spectrum in the 896-901 MHz and 935-940 MHz Bands, rel. Nov. 4, 1986, 1 FCC Rcd 543 (1986) (Public Notice of Nov. 4, 1986).

³⁰ PCIA Petition at 7.

³¹ AMI Petition at 3.

licensed to it prior to the auction.³² Petitioners contend that, if the Commission intends to subject incumbents to forfeiture of the entire MTA license, including their existing systems, incumbents will be dissuaded from participating in the auction³³ and non-incumbents will be given an unfair competitive advantage.³⁴ Geotek states that, absent clarification, an incumbent licensee will be risking substantial capital to bid on the MTA license, as well as its prior investment in the license and facilities associated with its existing system.³⁵

30. Southern California Edison Company ("SCE") requests a number of clarifications of the Commission's coverage requirements. First, SCE requests that the Commission clarify Section 90.665(c) to indicate precisely how population coverage will be counted.³⁶ SCE urges the Commission to choose a geographically determined benchmark, such as the U.S. Census Bureau's census tracts, to allow for more precise computation of population coverage.³⁷ Otherwise, SCE contends, since county population is essential to calculating MTA population, an MTA licensee may provide coverage to one corner of a county and claim credit for the entire county.³⁸ SCE predicts that the failure to clarify population computation methodology will result in protracted disputes between MTA license holders and the Commission.³⁹ Second, SCE requests that the Commission indicate precisely which edition and population table of *Rand McNally's Commercial Atlas and Marketing Guide* the Commission will use to determine whether an MTA licensee has complied with Section 90.665(c), a clarification which SCE deems critical in view of the five years that have passed since the last U.S. Census.⁴⁰ Third, SCE requests clarification of the coverage rule to indicate that MTA licensees must meet coverage requirements regardless of the percentage of the MTA population already served by incumbent licensees.⁴¹

31. Discussion. We will retain the coverage requirements outlined in Section

³² Petition for Reconsideration of Geotek Communications, Inc., filed June 5, 1995, at 8-9; Petition for Reconsideration and Clarification of RAM Mobile Data USA Limited Partnership, Inc., filed June 5, 1995, at 5.

³³ RAM Petition at 5.

³⁴ Geotek Petition at 9; RAM Petition at 5.

³⁵ Geotek Petition at 8.

³⁶ Petition for Clarification of the Southern California Edison Company, filed June 5, 1995, at 6-7.

³⁷ *Id.*

³⁸ SCE Petition at 6.

³⁹ SCE Petition at 7.

⁴⁰ SCE Petition at 7.

⁴¹ SCE Petition at 8.

90.665(c), which require 900 MHz MTA licensees to provide coverage to one-third of the population of their service area within three years of initial license grant and to two-thirds of the population of their service area within five years or, at the five year mark, to submit a showing of substantial service. We are convinced that these benchmarks are not too stringent, particularly in light of the "substantial showing" mechanism designed for specialized users, who may not be able to meet the two-thirds requirement due to individualized circumstances. We will review these showings on a case-by-case basis. We believe that any winning MTA bidder should have the ability to meet these coverage requirements.

32. The percentage of population served by the incumbent in a DFA is a factor that MTA bidders will have to take into account in determining whether and how it will meet the coverage requirements of a particular MTA on which it seeks to bid. We expect bidders to have a realistic plan for meeting coverage requirements, by investigating the possibility of resale, affiliation with other bidders, or buyouts of incumbents. Those with an interest in serving only part of an MTA also are free to enter into private contractual arrangements with the MTA licensee. If a bidder expects that it will not be able to reach an agreement with an incumbent, that factor should be considered in the bidding strategy. Developing separate coverage requirements for the portions of the MTA that currently are unserved by incumbents is tantamount to establishing the 900 MHz SMR auction as an "unserved area" auction. That principle is at odds with the Commission's policy for the 900 MHz SMR service of providing the system user with ubiquitous regional coverage.⁴² Therefore, we disagree with PCIA and AMI regarding coverage requirements. We will not condition compliance with Section 90.665(c) on the success (or lack thereof) of the MTA's licensee's ability to reach a satisfactory agreement with the incumbent. Thus, the MTA licensee must meet these coverage requirements regardless of the presence of an incumbent licensee.

33. We do, however, agree with RAM and Geotek and will modify Section 90.665(d) to state that an MTA licensee who also is the incumbent within the MTA will not forfeit the entire MTA for failure to meet coverage requirements. Such licensees will forfeit only the spectrum gained in the MTA license, and not the spectrum to which it originally was licensed as the incumbent in the DFA (including any secondary sites that have achieved primary status). In other words, only the right to use channels any place in the MTA will be forfeited, but any channels for which individual sites were constructed and operating prior to auction will be retained by the MTA licensee.

34. Finally, in response to SCE's request, we will use the 1992 edition of *Rand McNally's Commercial Atlas and Marketing Guide* (which is based on the April 1, 1990 U.S. Census) in determining whether the licensee has met its coverage requirement. Under our standard, a licensee will not be able to claim coverage of an entire county if it covers only a small portion of the county. As discussed at ¶ 112, *infra*, the Commission will provide, by Public Notice, population information corresponding to each MTA, which also will be used to

⁴² See *Competitive Bidding Third Report and Order* at ¶ 13.

calculate the upfront payment.

B. Treatment of Incumbents

1. MTA Licensee's Interference Protection Obligations to Incumbents

35. Background. The Commission stated in the *Second R&O and Second Further Notice*, that MTA licensees will be required to afford interference protection to incumbent SMR systems, as provided in Section 90.621(b), in one of three ways: (1) By locating their stations at least 113 km (70 miles) from any incumbent's facilities; (2) by complying with the co-channel separation standards in the short-spacing rule (§ 90.621(b)(4)), if they seek to operate stations located less than 113 km from an incumbent's facilities; or (3) by negotiating an even shorter distance with the incumbent licensee.⁴³

36. Petitions. Geotek requests that the Commission require the MTA licensee to comply with the minimum distance criteria without short spacing in order to avoid having the MTA licensee contain the growth of an incumbent's geographic service area.⁴⁴ Geotek notes that this is of particular concern in markets in which an incumbent operates with few or one transmitter(s) and the MTA licensee surrounds the incumbent, thereby preventing the incumbent from making modifications or supplementing its service.⁴⁵ Geotek claims that allowing the incumbents more flexibility will reduce the Commission's involvement in co-channel disputes.⁴⁶

37. Discussion. We will retain the rule as adopted. Geotek has not presented a sufficient justification to warrant our elimination of the short-spacing option in defining the MTA licensee's interference obligations. We find no merit to Geotek's claim that short-spaced MTA licensees will "box in" incumbents, as we have considered and rejected similar arguments in the past. When we developed the short-spacing table in the *Report and Order* for PR Docket 93-60,⁴⁷ Fleet Call (now Nextel) argued that the short-spacing table would impede the development of wide-area digital SMR systems. We denied this request and decided that the use of the short-spacing table offered a balance between increased spectrum efficiency, adequate co-channel protection and administrative convenience.⁴⁸ We continue to

⁴³ *Second R&O and Second Further Notice* at ¶ 44.

⁴⁴ Geotek Petition at 5-6.

⁴⁵ *Id.* at 5.

⁴⁶ *Id.* at 6.

⁴⁷ Co-Channel Protection Criteria for Part 90, Subpart S Stations Operating above 800 MHz, *Report and Order*, PR Docket No. 93-60, 8 FCC Rcd 7293 (1993) at ¶¶ 11,12 and n. 20.

⁴⁸ *Id.* at 13.

believe the use of the short-spacing table will afford maximum flexibility to the MTA licensee, will allow incumbents to fill in "dead spots,"⁴⁹ and still will protect the incumbent licensee from actual interference. Considering the likelihood that incumbent licensees will bid on the MTAs that surround their systems, we believe that the short-spacing option will not result in a plethora of interference disputes to be resolved by the Commission.

2. Incumbents' Interference Protection Obligations to MTA Licensee

38. Background. In the *Second R&O and Second Further Notice*, the Commission defined the incumbent licensee's existing service area by its originally-licensed 40 dBu median field strength contour.⁵⁰ We rejected commenters' suggestions that we use the 22 dBu contour as an incumbent's protected service area, because we have consistently applied the 40 dBu signal strength contour to incumbent operations.⁵¹ We noted that incumbents would be able to add new transmitters in their existing service area as long as they did not expand their original 40 dBu signal strength contour.⁵² We also required incumbents to notify the Commission of any changes in technical parameters or the construction of additional stations with a minor modification application.⁵³ We stated our intention to allow incumbents to continue existing operations without harmful interference and to give them flexibility to modify or augment their system without encroaching on the MTA licensee's operations.⁵⁴

39. Petitions. Several petitioners urge the Commission to reconsider its rejection of the 22 dBu contour as the definition of an incumbents' service area. Geotek contends that the 40 dBu contour is too restrictive, and suggests that the Commission use the 40 dBu contour to define the incumbent's protected contour while allowing modifications within the 22 dBu contour.⁵⁵ Geotek states that the proposed modifications would neither offer incumbents any more interference protection than they would receive under the current rules, nor expand incumbents' service area.⁵⁶ RAM insists that the 22 dBu contour definition enhances an incumbent's operational flexibility and ability to serve more effectively customers in its

⁴⁹ "Dead spots" are those areas where theoretically there should be enough signal/field strength to provide good service to the area, but due to any of a variety of reasons (e.g., high skyscrapers blocking the signal, mountain ranges shading the signal, etc.), the field strength in that region is insufficient to provide good service.

⁵⁰ *Second R&O and Second Further Notice* at ¶ 46.

⁵¹ *Id.*

⁵² *Id.* at ¶ 47.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Geotek Petition at 2-4; RAM Comments on Petition for Reconsideration at 2.

⁵⁶ Geotek Petition at 4.

service area without impinging on the adjacent MTA licensee's operations.⁵⁷ AMTA suggests that the Commission allow incumbents to implement additional or modified facilities at any site that does not expand the 22 dBu contour of an existing site, which facilities would not have to be protected from interference from subsequently granted MTA licenses.⁵⁸ AMTA claims that incumbents could cover what otherwise would be "dead spots" without adversely affecting the MTA licensee.⁵⁹ RAM also submits an engineering statement purporting to show many instances in which existing systems have added new sites to intensify coverage of already-served areas or fill in "dead spots," which extends the 40 dBu contour but does not increase the interference contour.⁶⁰

40. RAM also argues that the Commission should grant wide-area licenses to incumbents, rather than site-by-site licensing.⁶¹ RAM contends that, to give existing licensees flexibility to operate within their protected areas, the Commission should allow incumbents to trade in their site-specific licenses for a wide-area license, demarcated by the aggregate of the 40 dBu contours around each of the incumbent's contiguous sites operating in the same ten-channel block.⁶² RAM suggests that where the incumbent does not apply for, or does not win, the MTA license, it should be able to trade in its "site-by-site" licenses for a license that accurately reflects the 40 dBu contour to which it is now entitled.

41. Discussion. We are not persuaded to change our determination to use the 40 dBu contour to define an incumbent's service area in which they can make modifications without Commission action, rather than the 22 dBu contour, as petitioners request. As RAM points out, we recognized in the *Second R&O and Second Further Notice* that there would be instances where the 40 dBu contour could be expanded without expanding the 22 dBu contour⁶³ and that it would occur infrequently. RAM does not dispute this conclusion, nor has it submitted new information or raised new arguments that would persuade us to change our initial determination. We continue to believe that the use of the 40 dBu contour to determine the protected service area strikes the most reasonable balance between the rights of the incumbent to add sites within its protected contour and the interest of prospective MTA licensees in obtaining clear spectrum. However, we will modify incumbent notification

⁵⁷ RAM Petition at 3.

⁵⁸ Petition for Partial Reconsideration and Clarification of American Mobile Telecommunications Association, filed June 5, 1995, at 11.

⁵⁹ *Id.*

⁶⁰ *Id.* at 4.

⁶¹ RAM Petition at 2; RAM Comments on Petition for Reconsideration at 3.

⁶² RAM Petition at 2.

⁶³ *Id.*

requirements. All incumbents are prohibited from expanding their 40 dBu field strength contours. Therefore, we will not require incumbents who are making modifications to their systems within the 40 dBu signal strength contour to notify the Commission of modifications to their facilities. Elimination of the notification requirement in Section 90.667(a) of the Commission's Rules will reduce administrative burdens on incumbents without increasing problems of signal interference.

42. We will grant RAM's request to allow incumbents to have their licenses reissued if they are not the successful bidder for the MTA in which they are currently operating. This procedure, which would be granted post-auction upon the request of the incumbent, would essentially convert their current site licenses to a single "partitioned" license, authorizing operations throughout the contiguous and overlapping 40 dBu signal strength contours of the multiple sites. Incumbents seeking reissued "partitioned" licenses, however, will have to make a one-time filing of specific information for each of their external base sites that will assist the staff in updating the Commission's database after the close of the 900 MHz SMR auction. We believe that facilities added or modified without prior approval or subsequent notification under these new sections will not receive interference because they will be indirectly protected by the presence of surrounding stations of the same licensee on the same channel or channel block. If incumbents seek to gain additional geographic coverage beyond the 40 dBu protected contour, they must apply for the MTA license.

C. Secondary Site Licensing

43. Background. In the *Order on Reconsideration*⁶⁴ in this docket, we stated our intention to continue authorizing secondary sites, because it would allow incumbents, many of whom will seek to become MTA licensees, to continue building out their systems and provide service to consumers.⁶⁵ We also reasoned that such continued authorizations in advance of MTA licensing would not contribute to spectrum contamination, because such sites are not entitled to interference protection from MTA licensees, and would have to discontinue operations that interfere with MTA-licensed operations.⁶⁶ In the *Second R&O and Second Further Notice*, the Commission decided to afford primary site protection to secondary site applications filed on or before August 9, 1994, but stated that any applications filed after that date would continue to be authorized on a secondary site basis.⁶⁷ In adopting Section 90.667(b), the Commission also affirmed its intention not to authorize any secondary sites

⁶⁴ Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services, *Order on Reconsideration*, GN Docket No. 93-252, 10 FCC Rcd 1568 (1995) at ¶ 5.

⁶⁵ *Order on Reconsideration* at ¶ 4.

⁶⁶ *Id.* at ¶ 5.

⁶⁷ *Second R&O and Second Further Notice* at ¶ 53.

once the MTA licensee has been selected.⁶⁸

44. Petitions. AMTA and RAM now request that the Commission continue to grant applications for secondary sites after an MTA license has been granted.⁶⁹ RAM argues that the restriction in Section 90.667(b) conflicts with the Commission's objective of affording flexibility to incumbents, and that the continued licensing of such sites will not compromise the MTA licensing process.⁷⁰

45. Advanced Mobilecomm, Inc. ("AMI") and PCIA request that the Commission clarify one aspect of our decision to afford primary site status to secondary site authorizations which were licensed, or for applications that were filed, on or before August 9, 1994. Specifically, Petitioners request that the Commission require that such secondary sites (which have since been granted primary status) nevertheless should be required to take into account the original primary sites of incumbent licensees in adjacent markets.⁷¹ In particular, Advanced Mobilecomm points to the Los Angeles and San Diego co-channel systems, where the distance between sites is minimal.⁷² Advanced Mobilecomm also requests that the Commission reaffirm the special requirements for transmitters south of 33° 45' Latitude serving the Los Angeles DFA to protect subsequent grants in San Diego.⁷³

46. Discussion. We deny AMTA and RAM's request regarding post-auction secondary site licensing. No secondary site licenses will be granted once an MTA licensee has been selected. Notwithstanding the secondary nature of these sites, we believe it is important to assure potential MTA bidders that the spectrum upon which they are bidding will not become subsequently encumbered with secondary sites. We believe the better approach is to require an incumbent to negotiate with the MTA winner for the right to build additional secondary sites *after* the MTA licenses have been awarded, rather than to subject the MTA winners at the outset to potential disputes with incumbents on issues such as whether a particular secondary site will cause actual interference. Considering the proximity of the 900 MHz auction, we believe this approach provides the proper balance between the interest of the MTA bidders in assessing the value of the MTA, and the interest of the incumbent in building out its system.

47. We reiterate the special requirements for transmitters serving the Los Angeles

⁶⁸ 47 C.F.R. § 90.667(b).

⁶⁹ AMTA Petition at 11-12; RAM Petition at 4.

⁷⁰ RAM Petition at 4.

⁷¹ Advanced Mobilecomm Petition at 4-5; PCIA Petition at 8.

⁷² *Id.*

⁷³ *Id.* at 5 n.6.

DFA. In a 1986 Public Notice, the Commission stated that licensees serving the Los Angeles DFA that employ base station transmitters located on Santiago Peak and other peaks located south of 33° 45' North Latitude have special conditions attached to their licenses requiring that they protect subsequent grants to licensees that serve the San Diego DFA.⁷⁴

D. Finders' Preference Program

48. DW Communications, Inc. ("DW") and AMTA request that the Commission modify Section 90.667 to include licenses granted through the finders' preference program as incumbents entitled to co-channel interference protection.⁷⁵ Section 90.173(k) of the Commission's rules describes the Commission's "finders' preference program," which provides that an applicant finding unused spectrum will receive a dispositive preference for use of a channel in the 900 MHz band on an exclusive basis.⁷⁶ DW, a finders' preference licensee, is particularly concerned that, without such clarification, it would not be considered an incumbent and its primary site authorization would be only secondary in nature.⁷⁷ AMTA, going one step further, states that, to the extent the Commission retains the finders' preference program, it should exempt finders' preference licenses from the August 9, 1994 primary status cut-off requirement.⁷⁸

49. We will clarify Section 90.667 to include successful applicants for a finders' preference as "incumbents" within the meaning of the rule. As such, they will be entitled to co-channel protection from an MTA licensee. In response to AMTA's request, the Commission has stated that the function of finders' preference mechanisms with respect to CMRS services will be addressed in a future rule making proceeding.⁷⁹ While the broad issue of finders' preferences will be addressed in that proceeding, we are eliminating it immediately for the 900 MHz SMR service. The Commission will no longer accept finders' preference applications following the adoption of this *Order*.⁸⁰ The MTA licensee will have the

⁷⁴ Private Land Mobile Application Procedures for Spectrum in the 896-901 MHz and 935-940 MHz Bands, *Public Notice*, released November 4, 1986, at 7-8.

⁷⁵ Petition for Reconsideration of DW Communications, Inc., filed May 19, 1995, at 3-5; AMTA Petition at 9-10.

⁷⁶ 47 C.F.R. § 90.173(k).

⁷⁷ DW Petition at 3-4.

⁷⁸ AMTA Petition at 10.

⁷⁹ *CMRS Third Report and Order* at ¶ 398.

⁸⁰ The imposition of this freeze is procedural in nature and therefore is not subject to the notice and comment and effective date requirements of the Administrative Procedure Act (APA). *See Kessler v. FCC*, 326 F.2d 673 (D.C. 1963). Furthermore, good cause exists for noncompliance with these APA requirements. Adherence to the notice and comment and effective date requirements in this matter would be contrary to the

exclusive right to recover unconstructed or non-operational channels on blocks for which it is licensed.

E. Loading Requirements

50. Background. In the *Third Report & Order* in GN Docket No. 93-252 ("*CMRS Third Report & Order*"), we declined to apply the loading/automatic cancellation requirement for MTA licensees in the 900 MHz band, but decided to retain the loading requirement for 900 MHz SMR incumbent licensees.⁸¹ On reconsideration, we affirmed our decision in the *CMRS Third Report and Order* to retain the loading requirement for incumbent 900 MHz SMR licensees.⁸² We stated three reasons why we were retaining loading requirements for incumbents: (1) We already had granted incumbents an additional two year loading extension;⁸³ (2) incumbents who could not fulfill loading requirements because they were limited to operating in the DFAs now can obtain an MTA license; and (3) the public interest is not served by allowing an incumbent who does not obtain the MTA license to retain spectrum that it has been unable to utilize fully for seven years.⁸⁴ However, we did grant temporary relief in the form of a waiver from the loading rules to RAM until 30 days after the completion of the 900 MHz auction, based on the unique circumstances of RAM's substantially-constructed wide area network.⁸⁵ Recently, the Wireless Telecommunications Bureau granted the same type of temporary relief to Celsmer, which demonstrated that it had constructed a virtually seamless wide area network in Florida, that already is operating and serving customers.⁸⁶

51. Petitions. Several petitioners once again request that the Commission eliminate the five-year loading rule for all 900 MHz SMR systems. AMTA, PCIA and Celsmer take issue with the Commission's justification that 900 MHz SMR is "less mature" than the 800

public interest because compliance would undercut the purposes of the freeze.

⁸¹ *CMRS Third Report & Order* at ¶ 194. The loading rule, 47 C.F.R. § 90.631(i), requires that each applicant for a trunked system certify that a minimum of 70 mobiles for each channel authorized will be placed in operation within five years of the initial license grant (with the exception of the two-year renewal provided in subsection (i)); otherwise authorizations cancel automatically.

⁸² *Second R&O and Second Further Notice* at ¶ 57.

⁸³ See Amendment of Section 90.631 of the Commission's Rules and Regulations Concerning Loading Requirements for 900 MHz Trunked SMR Stations, *Report and Order*, PR Docket No. 92-17, 7 FCC Rcd 4914 (1992).

⁸⁴ *Second R&O and Second Further Notice* at ¶ 57.

⁸⁵ *Second R&O and Second Further Notice* at ¶¶ 58-59.

⁸⁶ Celsmer Request for Waiver of 47 C.F.R. § 90.631 Loading Standards for 900 MHz SMR Licensees, *Order*, DA 95-1537, released July 10, 1995.

MHz SMR service, for which no loading requirements were retained,⁸⁷ and AMTA points to PCS as an even newer service for which there are no loading requirements.⁸⁸ AMTA, PCIA and Advanced Mobilecomm argue that maintaining loading requirements for incumbent 900 MHz SMR systems, while eliminating the requirements for other services, does not promote regulatory symmetry.⁸⁹ PCIA and Advanced Mobilecomm argue that the MTA licensee has greater rights than the incumbent, with respect not only to loading but with respect to station cancellation, whereby the incumbent's unused channels revert to the MTA licensee.⁹⁰ Celsmer, PCIA and Advanced Mobilecomm contend that not all incumbents, particularly independent operators, have the means to solve their loading problem by obtaining the MTA license.⁹¹ Celsmer, PCIA and Advanced Mobilecomm blame regulatory delay in concluding the 900 MHz "Phase II" licensing proceeding for licensees' inability to build out their systems.⁹² As an alternative, AMTA requests that the Commission grant a limited waiver of the loading requirements similar to that granted to RAM.⁹³

52. DW contends finders' preference licensees that have received grants in 1995 should be specifically exempt from loading requirements.⁹⁴ While DW concedes that loading requirements are justified with respect to 900 MHz SMR licenses granted in 1987, DW also points out that 800 MHz SMR licensees that were granted on or after June 1, 1993, are not subject to loading requirements.⁹⁵ Therefore, to achieve regulatory symmetry with the 800 MHz SMR service, DW requests that the Commission amend Section 90.631(i) to exempt licensees of primary 900 MHz SMR stations whose initial licenses were granted after June 1, 1993.

53. Discussion. We have considered this issue fully in both the *CMRS Third Report and Order* and the *Second R&O and Second Further Notice*. Petitioners have raised no arguments that would persuade us to reconsider our determination to retain loading requirements for incumbent 900 MHz SMR licenses. The 900 MHz SMR service has a

⁸⁷ AMTA Petition at 7-8; Celsmer Petition at 2; PCIA Petition at 3.

⁸⁸ AMTA Petition at 7-8.

⁸⁹ AMTA Petition at 6-7; PCIA Petition at 4; Advanced Mobilecomm at 8.

⁹⁰ PCIA Petition at 4; Advanced Mobilecomm Petition at 8-9 (*citing Second R&O and Second Further Notice at ¶ 57*); RAM Comments on Petition for Reconsideration at 3.

⁹¹ Celsmer Petition at 3; PCIA Petition at 5; Advanced Mobilecomm at 6-7.

⁹² Celsmer Petition at 2; PCIA Petition at 3, 5; Advanced Mobilecomm Petition at 7-8.

⁹³ AMTA Petition at 7 n.13 and 8.

⁹⁴ DW Petition at 5.

⁹⁵ See 47 C.F.R. § 90.631(b).

unique history, in that the Commission has, at the request of the SMR industry, substantially extended the deadline for loading systems.⁹⁶ It simply does not serve the public interest to allow licensees, who have had a full seven years to load their system, to retain that spectrum.⁹⁷ Although finders' preference licensees may not have had seven years in which to meet the requirements, they will still be subject to loading requirements as incumbent licensees. Such finders' preference licensees will have seven years from their license grant to comply with the loading requirements.⁹⁸ We reemphasize that every incumbent, including a finders' preference licensee, has the opportunity to bid for an MTA license, for which it will have no loading requirements. Thus, we are not convinced that incumbents should be entitled to relief from this requirement. Nor are we convinced that every incumbent is entitled to temporary relief, such as that granted to both RAM and Celsmer. However, we will entertain waiver petitions and determine, on a case-by-case basis, whether a licensee, who bears the burden of proof, has made a showing justifying why loading standards should not apply to its unique situation.

G. Discontinuance of Operation

54. Background. Section 90.931(f) provides that if a station is not placed in operation within one year, its license cancels automatically. Prior to the *Second R&O and Second Further Notice*, the rule also provided that SMR licensees which had discontinued operations for more than 60 consecutive days were considered permanently discontinued, unless the Commission received prior notification. If the Commission rejected the licensee's justification, the licensee was required to resume operations within five days. In the *Second R&O and Second Further Notice*, the Commission modified Section 90.631(f) to permit licensees to discontinue operations for 90 continuous days without being considered permanently discontinued, and removed any provision for licensees to request an additional extension of this period.⁹⁹

55. Discussion. AMTA and Nextel request that the Commission specify that the 12-month period continues to govern SMR stations discontinued before the effective date of the rule, and that the 90-day period applies prospectively to stations discontinued after the

⁹⁶ See Amendment of Section 90.631 of the Commission's Rules and Regulations Concerning Loading Requirements for 900 MHz Trunked SMR Stations, *Report and Order*, PR Docket No. 92-17, 7 FCC Rcd 4914 (1992).

⁹⁷ Contrary to AMTA's argument, the coverage and construction goals for the PCS service are fairly stringent. See 47 C.F.R. §§ 24.103(c) and 24.203(b).

⁹⁸ See 47 C.F.R. §§ 90.173(k) and 90.631(b) and (i).

⁹⁹ *Second R&O and Second Further Notice* at ¶ 26; 47 C.F.R. § 90.631(f).

effective date of the rule.¹⁰⁰ We agree that SMR stations that were taken out of service before the effective date of the new rule would not be governed by the 90-day requirement.

56. With regard to wide-area SMR licensees that are replacing high power analog sites with low power digital sites, however, we will deem all the base stations that comprise the system "in operation" if the system meets the standards set out in *Fleet Call, Inc.*¹⁰¹ In *Fleet Call*, the Commission waived the one-year construction requirement so that Fleet Call (now Nextel) could convert its existing base stations with aggregate loading from single high-power sites to multiple low-power sites on an integrated basis in six major markets.¹⁰² It is established that permitting SMR licensees to undergo conversion to multiple low power sites increases spectrum efficiency, and poses little risk of spectrum warehousing. The conversion process does, however, result in intervals when, for example, high powered base stations are taken out of operation in order to bring low-power digital sites on-line. As a result, we will view the entire wide-area system as "operating" if, consistent with *Fleet Call*, particular base stations of the system have discontinued operation as part of the conversion to low power digital sites.

H. Foreign Ownership Waivers

57. Background. In Section 332(c)(6) of the Act,¹⁰³ Congress reclassified certain categories of private land mobile radio providers ("PLMRS") as commercial mobile radio service ("CMRS") providers, and provided for their treatment as common carriers. As a result, reclassified providers are subject to the Section 310(b) foreign ownership restrictions applicable to common carriers.¹⁰⁴ Congress provided for limited grandfathering of existing foreign interests in such licensees through a waiver petition process, whereby any reclassified PLMRS licensee could petition the Commission by February 10, 1994 for waiver of the application of Section 310(b) to any foreign ownership that lawfully existed as of May 24, 1993. The *CMRS First Report and Order* established the specific waiver petition procedure. In the *Second R&O and Second Further Notice*, pursuant to a request from Geotek, the Commission decided to grandfather any timely-filed petitions for waiver of the foreign

¹⁰⁰ AMTA Petition at 12-13; Nextel Petition at 2-4. The rule became effective on June 5, 1995. See 60 F.R. 22023 (May 4, 1995).

¹⁰¹ *Fleet Call, Inc., Memorandum Opinion and Order*, 6 FCC Rcd 1533 (1991), *recon. dismissed*, 6 FCC Rcd 6989 (1991) (*Fleet Call*).

¹⁰² *Id.* at 1536 ¶ 26. See also Letter from Ralph A. Haller, Chief, Private Radio Bureau to David Weisman, DA 92-1734, 8 FCC Rcd 143 (*Weisman Letter*).

¹⁰³ 47 U.S.C. § 332(c)(6).

¹⁰⁴ 47 U.S.C. § 332(c)(6); See also Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services, *First Report and Order*, GN Docket No. 93-252, 9 FCC Rcd 1056 (1994) (*CMRS First Report & Order*) at ¶¶ 2-3.

ownership restrictions filed by an incumbent in the event the incumbent wins the MTA license.¹⁰⁵

58. Petitions. Geotek now requests that the Commission extend that grandfathered status to any 900 MHz SMR MTA license that an incumbent may acquire, not just the MTA in which the applicant is also the incumbent.¹⁰⁶ In other words, Geotek requests that the grandfathered status apply to the licensee, not the license.¹⁰⁷ Geotek contends that such an interpretation would be consistent with common carrier precedent regarding waivers, and is a proper reading of Section 332(c)(6).¹⁰⁸ Geotek, however, does not cite to any specific Commission precedent in this area. Geotek also points out that the Commission's interpretation would prohibit reclassified CMRS providers from holding common carrier licenses, including microwave or other such licenses used to link base station facilities in the MTA.¹⁰⁹

59. Discussion. Geotek asks the Commission not only to apply its waiver to other licenses in the same service, but also to other licenses it may acquire in different services. With respect to Geotek's first request, we note that since Geotek filed its petition for reconsideration in this proceeding, the Wireless Telecommunications Bureau has resolved 33 requests for waiver of Section 310(b), including that filed by Geotek.¹¹⁰ We do not address Geotek's first request here as it is an issue discussed in petitions for reconsideration filed in the Bureau's proceeding. We note, however, that in light of the Bureau's decision, Geotek may bid in the upcoming auction. In the *Foreign Ownership Order*, the Bureau granted Geotek's petition, among others,¹¹¹ noting that the waivers apply to additional licenses granted to petitioners in the same service after May 24, 1993 and prior to August 10, 1996, provided the same ownership structure is maintained.¹¹² Thus, the Bureau held that such entities may acquire other SMR licenses, including MTA licenses in which it is not the incumbent. The Bureau stated that this decision was consistent with Congressional intent in grandfathering the foreign ownership interests of reclassified licensees and provided greater flexibility for the

¹⁰⁵ *Second R&O and Second Further Notice* at ¶ 71.

¹⁰⁶ Geotek Petition at 6.

¹⁰⁷ Geotek Petition at 8.

¹⁰⁸ Geotek Petition at 6-7.

¹⁰⁹ Geotek Petition at 7.

¹¹⁰ Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services -- Foreign Ownership Waiver Petitions, *Order*, GN Docket No. 93-252, DA 95-1303, released June 12, 1995 (*Foreign Ownership Order*) (petition(s) for recon. pending).

¹¹¹ *Id.* at ¶ 9.

¹¹² *Id.* at ¶ 10.

transition to CMRS reclassification. We note that in filing a short form application (FCC Form 175), an applicant must certify that it is qualified for the license and that it is in compliance with the foreign ownership provisions of Section 310 of the Act.¹¹³ However, regarding its second request, we do not believe the foreign ownership waiver provision in Section 332(c)(6) extends as far as Geotek argues. Section 332(c)(6) provides an opportunity for a limited waiver of Section 310(b) for private land mobile radio service providers ("PLMRS") that now are reclassified as common carriers. Common carrier licenses, including microwave licenses used to link base station facilities, always have been subject to Section 310(b)¹¹⁴ and could not be considered grandfathered simply because the licenses are used in conjunction with an SMR operation. In essence, Geotek's request to expand its waiver to apply to common carrier services in which it did not hold a license prior to May 24, 1993, does not comport with the statute. However, we note that Geotek may file for a declaratory ruling under Section 310(b)(4).¹¹⁵ While Geotek argues that existing precedent supports its request to extend the Section 332(c)(6) waiver to common carrier licenses, it does not cite any specific Commission precedent, and we believe that this is not the appropriate proceeding in which to assess its request under Section 310(b)(4).

V. SEVENTH REPORT AND ORDER

A. Competitive Bidding Issues

1. Competitive Bidding Design

60. **Background.** We tentatively concluded in the *Second R&O and Second Further Notice* that we would use simultaneous multiple round auctions for the 900 MHz SMR service.¹¹⁶ We based our proposal on the factors established in the *Competitive Bidding Second Report & Order*,¹¹⁷ for selecting from among auction methodologies to use for each

¹¹³ See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Second Memorandum Opinion & Order*, PP Docket No. 93-253, 9 FCC Rcd 7345 (1994) (*Competitive Bidding Second Memorandum Opinion & Order*) at ¶ 47. 47 C.F.R. 1.2105(a)(2)(v) and (vi).

¹¹⁴ See, e.g., Catherine L. Waddill, *Memorandum Opinion and Order and Notice of Apparent Liability*, 8 FCC Rcd 2169 (1993).

¹¹⁵ Section 310(b)(4) of the Communications Act authorizes the Commission to refuse to grant a license to any corporation directly or indirectly controlled by any other corporation which is foreign owned or controlled, if it is in the public interest. The Commission may act if an officer or more than 25% of the directors are aliens, if more than 25% of the capital stock is owned or voted by aliens, or if the corporation is organized under foreign law.

¹¹⁶ *Second R&O and Second Further Notice* at ¶ 74.

¹¹⁷ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Second Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2348 (1994) (*Competitive Bidding Second Report & Order*).

particular auctionable service.¹¹⁸ In that Order, we concluded that awarding licenses to those parties who value 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 highest 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 stated 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.¹¹⁹ Thus, 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.¹²⁰

61. We noted that, like PCS,¹²¹ the 900 MHz SMR licenses are interdependent, and licensees are likely to aggregate and substitute across spectrum blocks and geographic regions. Therefore, simultaneous multiple round bidding is likely to generate the most information about license values during the course of the auction and facilitate efficient aggregation of licenses across spectrum bands.¹²²

62. Comments. Most commenters agree with the Commission's proposal to use simultaneous multiple round auctions for selecting among mutually exclusive 900 MHz SMR applicants. According to AMTA, such a design is a means to facilitate spectrum aggregation in a single geographic area, as well as to consolidate other regions.¹²³ Nextel reasons that the opportunity to purchase a block of channels in all 51 MTAs, or a combination thereof, is essential to the ability of wide-area SMR operators to compete with other CMRS providers.¹²⁴ SCE agrees with the Commission's proposal, but suggests that the Commission provide the broadest possible information to potential bidders about the incumbents occupying each

¹¹⁸ *Second R&O and Second Further Notice* at ¶ 73.

¹¹⁹ *Id.* at ¶ 69.

¹²⁰ *Id.* at ¶¶ 109-111.

¹²¹ We adopted simultaneous multiple round auctions as the auction methodology for both broadband and narrowband PCS licenses. See *Competitive Bidding Fifth Report & Order* at ¶¶ 27-32 (broadband PCS); *Competitive Bidding Third Report & Order* at ¶¶ 17-21 (narrowband PCS).

¹²² *Second R&O and Second Further Notice* at ¶ 74.

¹²³ AMTA Comments at 2-3.

¹²⁴ Nextel Comments at 3.

block.¹²⁵ SCE, AMTA, and The Council of Independent Communications Suppliers ("CICS") suggest that the Bidder Information Package provide the incumbent licensee's name, frequencies, block numbers, geographic coordinates for each site, and a narrative site description including its address, city, county, and state.¹²⁶ Both SCE and AMTA maintain that, without such information, the Commission may be inclined to award a license to overly enthusiastic bidders who win a block without taking into consideration the location and number of incumbent licensees, only to find that construction requirements cannot be met.¹²⁷ According to CICS, a small business will have an uphill battle to develop an incumbent block even if it does obtain bidding credits.¹²⁸ RAM, however, reiterates its opposition to auctioning of 900 MHz frequency blocks on which there are existing operations, and contends that auctioning of licenses for those areas is contrary to legislative intent, because RAM believes that Congress intended to allow incumbent licensees to expand their systems without subjecting them to mutually exclusive applications.¹²⁹ Contrary to RAM's assertion, the Commission did not base its decision to auction encumbered licenses solely or predominantly on the possibility of deriving auction revenues. Prior to receiving auction authority, the Commission noted that its goal was to encourage the growth of wide-area SMR service.¹³⁰

63. Discussion. Based on the record in this proceeding and our successful experience conducting simultaneous multiple round auctions for narrowband and broadband PCS, we believe a simultaneous multiple round auction design is the most appropriate for the 900 MHz SMR service. First, for certain bidders, the value of these licenses will be significantly interdependent because of the desirability of aggregation across geographic regions. Under these circumstances, simultaneous multiple round bidding will generate more information about license values during the course of the auction and provide bidders with more flexibility to pursue back-up strategies, than if the licenses were auctioned separately. Simultaneous multiple round bidding therefore is most likely to award licenses to the bidders who value them the most highly and to provide bidders with the greatest likelihood of obtaining the license combinations that best satisfy their service needs. Finally, we expect the value of these licenses to be sufficiently high to warrant simultaneous multiple round bidding.

¹²⁵ SCE Comments at 6.

¹²⁶ *Id.* at 8; AMTA Reply Comments at 3; CICS Reply Comments at 7.

¹²⁷ SCE Comments at 6; AMTA Comments at 4.

¹²⁸ CICS Comments at 6.

¹²⁹ RAM Comments at n.1.

¹³⁰ Amendment 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 896-901 MHz and 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-553, *First Report and Order and Further Notice of Proposed Rule Making*, 8 FCC Rcd 1469 (1993) at ¶ 13, 19.

64. The Bidder Information Package will provide all the information about incumbent licensees that is available in our licensing records.

65. RAM's argument that incumbent blocks should not be auctioned has been addressed fully in the *CMRS Third Report and Order*¹³¹ and the *Second R&O and Second Further Notice*,¹³² and RAM has not raised new arguments which would warrant reconsideration of our decision. Since there are no alternative channels suitable for relocation, the Commission will require MTA licensees to afford protection to incumbent SMR systems. These protections will protect incumbent operators adequately without interfering with MTA licensees' operations.

2. License Grouping

66. Discussion. In the *Second R&O and Second Further Notice*, we tentatively concluded that all 51 MTAs in the 900 MHz SMR band should be auctioned simultaneously.¹³³ We noted that, even if holding a single auction proves to be more costly than breaking the licenses into groups, the added cost would be outweighed by the informational and bidding flexibility advantages afforded by a single auction.¹³⁴ We received no comments on this issue. As the 1,020 licenses to be auctioned in this service all are for the same amount of spectrum and will use a single service definition, we have determined that holding a single auction for all 51 MTAs in the 900 MHz SMR band will be the fairest, fastest, and most efficient means of distributing these licenses.

B. Bidding Issues

1. Bidding Procedures

67. Bidders will be able to submit bids on-site, via personal computers using remote bidding software, or via telephone. Given the space limitations for on-site bidding and the uncertainty as to the exact number of prospective bidders, however, the Commission reserves the right to have only remote bidding -- by personal computers and by telephone -- for the 900 MHz SMR auction.¹³⁵ The Commission will hold a seminar for prospective bidders to

¹³¹ *CMRS Third Report and Order* at ¶ 118-119.

¹³² *Second R&O and Second Further Notice* at ¶ 44-47.

¹³³ *Second R&O and Second Further Notice* at ¶ 78.

¹³⁴ *Id.*

¹³⁵ The Commission recently adopted a fee schedule for obtaining access to the Commission's database and remote bidding software packages. The remote access bidding software package is available for \$175. The charge for on-line remote access via a 900 number is \$2.30 per minute. See Assessment and Collection of Charges for FCC Proprietary Remote Software Packages, On-Line Communications Service Charges, and

acquaint them with this bidding design and all alternative bid submission methods.

68. Telephonic bidding, for example, is a simple and inexpensive method for bidders to submit bids. When submitting bids by telephone, bidders may utilize the Internet to learn of the round-by-round results of the auction. Online services such as CompuServe, Prodigy and America Online provide Internet access at a reasonable cost. Bidders also may, at negligible cost, use a computerized bulletin board service, accessible by telephone lines, from which auction results can be downloaded to a personal computer.¹³⁶

2. Bid Increments and Tie Bids

69. Background. In the *Second R&O and Second Further Notice*, we proposed to establish minimum bid increments for bidding in each round of the auction,¹³⁷ as we have done in previous multiple round auctions.¹³⁸ The bid increment is the amount or percentage by which a bid must be raised above the previous round's high bid in order to be accepted as valid in the current bidding round. The application of a minimum bid increment speeds the auction process and, along with activity and stopping rules, helps to ensure that the auction closes within a reasonable period of time. Establishing an appropriate minimum bid increment is important in a simultaneous auction with a simultaneous closing rule, because 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.

70. Specifically, we proposed to start the 900 MHz auction with relatively large bid increments, and to adjust the increments as bidding activity indicates.¹³⁹ The minimum bid increment in Stage I of the auction generally would be five percent of the high bid in the previous round or \$.02 per MHz-pop whichever is greater. In Stage II, we proposed to reduce the minimum bid increment to the greater of five percent or \$.01 per MHz-pop, and in Stage III, the bid increment would remain at the greater of five percent or \$.01 per MHz-pop. We proposed to retain the discretion to vary the minimum bid increments for individual license or groups of licenses at any time before or during the course of the auction, based on

Bidder's Information Packages in Connection With Connection With Auctionable Services, WT Docket No. 95-69. *Report and Order*, FCC 95-308, released July 21, 1995. Bidders may also bid via telephone for no additional charge.

¹³⁶ 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, PP Docket No. 93-253, *Report and Order*, FCC 95-230, released June 30, 1995 at ¶ 107 and n.77.

¹³⁷ *Second R&O and Second Further Notice* at ¶ 79.

¹³⁸ See, e.g., *Competitive Bidding Third Report & Order* at ¶¶ 30-32.

¹³⁹ *Id.* at ¶ 80.

the number of bidders, bidding activity, and the aggregate high bid amounts. We also proposed to retain the discretion to keep an auction open if there is a round in which no bids or "proactive" waivers (*i.e.*, waivers submitted by the bidder, as explained at ¶¶ 85-87) are submitted.¹⁴⁰

71. Comments. Both AMTA and Nextel support the Commission's proposals to impose bid increments.¹⁴¹ Pro Tec Communications, Inc. ("Pro Tec"), however, suggests that the Commission's proposed bid increment system may work a hardship on incumbent licensees who also are designated entities that plan to participate in the auction, because the proposed \$0.02 per MHz-pop may cause untenable jumps in bidding prices.¹⁴² Pro Tec explains that the value of sparsely populated areas and a widely distributed population base, which represents that portion not covered by Pro Tec's current service, is not equal to the per pop value of an urban, densely populated market.¹⁴³ Thus, Pro Tec suggests that the Commission reject the per pop system and simply adopt the proposed five percent criterion.¹⁴⁴

72. Discussion. We will announce by Public Notice prior to the auction the general guidelines for bid increments.¹⁴⁵ The Commission retains the discretion to set and, by announcement before or during the auction, vary the minimum bid increments for individual licenses or groups of licenses over the course of the auction. Where a tie bid occurs, we will determine the high bidder by the order in which the Commission receives the bids.¹⁴⁶ We have considered Pro Tec's argument that there will be differences in the per pop values of licenses across MTAs and even for different blocks within the same MTA, depending on the status of incumbents on the different blocks. To allow for the flexibility to deal with these differences, the Commission retains the discretion to vary both absolute and percentage bid increments for specific licenses. We do not believe that the possibility of value differences leads to the conclusion that we should eliminate absolute bid increments, as this might unduly prolong the auction.

3. Stopping Rules

¹⁴⁰ *Id.*

¹⁴¹ AMTA Comments at 4; Nextel Comments at 3.

¹⁴² Pro Tec Comments at 8.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 9.

¹⁴⁵ In an *Ex Parte* Letter filed on August 17, 1995, Geotek requested that the Commission retain discretion to lower the bid increments. We have adopted Geotek's suggestion to the extent that we have retained the discretion to set, raise or lower the bid increments by announcement before or during the auction.

¹⁴⁶ See *Competitive Bidding Second Report and Order* at ¶¶ 124-126.

73. Background. In multiple round auctions, a stopping rule must be established for determining when the auction is over.¹⁴⁷ In simultaneous multiple round auctions, bidding may close separately on individual licenses, simultaneously on all licenses, or a hybrid approach may be used. Under a license-by-license approach, bidding closes on each license after a certain number of rounds pass in which no new acceptable bids are submitted for that particular license. With a simultaneous stopping rule, bidding generally remains open on all licenses until there is no new acceptable bid for any license. This approach provides 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. Under a hybrid approach, we may use a simultaneous stopping rule (along with an activity rule designed to expedite closure for licenses subject to the simultaneous stopping rule) for the higher value licenses. For lower value licenses, where the loss from eliminating some back-up strategies is less, we may use the license-by-license approach.

74. For 900 MHz SMR, we proposed to adopt a simultaneous stopping rule.¹⁴⁸ We noted that MTA licenses are expected to have relatively high values because of the substantial amount of clear spectrum that remains available and the high valuation of SMR spectrum in secondary market transactions.¹⁴⁹ AMTA and Nextel support the Commission's proposal.¹⁵⁰

75. Discussion. We will adopt a simultaneous stopping rule for the 900 MHz SMR auction. The substitutability between licenses within the same MTA, and the ability to pursue back-up strategies support the use of a simultaneous stopping rule. Bidding will remain open on all licenses in an auction until bidding stops on every license. The auction will close after one round passes in which no new valid bids or proactive activity rule waivers (as defined in ¶¶ 85-86, *infra*) are submitted. We retain the discretion to keep an auction open even if no new acceptable bids and no proactive waivers are submitted in a single round.¹⁵¹ In the event that we exercise this discretion, the effect will be the same as if a bidder has submitted a proactive waiver. We also retain the discretion to announce license-by-license closings.

76. We retain the discretion to declare after 40 rounds that the auction will end after some specified number of additional rounds. We believe this number of rounds will assure that the auction will not close prematurely, while providing bidders with fair assurance that

¹⁴⁷ *Id.* at ¶ 128.

¹⁴⁸ *Second R&O and Second Further Notice* at ¶ 82.

¹⁴⁹ *Id.*

¹⁵⁰ AMTA Comments at 4; Nextel Comments at 3.

¹⁵¹ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC Rcd 7684 (1994) at ¶ 3.

the auction will be conducted as intended.¹⁵² Bids will be accepted only on licenses where the high bid has increased in the last three rounds.¹⁵³ This will deter bidders from continuing to bid on a few low value licenses solely to delay the closing of the auction. It also will enable the Commission to end the auction when it determines that the benefits of terminating the auction and issuing licenses exceed the likely benefits of continuing to allow bidding. The Commission will announce by Public Notice the number of remaining rounds and other final bidding procedures.

77. The disadvantage of declaring an imminent end to an auction, however, is that the procedure may result in less efficient allocation of licenses than if the auction remained open as long as new bids were received.¹⁵⁴ Therefore, we will declare the imminent end of the auction only in the case of extremely dilatory bidding, as we favor other methods to hasten the end of an auction -- shortening the bidding rounds, raising the minimum bid increments, and proceeding to a later auction stage.¹⁵⁵ This will facilitate the rapid completion of the auction by permitting the Commission to use larger bid increments, thereby speeding the auction pace without risking a premature auction close.¹⁵⁶

4. Duration of Bidding Rounds

78. Background. We proposed in the *Second R&O and Second Further Notice* to reserve the discretion to vary the duration of the bidding rounds or the interval at which bids are accepted. AMTA and Nextel support the Commission's proposals.¹⁵⁷

79. Discussion. In simultaneous multiple round auctions, bidders may need a significant amount of time to evaluate back-up strategies and develop their bidding plans. We delegate to the Wireless Telecommunications Bureau the discretion to vary the duration of the bidding rounds or the interval at which bids are accepted (e.g., run more than one round per day) in order to move the auction toward closure more quickly. The Bureau will 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.

¹⁵² See *Competitive Bidding Fifth Report and Order* at ¶ 48.

¹⁵³ *Competitive Bidding Fifth Report & Order* at ¶ 49.

¹⁵⁴ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Fourth Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC Rcd 6858 (1994) (*Competitive Bidding Fourth Memorandum Opinion & Order*) at ¶ 20.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at ¶ 5.

¹⁵⁷ AMTA Comments at 4; Nextel Comments at 3.

5. Activity Rules

80. Background. To ensure that simultaneous auctions with simultaneous stopping rules close within a reasonable period of time and to increase the information conveyed by bid prices during the auction, it is necessary to impose an activity rule to prevent bidders from waiting until the end of the auction before participating. In the *Competitive Bidding Second Report & Order*, we adopted the Milgrom-Wilson activity rule as our preferred activity rule where a simultaneous stopping rule is used.¹⁵⁸ The Milgrom-Wilson approach encourages bidders to participate in early rounds by limiting their maximum participation to some multiple of their minimum participation level. Bidders are required to declare their maximum eligibility in terms of MHz-pops, and to make an upfront payment proportional to that eligibility level.¹⁵⁹ (See discussion of upfront payments at ¶¶ 111-113, *infra*) In each round, bidders are 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 at the end of the withdrawal period in the previous round, as well as licenses on which a new valid bid is placed, count toward this bidding limit. Under this approach, bidders have the flexibility to shift their bids among any license for which they have applied so long as, within each round, the total MHz-pops encompassed by those licenses does not exceed the total number of MHz-pops on which they are eligible to bid.

81. In the *Second R&O and Second Further Notice*, we tentatively concluded that the Milgrom-Wilson activity rule should be used in conjunction with the proposed simultaneous stopping rule to award 900 MHz SMR licenses. We noted that it would best achieve the Commission's goals of affording bidders flexibility to pursue backup strategies, while at the same time ensuring that simultaneous auctions are concluded within a reasonable period of time. AMTA and Nextel support the Commission's proposals.¹⁶⁰

82. Discussion. We will employ the Milgrom-Wilson activity rule in conjunction with the simultaneous stopping rule. Under the Milgrom-Wilson procedure, the minimum activity level, measured as a fraction of the bidder's eligibility in the current round, increases during the course of the auction. Absent waivers (discussed *infra*), a bidder's eligibility (in terms of MHz-pops) in the current round is determined by the bidder's activity level and eligibility in the previous round. In the first round, however, eligibility is determined by the bidder's upfront payment and is equal to the upfront payment divided by \$.02 per MHz-pop.

83. In each round of Stage I, a bidder who wishes to maintain its current eligibility must be active on licenses encompassing at least one-half of the MHz-pops for which it

¹⁵⁸ *Competitive Bidding Second Report & Order* at ¶¶ 144-145.

¹⁵⁹ The number of "MHz-pops" is calculated by multiplying the population of the license service area by the amount of spectrum authorized by the license.

¹⁶⁰ AMTA Comments at 4; Nextel Comments at 3.

currently is eligible. Failure to maintain the requisite activity level will result in a reduction in the amount of MHz-pops upon which a bidder will be eligible to bid in the next round of bidding (unless an activity rule waiver, as defined in ¶ 85, *infra*, is used). During Stage I, if bidding activity is below the required minimum level, eligibility in the next round will be calculated by multiplying the current round activity by two (2). Eligibility for each applicant in the first round of the auction is determined by the amount of the upfront payment received and the licenses identified in its auction application. In each round of Stage II, a bidder who wishes to maintain its current eligibility is required to be active on at least 75 percent of the MHz-pops for which it is eligible in the current round. During Stage II, if activity is below the required minimum level, eligibility in the next round will be calculated by multiplying the current round activity by four thirds (4/3). In each round of Stage III, a bidder who wishes to maintain its current eligibility must be active on licenses encompassing at least 95 percent of the MHz-pops for which it is eligible in the current round. In Stage III, if activity in the current round is below 95 percent of current eligibility, eligibility in the next round will be calculated by multiplying the current round activity by twenty nineteenth (20/19). We reserve the discretion to set and, by announcement before or during the auction, vary the requisite minimum activity levels (and associated eligibility calculations) for each auction stage. Retaining this flexibility will improve the Commission's ability to control the pace of the auction and help ensure that the auction is completed within a reasonable period of time.

84. As in prior auctions, we will determine the transition from one stage to the next in the 900 MHz SMR auction by the aggregate level of bidding activity, subject to our discretion. The transition rule also may be defined in terms of the "auction activity level" -- the sum of the MHz-pops of those licenses whose high bid increased in the current round, as a percentage of the total MHz-pops of all licenses in that auction. The auction will start in Stage I and move to Stage II when the auction activity level is below ten percent for three consecutive rounds in Stage I. The auction will move from Stage II to Stage III when the auction activity level is below five percent for three consecutive rounds in Stage II. In no case can the auction revert to an earlier stage. However, we retain the discretion to determine and announce during the course of an auction when, and if, to move from one auction stage to the next. These determinations will be based on a variety of measures of bidder activity including, but not limited to, the auction activity level defined above, the percentage of licenses (measured in terms of MHz-pops) on which there are new bids, the number of new bids, and the percentage increase in revenue.

85. 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 will provide bidders with five activity rule waivers that may be used in any round during the course of the auction. If a bidder's activity level is below the required activity level a waiver automatically will be applied. That is, if a bidder fails to submit a bid in a round, and its activity level from any standing high bids (high bids at the end of the bid withdrawal period in the previous round) falls below its required activity level, a waiver automatically will be applied. A waiver will preserve current eligibility in the next round, but cannot be used to correct an error in the amount bid. An activity rule waiver applies to an entire round

of bidding and not to a particular MTA service area.

86. Bidders will be afforded an opportunity to override the automatic waiver mechanism when they place a bid, if they intentionally wish to reduce their bidding eligibility and do not want to use a waiver to retain their eligibility at its current level.¹⁶¹ If a bidder overrides the automatic waiver mechanism, its eligibility permanently will be reduced (according to the formulas specified above), and it will not be permitted to regain its bidding eligibility from a previous round. An automatic waiver invoked in a round in which there are no valid bids will not keep the auction open. Bidders will have the option to proactively enter an activity rule waiver during the bid submission period. Thus, a "proactive" waiver, as distinguished from an automatic waiver, is one requested by the bidder. If a bidder submits a proactive waiver in a round in which no other bidding activity occurs, the auction will remain open.

87. The Bureau retains the discretion to issue additional waivers during the course of an auction for circumstances beyond a bidder's control. The Bureau also retains the flexibility to adjust, by Public Notice prior to an auction, the number of waivers permitted, or to institute a rule that allows one waiver during a specified number of bidding rounds or during specified stages of the auction.¹⁶²

6. Rules Prohibiting Collusion

88. Background. In the *Competitive Bidding Second Report & Order*, we adopted a special rule prohibiting collusive conduct in the context of competitive bidding.¹⁶³ We observed that such a rule 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.¹⁶⁴ In the *Second R&O and Second Further Notice*, we tentatively concluded that Section 1.2105(c) of the Commission's Rules would apply to 900 MHz SMR auctions.¹⁶⁵ We also proposed that winning bidders in 900 MHz SMR auctions be subject to Section 1.2107(d) of the Commission's Rules.

89. Comments. AMTA suggests that the Commission modify the collusion rules to

¹⁶¹ See *Competitive Bidding Fourth Memorandum Opinion and Order* at ¶ 15.

¹⁶² See *Competitive Bidding Second Report and Order* at ¶ 145.

¹⁶³ See 47 C.F.R. § 1.2105(c); see also *Competitive Bidding Second Memorandum Opinion & Order* at ¶¶ 50-53 and Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Erratum*, PP Docket No. 93-253, rel. Oct. 19, 1994 (*Competitive Bidding 2nd MO&O Erratum*).

¹⁶⁴ See *Competitive Bidding Second Report & Order* at ¶ 221.

¹⁶⁵ *Second R&O and Second Further Notice* at ¶ 94.

reflect the differences between Section 1.2107(d) and Section 1.2105(c).¹⁶⁶ Specifically, AMTA requests that the Commission clarify that consortia agreements entered into after the filing of the Form 175 are permitted subject to the limitations set out in Section 1.2105(c)(2), which allows modification of the short-form to reflect the formation of consortia, under certain circumstances.¹⁶⁷ RAM requests that the Commission clarify that providing information about existing systems to potential new entrants in the 900 MHz SMR service does not constitute collusion.¹⁶⁸

90. Discussion. We will subject 900 MHz SMR licensees to the reporting requirements and rules prohibiting collusion embodied in Sections 1.2107(d) and 1.2105(c) of the Commission's Rules. In response to AMTA's suggestion, we restate the collusion rules here. Section 1.2107(d) provides that, as an exhibit to the long-form application, the applicant must provide a detailed explanation of the terms and conditions and parties involved in any bidding consortia, joint venture, partnership or other agreement or arrangement it had entered into relating to the competitive bidding process prior to the time bidding was completed. The rule provides that such agreements must have been entered into prior to the filing of the FCC Form 175. Section 1.2105(c), however, provides an exception to that prohibition for bidders who have not filed Form 175 applications for licenses in any of the *same* geographic license areas.¹⁶⁹ Those bidders may enter into such discussions, consortia, or arrangements, or add equity partners, after the filing of short-form applications.¹⁷⁰ We also will permit communications among bidders concerning matters unrelated to the license auctions, except for communications resulting in a transfer of control of the applicant.¹⁷¹

91. Section 1.2105(c)(4) also provides an exception for non-controlling parties holding an attributable interest in multiple applicants for the same geographic license area. Such parties may acquire an ownership interest in, form a consortium with, or enter into a joint bidding arrangement with, other applicants for licenses in the same geographic license area, provided that they have not communicated and will not communicate with any party

¹⁶⁶ AMTA Comments at 4.

¹⁶⁷ AMTA Comments at 4-5.

¹⁶⁸ RAM Comments at 8.

¹⁶⁹ 47 C.F.R. § 1.2105(c); see *Competitive Bidding Second Memorandum Opinion and Order* at ¶ 51 and *Competitive Bidding 2nd MO&O Erratum*..

¹⁷⁰ 47 C.F.R. § 1.2105(c)(3).

¹⁷¹ *Competitive Bidding Fourth Memorandum Opinion & Order* at ¶ 56. *But see Letter to R. Michael Senkowski from Rosalind K. Allen, Acting Chief, Commercial Radio Division*, rel. Dec. 1, 1994 (establishing that discussions that indirectly provide information that affects bidding strategy also are precluded by anti-collusion rules) and *Competitive Bidding Fourth Memorandum Opinion & Order* at note 125 (stating applicants also are subject to existing antitrust laws).

concerning the bids or bidding strategies of more than one of the applicants in which they hold attributable interests, or with which they have a consortium or joint bidding arrangement, and which have applied for licenses in the same geographic license area(s). The arrangements also must not result in any change in control of an applicant.¹⁷²

92. In addition, as discussed at ¶¶ 104-105, *infra*, bidders will be required by Section 1.2105(a)(2) 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. Bidders will 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.

93. We deny RAM's request to modify the collusion rule to exempt communications between MTA bidders and incumbents. First, as we have stated, the Bidder Information Package will contain information about the incumbent licensees. Any communications between MTA bidders and incumbent licensees should take place prior to the deadline for filing Form 175s. We see no reason to create a special exemption for this situation, particularly because the MTA bidder and the incumbent licensee may be competing for the same MTA license.

94. We note that where specific instances of collusion in the competitive bidding process are alleged during the petition to deny process, the Commission may conduct an investigation or refer such complaints to the United States Department of Justice for investigation. Bidders who are found to have violated the antitrust laws or the Commission's rules in connection with participation in the auction process may be subject to penalties under antitrust laws, forfeiture of their down payment or their full bid amount and revocation of their license(s), and they may be prohibited from participating in future auctions.¹⁷³

C. Procedural and Payment Issues

1. Pre-auction Application Procedures

95. Background. In the *Competitive Bidding Second Report & Order*, the Commission established general competitive bidding rules and procedures, which we noted may be modified on a service-specific basis.¹⁷⁴ In the *Second R&O and Second Further Notice*, we proposed to follow generally the processing and procedural rules established in the

¹⁷² 47 C.F.R. § 1.2105(c)(4); see *Competitive Bidding Second Memorandum Opinion and Order* at ¶ 52.

¹⁷³ *Second Report & Order & Further Notice* at ¶ 96.

¹⁷⁴ *Competitive Bidding Second Report and Order* at ¶ 6; 47 C.F.R. Part 1, Subpart Q.

Competitive Bidding Second Report & Order, with certain modifications designed to address the particular characteristics of the 900 MHz SMR service. AMTA generally agrees with our proposals.¹⁷⁵ Therefore, we will adopt such modified rules. 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. By ensuring that bidders and license winners are serious, qualified applicants, these proposed rules will minimize the need to re-auction licenses and prevent delays in the provision of 900 MHz SMR service to the public.

96. As MTA licensees will gain use of a large geographic area and the freedom to locate base stations anywhere within that larger geographic region, they differ from the existing 900 MHz licensees that essentially are confined to the smaller DFA region. Accordingly, we will treat all MTA applicants as initial applicants for public notice, application processing, and auction purposes, regardless of whether they are already incumbent operators.

97. Section 309(j)(5) provides that no party may participate in an auction "unless such bidder submits such information and assurances as the Commission may require to demonstrate that such bidder's application is acceptable for filing."¹⁷⁶ Moreover, "[n]o license shall be granted to an applicant selected pursuant to this subsection unless the Commission determines that the applicant is qualified pursuant to Section 309(a), Section 308(b), and Section 310" of the Communications Act.¹⁷⁷ As the legislative history of Section 309(j) makes clear, the Commission may require that bidders' applications contain all information and documentation sufficient to demonstrate that the application is not in violation of Commission rules, and we will dismiss applications not meeting those requirements prior to the competitive bidding.¹⁷⁸

98. In the *Competitive Bidding Second Report & Order*, we determined that we should require only a short-form application (FCC Form 175) prior to competitive bidding, and that only winning bidders should be required to submit a long-form license application (FCC Form 600) after the auction. As we determined that such a procedure would fulfill the statutory requirements and objectives and adequately protect the public interest, we incorporated these requirements into the rules adopted in the *Competitive Bidding Second Report & Order*.¹⁷⁹ Accordingly, we will extend the application of these rules to the competitive bidding process for 900 MHz SMR.

¹⁷⁵ AMTA Comments at 5.

¹⁷⁶ 47 U.S.C. § 309(j)(5).

¹⁷⁷ *Id.*

¹⁷⁸ See H.R. Rep. No. 111, 103rd Cong., 1st Sess. 258 (1993) (House Report).

¹⁷⁹ See 47 C.F.R. §§ 1.2104 and 1.2107.

99. Prior to the start of the 900 MHz SMR auction, the Wireless Telecommunications Bureau will release an initial Public Notice announcing the auction. The initial Public Notice will specify the licenses to be auctioned and the time and place of the auction in the event that mutually exclusive applications are filed. The Public Notice will specify the method of competitive bidding to be used, applicable bid submission procedures, stopping rules, activity rules, and the deadline by which short-form applications must be filed and the amounts and deadlines for submitting the upfront payment.¹⁸⁰ We will not accept applications filed before or after the dates specified in the Public Notice. Applications submitted before the release of the Public Notice will be returned as premature. Likewise, applications submitted *after* the deadline specified by Public Notice will be dismissed, with prejudice, as untimely.

100. Soon after the release of the initial Public Notice, a Bidder Information Package will be made available to prospective bidders. As discussed at ¶ 64, *supra*, the bidders' package will contain information on the incumbents occupying blocks on which bidding will be available.

101. All bidders will be required to submit short-form applications on FCC Form 175 (and FCC Form 175-S, if applicable), by the date specified in the initial Public Notice. Applicants are encouraged to file Form 175 electronically. Detailed instructions regarding electronic filing will be contained in the Bidder Information Package. Those applicants filing manually will be required to submit one paper original and one diskette original of their application, as well as two diskette copies. The short-form applications will require applicants to provide the information required by Section 1.2105(a)(2) of the Commission's Rules.¹⁸¹ Specifically, each applicant will be required to specify on its Form 175 applications certain identifying information, including its status as a designated entity (if applicable), its classification (*i.e.*, individual, corporation, partnership, trust, or other), the MTAs and frequency blocks for which it is applying, and, assuming that the licenses will be auctioned, the names of persons authorized to place or withdraw a bid on its behalf.

102. As we indicated in the *Competitive Bidding Second Report & Order*, if we receive only one application that is acceptable for filing for a particular license, and thus there is no mutual exclusivity, we will issue a Public Notice cancelling the auction for this license and establishing a date for the filing of a long-form application, the acceptance of which will trigger the procedures permitting petitions to deny (as discussed at ¶ 127, *infra*).¹⁸² If no petitions to deny are filed, the application will be grantable after 30 days.

2. Amendments and Modifications

¹⁸⁰ See *Competitive Bidding Second Report & Order* at ¶ 164.

¹⁸¹ 47 C.F.R. § 1.2105(a)(2).

¹⁸² See *Competitive Bidding Second Report & Order* at ¶ 165.

103. Background. To encourage maximum bidder participation, we proposed in the *Second R&O and Second Further Notice* to provide applicants with an opportunity to correct minor defects in their short-form applications prior to the auction.¹⁸³ We received no comments on this proposal.

104. Discussion. 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, etc.) will be permitted to file corrected applications. We also will waive the *ex parte* rules as they apply to the submission of amended short-form applications for the 900 MHz SMR auctions, to maximize applicants' opportunities to seek Commission staff advice on making such amendments.¹⁸⁴ Applicants will not be permitted to make any major modifications to their applications, including, but not limited to, changes in license areas and changes in control of the applicant, or additions of other bidders into the bidding consortia, until after the auction.¹⁸⁵ Applicants may 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 will 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.¹⁸⁶ In addition, applications that are not signed will be dismissed as unacceptable, as will applications in which no market designations are made.

105. In addition, a single member of a bidding consortium may withdraw from a consortia only in a particular MTA(s), but otherwise remain in the consortium for purposes of bidding on all other markets specified on the short-form application. However, such arrangements to assign the member's interests in particular licenses to other consortium members after the auction must be disclosed on an original or amended short-form application, and a request to transfer or assign the license also must be filed in conjunction with the long-form application.¹⁸⁷

106. Upon reviewing the short-form applications, we will issue a Public Notice listing

¹⁸³ *Second R&O and Second Further Notice* at ¶ 105.

¹⁸⁴ The Commission also waived the *ex parte* rules as they applied to the A and B blocks of the broadband PCS auctions. See 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, *Public Notice*, 9 FCC Rcd 6760 (1994).

¹⁸⁵ Bidders who have not filed Form 175 applications for licenses in any of the same geographic license areas may enter into bidding consortia, joint ventures, partnerships or other agreements. See ¶ 90, *infra*.

¹⁸⁶ See *Competitive Bidding Second Memorandum Opinion & Order* at ¶ 52.

¹⁸⁷ See *Letter to Leonard J. Kennedy, Esq. from Rosalind K. Allen, Acting Chief, Commercial Radio Division*, rel. Dec. 14, 1994.

all defective applications, and applicants with minor defects will be given an opportunity to cure and resubmit a corrected version. By the resubmission date, all applicants will be required to submit an upfront payment to the Commission, as discussed below, to the Commission's lock-box 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 will issue a second Public Notice announcing the names of all applicants that have been determined as 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 Public Notice will be issued a bidder identification number and further information and instructions regarding auction procedures.

3. Upfront Payments

107. Background. In the *Competitive Bidding Second Report & Order*, we concluded that a substantial upfront payment prior to the beginning of an auction is necessary to ensure that only serious and qualified bidders participate.¹⁸⁸ By requiring such a payment, we also help to ensure that any bid withdrawal or default assessments are paid. We tentatively concluded to use the standard upfront payment formula of \$0.02 per MHz-pop, based on the number of 10-channel blocks in each MTA identified by an applicant on its Form 175, and to allow bidders to bid on any combination of licenses, as long as the total MHz-pops combination would not exceed the amount covered by the upfront payment.¹⁸⁹

108. Comments. Four commenters addressed the Commission's proposal to require an upfront payment equal to \$0.02 per MHz-pop. RAM supports the Commission's proposal.¹⁹⁰ Geotek does not support the Commission's proposal, reasoning that such a formula, as opposed to a per-license upfront payment, may encourage bidders to bid in every block, including encumbered blocks in which they have no particular interest.¹⁹¹ Nextel contends that an upfront payment of \$0.02 per MHz-pop may be insufficient to discourage insincere bidders, because the capital outlay is significantly different from PCS.¹⁹² CICS disagrees with Nextel, stating that the nature of the auction process will deter speculators and that, in any event, the imposition of strict penalties is a better safeguard.¹⁹³

¹⁸⁸ *Competitive Bidding Second Report & Order* at ¶ 171.

¹⁸⁹ Each 10-channel block accounts for .25 MHz.

¹⁹⁰ RAM Comments at 7-8.

¹⁹¹ Geotek Comments at 6-7.

¹⁹² Nextel Comments at 3-4.

¹⁹³ CICS Reply Comments at 6.

109. Both Geotek and RAM urge the Commission to require upfront payments for each frequency block for which an applicant designates an interest on its FCC Form 175, and that bidding eligibility should be limited to those designated blocks.¹⁹⁴ RAM disagrees with the Commission's proposal to allow bidding on any combination of licenses for which the total MHz-pop does not exceed the amount covered by the upfront payment, because a single upfront payment should not make a bidder eligible for multiple licenses.¹⁹⁵ RAM comments that to do otherwise would not follow the congressional directive to avoid mutual exclusivity.¹⁹⁶

110. Discussion. We reject both Geotek's and RAM's arguments that we should limit a bidder's eligibility to the specific blocks designated on the applicant's Form 175, or that we should adopt a per-license upfront payment. The simultaneous multiple round auction design combined with the standard bid withdrawal payments is designed to allow bidders to have flexibility to substitute bidding on various licenses during the course of the auction. The flexibility to respond to information during the course of the auction is one of the major beneficial features of the auction. If we were to adopt the Geotek/RAM limitation, this flexibility would be lost. For example, bidders can change their strategy during an auction and bid on a larger number of smaller licenses (*i.e.*, MTAs with fewer pops), or a smaller number of larger licenses, so long as the total MHz-pops combination does not exceed the amount covered by the upfront payment. Bidders would be forced to bid on more licenses than they ultimately wish to obtain under the Geotek/RAM proposal. They would be forced to risk an amount that would have little correspondence with the value of the licenses ultimately won. We believe that preserving the bidder's flexibility outweighs the small amount of speculation that might be deterred with a stricter rule, particularly in light of the deterrent effect of the bid withdrawal payment (as discussed at ¶¶ 120-122, *infra*).

111. We will adopt the standard \$0.02 per Mhz-pop formula to calculate the upfront payment. We disagree with Nextel that the \$0.02 per MHz-pop formula is too insignificant to deter speculation in the 900 MHz SMR service. The upfront payment for PCS was calculated to be approximately five percent of the final price to approximate one bid increment. In both the narrowband and broadband PCS auctions, in which we used the \$0.02 per MHz-pop upfront payment, all bid withdrawal payments were paid in full and all winning bidders have paid all amounts due. Thus, our experience demonstrates that the upfront payment will be sufficient to deter speculation in this auction as well.¹⁹⁷

¹⁹⁴ Geotek Comments at 5; RAM Comments at 7-8.

¹⁹⁵ RAM Comments at 7-8.

¹⁹⁶ RAM Comments at 7-8.

¹⁹⁷ In an *Ex Parte* Letter filed August 17, 1995, Geotek claimed that, based on its 900 MHz SMR acquisitions, the \$0.02 per MHz-pop formula overestimates the value of an MTA license. On the other hand, RAM, in an *Ex Parte* Letter filed August 23, 1995, based on its 900 MHz SMR acquisitions, agreed with the proposed \$0.02 per MHz-pop formula. Since there is disagreement as to the licenses' valuation, we will retain

112. In the initial Public Notice issued prior to the auction, we will announce population information corresponding to each license and the upfront payment amount for each MTA license. In general, population coverage for each channel block in each MTA will be based on a formula that takes into account the presence of incumbent licensees.

113. Upfront payments will be due by a date specified by Public Notice, but generally no later than 14 days before a scheduled auction. Each qualified bidder will be issued a bidder identification number and further information and instructions regarding the auction procedures. During the auction, bidders will be required to provide their bidder identification numbers when submitting bids.

4. Down Payment and Full Payment

114. Background. In the *Competitive Bidding Second Report & 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 default assessment if such default occurs.¹⁹⁸ 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.¹⁹⁹ We also determined that this amount was appropriate for the broadband PCS auctions.²⁰⁰ Using the same reasoning in the *Second R&O and Second Further Notice*, we tentatively concluded that, with the exception of designated entities eligible for installment payments, winning bidders in 900 MHz SMR auctions would have to supplement their upfront payments with a down payment sufficient to bring their total deposits up to 20 percent of their winning bid(s). AMTA generally supports this proposal.²⁰¹

115. Discussion. With the exception of designated entities eligible for installment payments (as discussed at ¶¶ 169-170, *infra*), winning bidders must supplement their upfront payments with a down payment sufficient to bring their total deposits up to 20 percent of their winning bid(s). If the upfront payment already tendered by a winning bidder, after deducting any bid withdrawal and default payments due, amounts to 20 percent or more of its winning bids, no additional deposit will be required. If the upfront payment amount on deposit is greater than 20 percent of the winning bid amount after deducting any bid

the standard \$0.02 formula.

¹⁹⁸ *Competitive Bidding Second Report & Order* at ¶ 190.

¹⁹⁹ *Id.*

²⁰⁰ *See Competitive Bidding Fifth Report & Order* at ¶ 73.

²⁰¹ AMTA Comments at 5.

withdrawal and default payments due, the additional monies will be refunded. If a bidder has withdrawn a bid or defaulted but the amount of the payment cannot yet be determined, the bidder will be required to make a deposit of 20 percent of the amount bid on such licenses. When it becomes possible to calculate and assess the payment, any excess deposit will be refunded. Upfront payments will be applied to such deposits, and to bid withdrawal and default assessments due, before being applied toward the bidder's down payment on licenses the bidder has won and seeks to acquire.

116. Winning bidders must submit the required down payment by cashier's check or wire transfer to our lock-box bank by a date and time to be specified by Public Notice, generally within five business days following the close of bidding. All auction winners generally will be required to make full payment of the balance of their winning bids within five (5) business days following Public Notice that the Commission is prepared to award the license. The Commission generally will grant uncontested licenses within ten (10) business days after receiving full payment.

117. We also will subject an auction winner that is eligible to make payments through an installment plan (*i.e.*, designated entities, as discussed at ¶¶ 152-156, *infra*) to different payment requirements. Such an entity will be required to bring its deposit with the Commission up to five percent of its winning bid after the bidding closes, and will have to pay an additional five percent of its winning bid to the Commission within five (5) business days following Public Notice that the Commission is prepared to award the license. The Commission then will grant the license generally within ten (10) business days after receiving the five percent payment.

5. Bid Withdrawal, Default, and Disqualification

118. Background. We determined in the *Competitive Bidding Second Report & Order* that there must be a substantial payment assessed to bidders if they withdraw a high bid, are found not to be qualified to hold licenses, or default on payment of a balance due. Although we concluded that payment of *all* amounts that a bidder has on deposit may be too severe in many cases, we devised alternative disincentives for withdrawal, default, or disqualification.²⁰² In the *Second R&O and Second Further Notice*, we tentatively concluded that these procedures, found in Sections 1.2104(g) and 1.2109 of the Commission's Rules, would be appropriate for the 900 MHz SMR auction as well.²⁰³ Accordingly, we proposed that any bidder that withdraws a high bid during an auction before the Commission declares bidding closed will 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 offered by the Commission, if this subsequent winning bid is lower than the withdrawn bid.

²⁰² See *Competitive Bidding Second Report & Order* at ¶ 197.

²⁰³ *Second R&O and Second Further Notice* at ¶ 111.

119. Comments. The only commenter on this issue, Nextel, favors stricter payments on bid withdrawal.²⁰⁴ Nextel maintains that the Commission should impose forfeiture of the upfront payment for withdrawal of a high bid, due to the high potential for abuse in the 900 MHz SMR auctions.²⁰⁵ Nextel, however, fails to explain why the 900 MHz SMR auction would be especially prone to abuse.

120. Discussion. We disagree with Nextel's recommendation, because we believe that forfeiture of the entire upfront payment is too draconian for the bidder who withdraws only one bid. Since commenters have not stated why the 900 MHz SMR service differs in this respect from the narrowband and broadband PCS services, there is no justification for departing from the already tested narrowband and broadband PCS withdrawal, default, and disqualification assessments. Therefore, we believe our proposal to apply Section 1.2104(g)(1) to the 900 MHz SMR auction is more equitable and is consistent with our practice in prior auctions. Section 1.2104(g)(1) provides that any bidder that withdraws a high bid during an auction before the Commission declares bidding closed will 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 offered by the Commission, if this subsequent winning bid is lower than the withdrawn bid.

121. 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 is re-offered in the same auction, the winning bid refers to the high bid amount, made subsequent to the withdrawal, in that auction. If the subsequent high bidder also withdraws its bid, that bidder will be required to pay an assessment equal to the difference between its withdrawn bid and the amount of the subsequent winning bid the next time the license is offered by the Commission.²⁰⁶ If a license which is the subject of withdrawal or default is not re-auctioned, but instead is 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 will 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 we will 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.

122. After bidding closes, we will apply Section 1.2104(g)(2) to assess a defaulting auction winner an additional payment of three percent of the subsequent winning bid or three percent of the amount of the defaulting bid, whichever is less.²⁰⁷ The additional three percent

²⁰⁴ Nextel Comments at 4-5.

²⁰⁵ *Id.* at 4-5.

²⁰⁶ See 47 C.F.R. § 1.2104(g)(1).

²⁰⁷ See 47 C.F.R. §§ 1.2104(g) and 1.2109.

payment is designed to encourage bidders who wish to withdraw their bids to do so before bidding ceases. We will hold deposits made by defaulting or disqualified auction winners until full payment is made.

123. These payment requirements will discourage default and ensure that bidders meet all eligibility and qualification requirements. If a default or disqualification involves gross misconduct, misrepresentation or bad faith by an applicant, the Commission may declare the applicant and its principals ineligible to bid in future auctions, and may take any other action that it deems necessary, including institution of proceedings to revoke any existing licenses held by the applicant.²⁰⁸

124. If the MTA winner defaults, is otherwise disqualified after having made the required down payment, or the license is terminated or revoked, then the Commission will re-auction the license.²⁰⁹ If the default occurs within five business days after the bidding has closed, the Commission retains 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 the final bid levels. If only a short time has passed since the initial auction, the Commission may choose to offer the license to the highest losing bidders if the cost of running another auction exceeds the benefits.

6. Long-Form Applications

125. Discussion. We proposed in the *Second R&O and Second Further Notice* to apply the general procedures for filing long-form applications²¹⁰ to the 900 MHz SMR auctions.²¹¹ We received no comments on this proposal. Therefore, we will follow these procedures if the winning bidder makes the down payment in a timely manner: A long-form application filed on FCC Form 600 must be filed by a date specified by Public Notice, generally within ten business days after the close of bidding. After the Commission receives the winning bidder's down payment and long-form application, we will review the long-form application to determine if it is acceptable for filing. In addition to the information required in the Form 600, designated entities will be required to submit evidence to support their claim to any special provision available for designated entities described in this Order. This information may be included in an exhibit to FCC Form 600. This information will enable the Commission, and other interested parties, to ensure the validity of the applicant's certification of eligibility for bidding credits, installment payment options, and other special

²⁰⁸ See *Competitive Bidding Second Report & Order* at ¶ 198, citing Character Qualifications Policy Statement, 102 FCC 2d 1179 (1986).

²⁰⁹ See *id.* at ¶ 204; 47 C.F.R. § 1.2109(c).

²¹⁰ See 47 C.F.R. § 1.2107.

²¹¹ *Second R&O and Second Further Notice* at ¶ 116.

provisions. Upon acceptance for filing of the long-form application, the Commission will issue 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, the license(s) will be granted to the auction winner.²¹²

7. Petitions to Deny and Limitations on Settlements

126. Discussion. We determined in the *CMRS Third Report & Order* that the petition to deny procedures in Section 90.163 of the Commission's Rules will apply to the processing of applications for the 900 MHz SMR service.²¹³ Although we did not request comment on this issue, AMTA expressed its support for the Commission's adoption of a limitation on settlements.²¹⁴ AMTA expresses its concern that, due to the small size of the spectrum blocks that will be auctioned in 900 MHz and the presence of incumbents, the auctions offer an opportunity to "greenmail" current licensees.²¹⁵ A party filing a petition to deny against a 900 MHz SMR application will be required to demonstrate standing and meet all other applicable filing requirements. The "greenmail" restrictions in Section 90.162 were established to prevent the filing of speculative applications and pleadings (or threats of the same) designed to extract money from 900 MHz SMR applicants. Thus, we will limit the consideration that an applicant or petitioner is permitted to receive for agreeing to withdraw an application or a petition to deny to the legitimate and prudent expenses of the withdrawing applicant or petitioner.

127. With respect to petitions to deny, the Commission need not conduct a hearing before denying an application if it determines that an applicant is not qualified and no substantial issue of fact exists concerning that determination.²¹⁶ In the event the Commission identifies substantial and material issues of fact, Section 309(i)(2) of the Communications Act permits the submission of all or part of evidence in written form in any hearing and allows employees other than administrative law judges to preside over the taking of written evidence.

8. Transfer Disclosure Requirement

128. Background. In Section 309(j), Congress directed 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 methods employed to issue licenses

²¹² See generally 47 C.F.R. §§ 90.163-90.166.

²¹³ *CMRS Third Report and Order* at ¶¶ 21, 337, 347.

²¹⁴ AMTA Comments at 5.

²¹⁵ AMTA Comments at 5-6.

²¹⁶ *Competitive Bidding Second Report & Order* at ¶ 202.

and permits."²¹⁷ In the *Competitive Bidding Second Report & Order*, the Commission adopted safeguards designed to ensure that the requirements of Section 309(j)(4)(E) are satisfied.²¹⁸ We decided that it was important to monitor transfers of licenses awarded by competitive bidding to accumulate the necessary data to evaluate our auction designs and to judge whether "licenses [have been] issued for bids that fall short of the true market value of the license."²¹⁹ Therefore, we imposed a transfer disclosure requirement on licenses obtained through the competitive bidding process, whether by a designated entity or not.²²⁰ We tentatively concluded in the *Second R&O and Second Further Notice* that the transfer disclosure requirements of Section 1.2111(a) should apply to all 900 MHz SMR licenses obtained through the competitive bidding process.²²¹

129. Discussion. We received no comments on this proposal. Therefore, we will apply Section 1.2111(a) to all 900 MHz SMR licenses obtained through the competitive bidding process. Generally, licensees transferring their licenses within three years after the initial license grant will be required to file, together with their transfer applications, 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. As we indicated in the *Second R&O and Second Further Notice*, we will give 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 within three years after the initial license grant, so that we may determine if any unforeseen problems relating to unjust enrichment have arisen outside the designated entity context.²²²

9. Performance Requirements

130. Discussion. 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."²²³ In the *Competitive Bidding Second Report*

²¹⁷ 47 U.S.C. § 309(j)(4)(E).

²¹⁸ *Competitive Bidding Second Report & Order* at ¶¶ 210-226, 258-265.

²¹⁹ See House Report at 257; *Competitive Bidding Second Report & Order* at ¶ 214.

²²⁰ See 47 C.F.R. § 1.2111(a).

²²¹ *Second R&O and Second Further Notice* at ¶ 120.

²²² *Id.* See also *Competitive Bidding Second Report & Order* at ¶ 214. These particular transfer disclosure requirements are in addition to the unjust enrichment provisions discussed in this Order at ¶¶ 173-174, *infra*.

²²³ 47 U.S.C. § 309(j)(4)(B).

& Order, we decided it was unnecessary and undesirable to impose additional performance requirements, beyond those already provided in the service rules, for all auctionable services.²²⁴ In the *Second R&O and Second Further Notice*, we tentatively concluded that the coverage requirements that we adopted there would be sufficient to address the spectrum warehousing concern.²²⁵ We received no comment on this issue. Therefore, we will not adopt any performance requirements for the 900 MHz SMR service beyond that required by Section 90.665. Because the failure to meet those coverage requirements will result in automatic cancellation of license, we believe that is sufficient incentive to promote prompt service and prevent spectrum warehousing.²²⁶

D. Treatment of Designated Entities

1. Overview, Objectives, and the Impact of *Adarand Constructors v. Peña*

131. Background. The Communications Act provides that, in developing competitive bidding procedures, the Commission shall consider various statutory objectives and consider several alternative methods for achieving them. Specifically, the statute provides that in establishing eligibility criteria and bidding methodologies the Commission shall "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people 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."²²⁷ Small businesses, rural telephone companies and businesses owned by minorities and/or women are collectively referred to as "designated entities."²²⁸ Section 309(j)(4)(A) provides that to promote the statute's objectives the Commission shall "consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods . . . and combinations of such schedules and methods."²²⁹ The statute also requires 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."²³⁰

²²⁴ *Competitive Bidding Second Report and Order* at ¶ 219. See also 47 C.F.R. §§ 24.103; 24.206.

²²⁵ *Second R&O and Second Further Notice* at ¶ 121; 47 C.F.R. § 90.665.

²²⁶ See discussion at ¶¶ 31-33, *supra*.

²²⁷ 47 U.S.C. § 309(j)(3)(B).

²²⁸ *Competitive Bidding Second Report and Order* at ¶ 227.

²²⁹ 47 U.S.C. § 309(j)(4)(A).

²³⁰ 47 U.S.C. § 309(j)(4)(D).

132. In instructing the Commission to ensure the opportunity for designated entities to participate in auctions and spectrum-based services, Congress was well aware of the problems that designated entities would have in competing against large, well-capitalized companies in auctions and the difficulties they encounter in accessing 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."²³¹ The House Report states that the House Budget 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."²³² More specifically, the House Budget 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."²³³

133. Consistent with Congress's concern that auctions not operate to exclude small businesses, the provisions relating to installment payments clearly were 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, including those owned by members of minority groups and women."²³⁴ 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."²³⁵

134. In addition, with regard to access to capital, Congress had 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."²³⁶ As a result of 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

²³¹ House Report at 254.

²³² *Id.*

²³³ *Id.* at 255.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ Small Business Credit and Business Opportunity Enhancement Act of 1992, § 331(a) (3), Pub. Law 102-366, Sept. 4, 1992.

"legislation and regulations that enhance the viability of small business concerns."²³⁷

135. In our initial implementation of Section 309(j) of the Communications Act, we established in the *Competitive Bidding Second Report & Order* eligibility criteria and general rules that would govern the special measures for designated entities.²³⁸ We also identified several measures, including installment payments, spectrum set-asides, and bidding credits, 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.

136. 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.²³⁹ 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 that sought to enable designated entities to overcome the barriers to accessing capital in each particular service. Moreover, the measures we adopted also were designed to increase the likelihood that designated entities who win licenses in the auctions become strong competitors in the provision of wireless services.

137. Impact of *Adarand Constructors, Inc. v. Peña*. In the broadband PCS docket, we determined that, on separate entrepreneurs' blocks, the bidding credits would vary according to the type of qualifying designated entity that applied (*i.e.*, a small business would receive a 10 percent bidding credit, a business owned by minorities or women would receive

²³⁷ § 331(b)(2),(3).

²³⁸ See also *Competitive Bidding Second Memorandum Opinion and Order* at ¶¶ 64 through 165.

²³⁹ For instance, we determined that minority-owned and women-owned businesses in the nationwide narrowband PCS auction would receive a 25 percent bidding credit on certain channels. *Competitive Bidding Third Report and Order* at ¶ 72. In the regional narrowband PCS auction women-owned and minority-owned businesses would receive a 40 percent bidding credit on certain channels and small businesses would be eligible for installment payments on all channels. *Id.* at ¶ 87; Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Third Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, 10 FCC Rcd 175 (1994) (*Competitive Bidding Third Memorandum Opinion & Order & Further Notice*) at ¶ 58. For the Interactive Video and Data Service (IVDS), we adopted a 25 percent bidding credit for one license in each market for women-owned and minority-owned businesses and installment payments for small businesses. Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Fourth Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2330 (1994) (*Competitive Bidding Fourth Report & Order*) at ¶¶ 39, 53.

a 15 percent bidding credit, and a small business owned by women or minorities would receive an aggregated bidding credit of 25 percent),²⁴⁰ and all entrepreneurs' block licensees would be eligible for varying degrees of installment payments.²⁴¹ The Commission adopted special provisions for businesses owned by members of minority groups or women and analyzed their constitutionality using the "intermediate scrutiny" standard of review articulated in *Metro Broadcasting v. FCC*,²⁴² because, as in *Metro*, the proposed provisions involved Congressionally-mandated benign race- and gender-conscious measures.²⁴³

138. After the release of the broadband PCS rules, the Supreme Court decided *Adarand Constructors v. Peña*,²⁴⁴ which overruled *Metro Broadcasting* "to the extent that *Metro Broadcasting* is inconsistent with" the holding in *Adarand* that "all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny."²⁴⁵ As a result of the *Adarand* decision, the constitutionality of 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.²⁴⁶ Upon further notice,²⁴⁷ the Commission modified the designated entities provisions in the "C" Block auction so as to render them race- and gender-neutral, because of the potential and substantial delay that would be incurred in supplementing the record to meet a "strict scrutiny" standard, and to avoid the substantial likelihood that the auction would be stayed based on the holding in *Adarand*.²⁴⁸

139. In the 900 MHz SMR service, as in other auctionable services, we remain committed to meeting the statutory objectives of promoting economic opportunity and

²⁴⁰ *Competitive Bidding Fifth Report & Order* at ¶ 133. See also Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403 (1994) (*Competitive Bidding Fifth Memorandum Opinion & Order*) at ¶ 99.

²⁴¹ *Competitive Bidding Fifth Memorandum Opinion & Order* at ¶ 103.

²⁴² 497 U.S. 547, 564-65 (1990). (*Metro*).

²⁴³ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Notice of Proposed Rule Making*, PP Docket No. 93-253, 8 FCC Rcd 7635 (1993) at ¶ 73.

²⁴⁴ 115 S.Ct. 2097 (1995) (*Adarand*).

²⁴⁵ *Adarand*, 115 S.Ct. at 2113.

²⁴⁶ *Id.*

²⁴⁷ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Further Notice of Proposed Rule Making*, PP Docket No. 93-253, GN Docket No. 90-314, GN Docket No. 93-252, FCC 95-263, released June 23, 1995.

²⁴⁸ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Sixth Report and Order*, PP Docket No. 93-253, FCC 95-301, released July 18, 1995 (*C Block Auction Order*).

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, rural telephone companies, and businesses owned by members of minority groups and women. Accordingly, in balancing the objectives set forth in the statute, we tentatively concluded that bidding credits, reduced down payments and installment payments should be made available to all small businesses -- including those owned by minorities and women and small rural telephone companies -- on all 900 MHz SMR channel blocks in each MTA.²⁴⁹ In addition, to facilitate the introduction of service to rural areas, we proposed to allow rural telephone companies to obtain geographically partitioned 900 MHz SMR licenses in areas where they provide telephone service, similar to the program adopted in broadband PCS.²⁵⁰

140. The *Second R&O and Second Further Notice* in this docket was released two months before the Supreme Court's decision in *Adarand*. Consequently, we issued a Public Notice requesting further comment on the effect of the *Adarand* decision on the proposals made in the *Second R&O and Second Further Notice* in order to supplement our record in the 900 MHz SMR proceeding.²⁵¹ We received three comments in response to the Public Notice. All three commenters, AMTA, Geotek, and RAM, agree with the Commission's proposal not to adopt separate provisions for minority-owned and women-owned entities that are not small businesses. AMTA submits that the financial barriers which have provided a basis for race- and gender-specific programs in other more capital-intensive services are not present in the 900 MHz SMR service and that the service lacks a history of licensing discrimination.²⁵² Geotek asserts that there is no history of discrimination in 900 MHz SMR, and that Section 309(j) does not justify separate classifications for minority-owned and women-owned businesses in the 900 MHz SMR service.²⁵³ RAM contends that the Commission's gender-neutral and race-neutral proposals serve as adequate incentive to diversified participation in the 900 MHz SMR service.²⁵⁴ All three commenters express their belief that the goals of Section 309(j) will be served by the Commission's original proposal to extend benefits only to small businesses, the definition of which will, they believe, include significant numbers of minority-owned and women-owned entities within its purview.²⁵⁵ Based on the record in this

²⁴⁹ *Second R&O and Second Further Notice* at ¶ 128.

²⁵⁰ *Id.*; See also *Competitive Bidding Fifth Report and Order* at ¶¶ 148-153.

²⁵¹ Request for Comments in 900 MHz SMR Proceeding, *Public Notice*, DA 95-1479, released June 30, 1995.

²⁵² Further Comments of AMTA, filed July 14, 1995, at 3.

²⁵³ Further Comments of Geotek, filed July 14, 1995, at 3.

²⁵⁴ Further Comments of RAM, filed July 14, 1995, at 1-2.

²⁵⁵ AMTA Further Comments at 5-6; Geotek Further Comments at 4; RAM Further Comments at 1-2.

proceeding which establishes 900 MHz SMR service's comparatively lower capital costs than PCS, we intend to adopt bidding credits, installment payments, and reduced down payments for small businesses that meet the Commission's small business definitions, as discussed in ¶¶ 152-156, and will not adopt separate provisions for minority-owned and women-owned entities. As there will be small businesses with variable abilities to access capital, we will tier the bidding credits to account for these differences. We believe these provisions will meet Congress's goal of promoting wide dissemination of wireless licenses. Detailed discussion regarding each aspect of this decision follow.

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

141. Background. In the *Second R&O and Second Further Notice*, we proposed to limit eligibility for bidding credits, installment payments and reduced down payments to small businesses, including those owned by members of minority groups and women and those rural telephone companies that meet our small business size standards.²⁵⁶ We proposed to define small businesses as those entities with less than \$3 million in average gross revenues for the preceding three years, based in part on data provided by AMTA.²⁵⁷ We stated our belief that providing credits on all blocks and lowering the gross revenue threshold for small businesses would create more opportunities for minorities and women.²⁵⁸ To enhance our understanding of the capital requirements the 900 MHz SMR service, however, we sought comment on the projected costs associated with acquisition, construction and operation of 900 MHz MTA licenses; the composition of existing 900 MHz SMR providers in terms of women and minority ownership; to what extent participants in 900 MHz SMR networks have been small businesses owned by minorities and women; and the likelihood that management agreements are likely to serve as a vehicle for participation in the 900 MHz SMR service by minority and women-owned businesses.²⁵⁹

142. In the *Competitive Bidding Second Memorandum Opinion & Order*, we stated that 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.²⁶⁰ With respect to eligibility in the 900 MHz auction for provisions available to small businesses, we stated that, because the 900 MHz SMR service is expected to be less capital-intensive than broadband PCS and regional narrowband

²⁵⁶ *Second R&O and Second Further Notice* at ¶ 135.

²⁵⁷ *Id.* at ¶ 138 and n.202, citing AMTA *Ex Parte* Letter, filed March 23, 1995, at 5.

²⁵⁸ *Id.* at ¶ 135.

²⁵⁹ *Id.* at ¶ 136.

²⁶⁰ *Competitive Bidding Second Memorandum Opinion & Order* at ¶ 145.

PCS, in which we adopted a \$40 million threshold,²⁶¹ and it encompasses a smaller amount of spectrum than PCS and less area than regional narrowband PCS, a much lower gross revenue threshold would be warranted. Therefore, we proposed 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 less than \$3 million.

143. With respect to the proposed small business definition, we sought comment on whether the \$3 million definition was an appropriate threshold; and whether it should be higher or lower, based on the types of companies that are likely to benefit from the special provisions offered.²⁶² We also tentatively concluded that we would consider the revenues of affiliates and certain investors, and we proposed to apply the 25 percent attribution threshold and affiliation rules similar to those used in the PCS auction rules.²⁶³ We sought comment on whether the 900 MHz SMR service warranted a different attribution threshold.²⁶⁴

144. We also sought comment on whether, in the event we were to adopt separate provisions for minority-owned and women-owned entities, we should use the definition of minority-owned businesses and women-owned businesses contained in Section 1.2110(b)(2) of the Commission's rules, *i.e.*, businesses in which minorities and/or women control the applicant, have at least 50.1 percent equity ownership and, in the case of a corporate applicant, a 50.1 percent voting interest. Under this rule, every general partner in a partnership either must be a minority and/or woman who individually or together own at least 50.1 percent of the partnership equity.²⁶⁵

145. Comments. AMTA, Nextel, RAM, Celsmer and Motorola favor the Commission's proposal to limit eligibility for bidding credits to small businesses,²⁶⁶ while AMTA, RAM, Celsmer and Motorola also favor reduced down payments and installment payments to small businesses.²⁶⁷ The combination of bidding credits, reduced down payments and installment payments, as well as the relatively small capital outlay required for entry into

²⁶¹ *Competitive Bidding Fifth Report & Order* at ¶ 175; Implementation of Section 309(j) of the Communications Act - Competitive Bidding Narrowband PCS, PP Docket No. 93-253, *Competitive Bidding Third Memorandum Opinion & Order & Further Notice* at ¶ 46.

²⁶² *Second R&O and Second Further Notice* at ¶ 139.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *See id.* § 1.2110(b)(2).

²⁶⁶ AMTA Comments at 8; Motorola Comments at 9; Nextel Comments at 5; RAM Comments at 6; Celsmer Comments at 5; Celsmer Reply Comments at 3-4.

²⁶⁷ AMTA Comments at 8; Motorola Comments at 9; RAM Comments at 6; Celsmer Comments at 5; Celsmer Reply Comments at 3-4.

the 900 MHz SMR service, were found by commenters to increase the likelihood that women and minority-owned businesses would be able to participate.²⁶⁸ Motorola supports its conclusion with data purporting to show that the capital outlay needed to start up and build out a 900 MHz SMR system will be significantly less than that for either narrowband or broadband PCS.²⁶⁹ Specifically, Motorola estimates that a system adequate to provide service throughout an entire MTA should cost less than \$2 million, as compared with build-out costs for nationwide narrowband and broadband PCS, anticipated to exceed hundreds of millions of dollars.²⁷⁰ AMTA agrees that economic barriers to minority entry into 900 MHz SMR service are extremely small in comparison to other telecommunications services, and that the industry has more diversified licensees than many other telecommunications services, making specific remedies unnecessary.²⁷¹ Celsmer comments that 900 MHz SMR is not as cost-prohibitive as cellular or PCS, eliminating the need for additional enhancements for minority-owned and women-owned businesses.²⁷² Motorola and RAM suggest that the use of enhanced benefits for women-owned and minority-owned entities may well result in a constitutional challenge, which would delay the auction, and that the Commission's proposals in the *Second Further Notice* clearly are constitutional.²⁷³ Nextel comments that the Commission's proposal not to set aside a specific block for designated entity bidding serves the public interest in light of the presence of incumbents.²⁷⁴ In their response to our *Adarand* Public Notice, AMTA, RAM and Geotek expressed support for the Commission's decision to limit eligibility to small businesses.²⁷⁵

146. On the other hand, in comments filed before the Supreme Court's *Adarand* decision, the National Association of Black Owned Broadcasters ("NABOB") and the Minority Business Enterprise Legal and Defense Education Fund, Inc. ("MBELDEF") disagree with the Commission's proposal to limit eligibility to small businesses. NABOB contends that the Commission would not be complying with Section 309(j) of the Act unless it specifically includes rules that promote economic opportunities for minorities.²⁷⁶ NABOB urges the

²⁶⁸ Celsmer Comments at 5; Celsmer Reply Comments at 3-4; RAM Comments at 6; Motorola comments at 6-8; Geotek Comments at 3.

²⁶⁹ Motorola Comments at 6.

²⁷⁰ *Id.*

²⁷¹ AMTA Reply Comments at 2-3.

²⁷² Celsmer Comments at 5; Celsmer Reply Comments at 3-4.

²⁷³ Motorola Reply Comments at 2; 5-6; RAM Comments at 6.

²⁷⁴ Nextel Comments at 5.

²⁷⁵ AMTA Further Comments at 3; Geotek Further Comments at 2; RAM Further Comments at 1.

²⁷⁶ NABOB Comments at 1.

Commission to rely on a 1995 National Telecommunications and Information Administration ("NTIA") study that shows a decline in African-American owned telecommunications companies over the last three years, to justify promotion of minority business opportunities.²⁷⁷ NABOB contends that the Commission is not complying with Section 309(j) because, while 99 percent of all minority businesses may fall under our proposed definition, 99 percent of all small businesses are not minority-owned.²⁷⁸ NABOB proposes a 25 percent bidding credit for all minority-owned businesses having up to \$125 million in gross revenue and limiting eligibility to 20 percent of the channels to minority-owned companies.²⁷⁹ MBELDEF contends that the Commission's proposals do not provide enough benefit to minorities, and that the Commission will not be able to monitor the benefits of its programs for minorities.²⁸⁰ MBELDEF expresses concern that without race-specific benefits, the benefits of any race-neutral provisions will be diluted.²⁸¹

147. Although we did not request comment on the issue of incumbent licensees who meet the designated entity definition, Pro Tec, a women-owned entity, suggests that the Commission waive the auction requirement for incumbent licensees who also are designated entities.²⁸² To that end, Pro Tec suggests that the Commission employ the following criteria to determine when wide area licenses should be awarded to designated entity incumbents: (1) the company is a small or women-owned or minority-owned business as defined in the *Further Notice*; (2) the entity has a fully constructed and operational 900 MHz system operating on at least 10 channels; and (3) the existing system, employing a 55-mile contour, currently provides coverage to 25 percent or more of the population within the MTA.²⁸³ As an alternative, Pro Tec suggests that the Commission use these three criteria to judge eligibility for higher bidding credits, e.g., 40 percent.²⁸⁴ As another alternative, Pro Tec suggests that the Commission limit bidding on channels that are encumbered by designated entities to other designated entities.²⁸⁵ Pro Tec comments that the public interest will be disserved by forcing incumbent designated entity licensees to pay in auctions for spectrum

²⁷⁷ NABOB Comments at 3-4.

²⁷⁸ NABOB Comments at 7.

²⁷⁹ NABOB Comments at 8.

²⁸⁰ MBELDEF Comments at 3.

²⁸¹ MBELDEF Comments at 4.

²⁸² Pro Tec Comments at 4.

²⁸³ *Id.* at 4.

²⁸⁴ *Id.* at 5.

²⁸⁵ *Id.* at 5.

with money that is better spent on construction of a wide area system.²⁸⁶

148. Small Business Definition. The majority of commenters agree with the Commission's proposed definition of small businesses as those with gross revenues over the past three years of \$3 million or less. RAM, AMTA, Motorola and Celsmer comment that this limit will encompass the majority of women-owned and minority-owned businesses.²⁸⁷ Geotek comments that due to the relatively low start-up and build-out costs of the 900 MHz service, small businesses less likely will need special provisions such as bidding credits, installment payments and reduced down payments in the auction.²⁸⁸ Geotek and CICS also comment that affording bidding credits, installment payments, and reduced down payments to entities that exceed the \$3 million threshold may unfairly favor those entities over incumbents.²⁸⁹ CICS, however, suggests that the Commission encourage small business participation by using Basic Trading Areas ("BTAs"), which are smaller service areas, rather than MTAs.²⁹⁰ Motorola estimates that 25 per cent or more of all existing SMR licensees have gross revenues of less than \$3 million, and that the Commission's proposal will limit bidding credits to entities that could successfully compete in the 900 MHz SMR market.²⁹¹ AMTA agrees with Motorola's assessment.²⁹²

149. Small Common Carrier Coalition ("SCCC"), National Telephone Cooperative Association ("NTCA"), SBA and Monterey disagree with the Commission's proposed definition, and urge the Commission to adopt a higher threshold.²⁹³ SCCC contends that the proposed definition is too narrow to include rural telephone companies, which have a significant amount of capital necessary to operate a rural telephone company.²⁹⁴ SCCC suggests that the Commission use the same definition as that used for broadband PCS, *i.e.*, less than \$40 million in gross revenues for the three preceding years, or a prorated gross revenue cap based on the \$40 million cap.²⁹⁵ As an example, SCCC states that under a

²⁸⁶ *Id.* at 4-5.

²⁸⁷ AMTA Comments at 8-9; RAM Comments at 6; Motorola Comments at 7-8; Celsmer Comments at 5-6.

²⁸⁸ Geotek Comments at 3-4.

²⁸⁹ *Id.* at 3-4; CICS Reply Comments at 4.

²⁹⁰ CICS Reply Comments at 4.

²⁹¹ Motorola Comments at 7; Motorola Reply Comments at 6.

²⁹² AMTA Reply Comments at 6-7.

²⁹³ SCCC Comments at 3; NTCA Comments at 4; SBA Comments at 7; Monterey Reply Comments at 2.

²⁹⁴ SCCC Comments at 3-5.

²⁹⁵ SCCC Comments at 6-7.

prorated cap, the cap for 10 MHz of SMR spectrum would be \$13.5 million.²⁹⁶ As another alternative, SCCC suggests that the Commission base the small business definition on net revenues, which more accurately may reflect a company's resources.²⁹⁷ RAM and Geotek disagree with SCCC's suggestion that the Commission change the proposed small business definition to include rural telephone companies, stating that rural telephone companies already can take advantage of their existing infrastructure and do not need any additional advantage over incumbents and new entrants serving rural areas.²⁹⁸

150. SBA, NTCA, and Celsmer recommend that the Commission adopt a \$15 million threshold, based on high construction costs in the 900 MHz SMR service.²⁹⁹ SBA points out that, due to high construction costs, an entity with only \$3 million in gross revenues could exhaust half its gross revenue in the construction of two blocks, which could range between \$500,000 and \$750,000.³⁰⁰ As a result, SBA concludes, any business under the \$3 million threshold would be precluded from developing a wide area network.³⁰¹ SBA also comments that the Commission should take into account migration of large commercial entities from the 800 MHz SMR service, as it did when it expanded the size of businesses qualifying as small businesses in the narrowband PCS auctions due to potential migration from other services.³⁰² NTCA contends that there is no record indicating that a business with gross revenues of \$3 million or less will be able to raise the capital for construction, and that such a result would render bidding credits, reduced down payment, and installment payments meaningless.³⁰³ NTCA also points out that the Commission's proposed \$3 million threshold does not meet any SBA-approved small business definition.³⁰⁴ RAM replies that the Commission should not delay the auction pending SBA approval on the definition of small businesses.³⁰⁵

151. AMTA, Geotek, and Motorola disagree with the suggestion of SBA, NTCA, and SCCC that the Commission adopt a \$15 million threshold. AMTA and Geotek disagree on

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ RAM Reply Comments at 3-4; Geotek Reply Comments at 4.

²⁹⁹ SBA Comments at 8-9; NTCA Comments at 4; Celsmer Reply Comments at 1-2.

³⁰⁰ SBA Comments at 7-8.

³⁰¹ *Id.* at 8.

³⁰² SBA Comments at 9.

³⁰³ *Id.*

³⁰⁴ NTCA Comments at 4.

³⁰⁵ RAM Reply Comments at 6-7.

the basis that the comparisons with broadband PCS, cellular, or even 800 MHz SMR are not relevant to the 900 MHz spectrum.³⁰⁶ AMTA points out that there are drastic differences between the number of licenses available and the size of the licenses in broadband PCS and in 900 MHz.³⁰⁷ AMTA also states that the nature of 900 MHz SMR makes it more likely that the build-out of the system will be less expensive than cellular, PCS or 800 MHz SMR wide-area systems.³⁰⁸ Geotek contends that SBA's statement regarding migration from the 800 MHz SMR spectrum is purely speculative, and that the licenses are not fungible due to technical differences between the services.³⁰⁹ AMTA states that SBA's contention that an entity with \$15 million in gross revenues has the wherewithal to construct and operate a 900 MHz SMR system is the precise reason why such an entity does not need bidding credits.³¹⁰ AMTA also urges the Commission not to switch to a net revenue test, because a large well-financed entity may use accounting methods that demonstrate very low net revenues.³¹¹ Motorola maintains that expanding the threshold would dilute the Commission's original purpose of conveying benefits to truly small entities.³¹²

152. Discussion. In balancing the objectives set forth in the auction statute, and mindful of the new parameters set out in *Adarand*, we will extend eligibility for bidding credits, reduced down payments and installment payments to all small businesses -- including those owned by minorities, women and small rural telephone companies. Although we are not providing separate provisions for minority-owned and women-owned businesses, we will continue to request bidder information on the short-form filings as to minority and/or women-owned status (as defined in § 90.814(f)), in addition to small business status and, in analyzing the applicant pool and the auction results, we will monitor whether we have accomplished substantial participation by minorities and women through the broad provisions available to small businesses. This also will assist us in preparing our report to Congress on the success of designated entities in auctions.³¹³ If bidding credits only for small businesses prove unsuccessful in accomplishing participation by a significant number of women and minority-owned entities, we retain discretion to tailor our approach for future auctions within the parameters of the *Adarand* strict scrutiny test.

³⁰⁶ AMTA Reply Comments at 5-7; Geotek Reply Comments at 3.

³⁰⁷ AMTA Reply Comments at 7.

³⁰⁸ AMTA Reply Comments at 7-8.

³⁰⁹ Geotek Reply Comments at 3.

³¹⁰ AMTA Reply Comments at 8 n.4. See SBA Comments at 8.

³¹¹ AMTA Reply Comments at 8.

³¹² Motorola Reply Comments at 6-7.

³¹³ See 47 U.S.C. § 309(j)(12)(D).

153. Furthermore, we believe, and are supported by most commenters, that both the \$3 million and \$15 million small business definitions are appropriate for the 900 MHz SMR service. We will adopt a "tiered" system for awarding bidding credits, as discussed in further detail at ¶¶ 164-165, *infra*. We believe that a \$40 million definition is unwarranted, because build-out costs are likely to be much lower than those for broadband PCS and regional narrowband PCS. Additionally, the license supply (1,020) is more abundant and we believe that the costs of acquiring a 900 MHz SMR license are lower than for broadband or narrowband regional PCS licenses. We believe that many of the incumbents already licensed in the 900 MHz SMR service will fall within either one of these definitions of small business,³¹⁴ which are a variation of the definition used for broadband PCS.³¹⁵ Although SBA questions whether a \$3 million entity can raise the capital required to build out a wide area network, we have placed reliance on the estimates both of the industry³¹⁶ and industry representatives³¹⁷ in determining that the \$3 million figure will be high enough to include truly small businesses. Businesses with gross revenues of not more than \$3 million may have systems only in a single MTA and may not be interested in building large regional networks. However, in reliance on SBA's suggestion, we also believe that the \$15 million figure is low enough so as not to include businesses that, by industry standards, would not need the assistance of bidding credits, installment payments, and reduced down payments to compete successfully in the auction. Furthermore, given the costs of building out a system spanning several MTA's, a \$15 million or less small business definition is appropriate.³¹⁸

154. We reject SCCC's argument that we should use a small business threshold that is designed to include most rural telephone companies. By virtue of their existing infrastructure, rural telephone companies already have an edge over other new entrants. Therefore, we are not convinced that their ineligibility for bidding credits, installment payments, and reduced down payments will hinder their entry into 900 MHz SMR services. Moreover, we are adopting partitioning rules, as discussed at ¶¶ 177-179, *infra*. We also reject SCCC's request to use a "net revenues" test for the same reasons we have rejected that test for other auctionable services. Although we stated in the *Competitive Bidding Second Report and Order* that we would use a "net worth" test in most circumstances,³¹⁹ we decided subsequently to apply a "gross revenues" test to auctionable services as a more accurate

³¹⁴ See, e.g., AMTA *Ex Parte* Letter, filed Mar. 23, 1995, at 3.

³¹⁵ *Competitive Bidding Fifth Report & Order* at ¶ 175.

³¹⁶ AMTA Comments at 7-8; RAM Comments at 6; Motorola Comments at 7-8; Celsmer Comments at 5-6.

³¹⁷ AMTA *Ex Parte* Letter, filed Mar. 23, 1995, at 2-3.

³¹⁸ We need not consider the migration from unsuccessful bidders in the 800 MHz SMR auction to the 900 MHz SMR spectrum, because the 900 MHz SMR auction will precede that of 800 MHz SMR.

³¹⁹ *Competitive Bidding Second Report & Order* at ¶ 271.

indicator of a company's size.³²⁰ A gross revenues test is a clear measure for determining the size of a business and is an established method of determining size eligibility for various types of federal programs that aid small businesses.³²¹

155. Although we received no comment on our proposed attribution level of 25 percent,³²² we have decided that the attribution level for purposes of meeting the financial cap should be consistent with our treatment of SMR attribution in other contexts. In the *CMRS Third Report and Order*, we adopted a cap on the amount of PCS, cellular and SMR spectrum any single entity could own within a geographic area.³²³ Pursuant to Section 20.6(d) of the Commission's Rules, we established attribution levels for the SMR service as a 20 percent ownership interest in the applicant.³²⁴ Therefore, we will not attribute the gross revenues of investors that hold less than a 20 percent interest in the applicant, but we will include the gross revenues of the applicant's affiliates and investors with ownership interests of 20 percent or more in the applicant in determining whether an applicant qualifies as a small business.³²⁵ As has been the case in prior auctions where special provisions for small businesses have been made, it also is our expectation that a qualifying small business or principals of a qualifying small business will retain *de facto* and *de jure* control of the applicant. In determining attribution when 900 MHz SMR licensees are held indirectly through intervening corporate entities, we will use the multiplier adopted in the *CMRS Third Report and Order* for the spectrum aggregation cap.³²⁶

156. As we noted in the *Second R&O and Second Further Notice*, U.S. Census Data shows that approximately 99 percent of all women-owned businesses and 99 percent of all

³²⁰ See, e.g., *Competitive Bidding Fifth Report and Order* at ¶ 157; Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service in the Instructional Television Fixed Service, MM Docket No. 94-131, *Report and Order*, FCC 95-230, released June 30, 1995 at ¶ 191.

³²¹ All federal agencies base eligibility of small businesses to bid on a government contract set aside on the (single) size standard set forth in the solicitation. See, e.g., 13 C.F.R. § 121.902. See also *Competitive Bidding Fifth Report and Order* at ¶ 23 and n. 55.

³²² *Second R&O and Second Further Notice*, at ¶ 67.

³²³ *CMRS Third Report and Order* at ¶ 16.

³²⁴ See *CMRS Third Report and Order* at ¶ 276; 47 C.F.R. § 20.6

³²⁵ 47 C.F.R. § 90.814(g). Compare 47 C.F.R. §§ 24.320(b)(2)(iv); 24.720(j)(1).

³²⁶ *CMRS Third Report and Order* at ¶ 277. See 47 C.F.R. § 20.6(d)(6).

minority-owned businesses generated net receipts of \$1 million or less.³²⁷ Thus, we expect that we will capture the majority of minority and women-owned businesses within these categories. In doing so, we believe that we will satisfy the requirement of § 309(j) to provide opportunities for business owned by minority groups and women to participate in the provision of spectrum based services. Moreover, in light of the statute's instruction to "design and test multiple alternative methodologies,"³²⁸ we believe that the 900 MHz SMR service may be a suitable service in which to assess the effectiveness of more uniform measures, because capital entry requirements are expected to be lower than PCS and the spectrum is occupied by incumbents who will not be required to relocate. In designing our auction rules for broadband PCS, we observed that the different capital requirements of each spectrum-based service would influence our decision as to the types of provisions necessary for designated entities.³²⁹ In that context, we decided that lack of access to capital for women and minorities becomes especially problematic for very costly spectrum-based services, such as broadband or regional narrowband PCS³³⁰ and nationwide narrowband PCS. As a result, we found that women and minorities could not overcome historical difficulties in accessing capital without additional provisions.³³¹ We also decided that such targeted provisions may not be necessary in other less costly spectrum-based services.³³² Our expectation is that while 900 MHz MTA service may be a capital-intensive undertaking, it should require considerably less capital than broadband or regional narrowband PCS, thereby providing greater opportunities for participation by smaller businesses, including those owned by women and minorities. For these reasons, we disagree with NABOB's argument that our rules would be inconsistent with the mandate of § 309(j) of the Communications Act.

3. Bidding Credits

157. Background. Bidding credits allow eligible designated entities to receive a payment discount for their winning bid in an auction. In the *Competitive Bidding Second Report & Order*, we determined that competitive bidding rules applicable to individual

³²⁷ *Second R&O and Second Further Notice* at ¶ 135, citing *Women-Owned Businesses*, WB 87-1, 1987 Economic Census, p. 144, Table 8; *Survey of Minority-Owned Business Enterprises*, MB 87-4, 1987 Economic Census, pp 81-82, Table 8. For purposes of this data, these are entities that earned at least \$500 and filed an IRS Form 1040, Schedule C, and in which at least 51% of the assets are owned by minorities or women. The definition of minorities is the same as that defined in § 90.814(f).

³²⁸ 47 U.S.C. § 309(j)(3).

³²⁹ *Competitive Bidding Fifth Report & Order* at ¶ 96.

³³⁰ In the *Competitive Bidding Fifth Report & Order*, for example, we decided it was necessary to do more for minorities and women in an extremely capital-intensive service such as broadband PCS. *Id.* at ¶¶ 96 and 113.

³³¹ *Id.* at ¶¶ 96, 101.

³³² *Id.* at ¶ 96.

services would specify the designated entities eligible for bidding credits and the amounts of the available bidding credits for that particular service.³³³ In the *Competitive Bidding Third Report & Order*,³³⁴ 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, designated entities would receive a 40 percent bidding credit.³³⁵ For broadband PCS, we originally adopted a "tiered approach" of awarding 10 percent to small businesses, 15 percent to minority-owned and women-owned entities, and 25 percent to small businesses that also are owned by women or minorities.³³⁶ After *Adarand*, we modified the broadband PCS rule to provide a single bidding credit of 25 percent for small businesses.³³⁷

158. For the 900 MHz SMR service, we proposed to offer a 10 percent bidding credit to small businesses bidding on any of the ten-channel blocks within each MTA.³³⁸ Although we proposed to limit eligibility for bidding credits to small businesses, we also sought comment on whether this eligibility should be expanded to include businesses owned by minorities and/or women, even if they do not fall within our small business size standards for 900 MHz SMRs.³³⁹ We also sought comment on a second bidding credit alternative, which would entitle small businesses, and minority and women-owned businesses to receive bidding credits on the five least encumbered blocks in each MTA.³⁴⁰ We asked whether, assuming bidding credits were limited to small businesses, we also should limit availability of the credit to the channel blocks with the fewest incumbents; what bidding credit amounts should apply to women and minority-owned businesses and small businesses; whether women-owned and minority-owned businesses that also are small businesses should receive an aggregated bidding credit; and the ramifications of each proposal for the incumbents in each block.³⁴¹ We also asked whether some other amount was appropriate for a bidding credit.³⁴²

159. Comments. Most commenters agree with the Commission's proposal to limit

³³³ *Competitive Bidding Second Report & Order* at ¶ 241.

³³⁴ *Competitive Bidding Third Report & Order* at ¶ 72.

³³⁵ *Competitive Bidding Third Memorandum Opinion & Order & Further Notice* at ¶ 58.

³³⁶ *Competitive Bidding Fifth Report and Order* at ¶¶ 132-133.

³³⁷ *C Block Auction Order* at ¶ 9; 47 C.F.R. § 24.712.

³³⁸ *Second R&O and Second Further Notice* at ¶ 130.

³³⁹ *Id.* at ¶ 132.

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *Id.*

bidding credits to small businesses, but disagree on the amount of the credit and whether they should apply to encumbered blocks. Both Geotek and AMTA agree that 10 percent is a reasonable amount.³⁴³ Nextel and the Council of Independent Communications Suppliers ("CICS") contend that the Commission's proposal will meet legislative intent to ensure participation by designated entities.³⁴⁴ Celsmer, though supportive of bidding credits for small businesses, comments that 10 percent is too low because, although the start-up costs may not be great, small bidders will bid directly against large communications corporations for the same licenses.³⁴⁵ Celsmer concludes that a higher bidding credit is warranted in light of the Commission's decision not to set aside an entrepreneur's block, in which smaller businesses would only bid against each other.³⁴⁶ RAM, however, comments that because they believe 900 MHz SMR systems are worth a fraction of the value of PCS frequencies, the proposed bidding credit is too high.³⁴⁷

160. Geotek, RAM, and AMTA comment that bidding credit(s) should be limited to unencumbered blocks, because doing otherwise would unfairly prejudice incumbents,³⁴⁸ would lead to speculative bidding and anti-competitive behavior such as "greenmailing,"³⁴⁹ and is not statutorily mandated.³⁵⁰ As an alternative, Geotek proposes that designated entities bidding on unencumbered spectrum receive no higher credit than incumbents.³⁵¹ RAM also comments that incumbent licensees should be given priority over new entrants to expand their networks³⁵² and prefers that a lower bidding credit apply to all blocks, as opposed to a higher bidding credit on the least encumbered blocks.³⁵³ AMTA suggests that the Commission limit bidding credits to the three least encumbered blocks in each MTA.³⁵⁴ Celsmer agrees with RAM that the Commission should not afford new applicants bidding credits on encumbered

³⁴³ Geotek Comments at 4-5; AMTA Comments at 6; AMTA Reply Comments at 5.

³⁴⁴ Nextel Comments at 5; CICS Reply Comments at 3.

³⁴⁵ Celsmer Comments at 2-3.

³⁴⁶ *Id.* at 3; Celsmer Reply Comments at 2-3.

³⁴⁷ RAM Reply Comments at 1.

³⁴⁸ Geotek Comments at 4-5; Geotek Reply Comments at 4.

³⁴⁹ RAM Comments at 2-3; AMTA Comments at 7; Geotek Comments at 4-5.

³⁵⁰ RAM Comments at 5; Geotek Comments at 4.

³⁵¹ Geotek Reply at 5-6.

³⁵² RAM Comments at 3-4.

³⁵³ RAM Comments at 4.

³⁵⁴ AMTA Comments at 6-7; AMTA Reply Comments at 5.

blocks,³⁵⁵ but disagrees with AMTA's suggestion that the Commission should not afford any bidding credits on encumbered blocks,³⁵⁶ as that would prejudice incumbent small businesses bidding on their own blocks.³⁵⁷

161. Pro Tec suggests that any existing incumbent designated entity that meets its three criteria³⁵⁸ should be given at least a 40 percent bidding credit.³⁵⁹ Pro Tec asserts that such bidding credits would encourage greater participation in the auction process by small businesses, women and minorities.³⁶⁰

162. SBA contends that the Commission should wait until the conclusion of the 800 MHz SMR auction before setting the rules for 900 MHz SMR.³⁶¹ If, at that time, the Commission determines that there will be significant migration of unsuccessful 800 MHz bidders into 900 MHz, the Commission either should adopt a greater bidding credit or establish an entrepreneurs' block in 900 MHz.³⁶²

163. In response to our Public Notice requesting comment on the impact of the *Adarand* decision on the Commission's 900 MHz SMR proposals,³⁶³ Geotek supplemented its comments by suggesting that "no compelling governmental interest" exists for expanding bidding credit eligibility beyond the small business definition proposed by the Commission.³⁶⁴

164. Discussion. We will adopt a proposal to offer small businesses a bidding credit

³⁵⁵ See RAM Comments at 5.

³⁵⁶ See AMTA Comments at 7.

³⁵⁷ Celsmer Reply Comments at 3.

³⁵⁸ Pro Tec's criteria are: (1) the company is a small or women-owned or minority-owned businesses as defined in the *Further Notice*; (2) the entity has a fully constructed and operational 900 MHz system operating on at least 10 channels; and (3) the existing system, employing a 55-mile contour, currently provides coverage to 25% or more of the population within the MTA.

³⁵⁹ Pro Tec Comments at 5.

³⁶⁰ Pro Tec Comments at 5.

³⁶¹ SBA Comments at 10.

³⁶² SBA Comments at 11.

³⁶³ Request for Comments in 900 MHz SMR Proceeding, *Public Notice*, DA 95-1479, released June 30, 1995.

³⁶⁴ Geotek Further Comments at 2.

on all blocks on a "tiered" basis similar to the one originally offered for broadband PCS.³⁶⁵ Accordingly, very small businesses with gross revenues that are not more than \$3 million for the preceding three years are entitled to a 15 percent bidding credit on all blocks; small businesses with gross revenues that are not more than \$15 million for the preceding three years are entitled to a 10 percent bidding credit on all blocks. Bidding credits for small businesses are not cumulative. Thus a \$3 million small business will be eligible for only a 15 percent bidding credit, not a 25 percent credit. This formula strikes a reasonable compromise between the new applicants who favor a higher bidding credit on all blocks, and the incumbent commenters who favor a lower bidding credit only on unencumbered blocks. We also believe that limiting the bidding credit to small businesses poses the slightest risk of legal challenge (and accompanying delay) in light of the *Adarand* decision.³⁶⁶ Considering the dormancy of the 900 MHz SMR spectrum, we believe that avoiding any further delay in the Phase II licensing process is of paramount importance. Tiered bidding credits are narrowly tailored to the varying abilities of businesses to access capital. Smaller businesses have more difficulty accessing capital and thus need a higher bidding credit. Tiering also takes into account that different small businesses will pursue different strategies, such as single MTAs, large regions or nationwide coverage.

165. Along with other provisions in this *Order*, these bidding credits will help to achieve the objectives of Congress by providing small businesses, including women-owned and minority-owned small businesses, with a meaningful opportunity to obtain licenses in the 900 MHz SMR auction, while accommodating the concerns of incumbents within the DFAs.³⁶⁷ While some discount is needed to put small businesses on equal footing with other larger applicants, given the large number of licenses available in this service (*i.e.*, 1,020), we believe it is unnecessary to provide a higher bidding credit, such as that provided for certain designated entities in regional narrowband PCS.³⁶⁸ In narrowband PCS and broadband PCS, we limited the channel blocks on which bidding credits were available to designated

³⁶⁵ See, e.g., *Competitive Bidding Fifth Report and Order* at ¶ 130.

³⁶⁶ See *C Block Auction Order* at ¶ 1.

³⁶⁷ In auctions conducted to date, bidding credits have been available for women and minority-owned applicants, with installment payments available for both women and minority-owned businesses and small businesses. In auctions where bidding credits for women and minorities have been available, participation and success in spectrum-based auctions have varied. For example, in nationwide narrowband PCS, a 25 percent bidding credit did not produce successful bidders among women and minority-owned applicants. In regional narrowband PCS, four of the nine winning bidders applied for a 40 percent bidding credit and installment payments to obtain licenses. Our auction experience to date has not included our current proposal to provide a small business bidding credit available on all blocks, although we recently modified our broadband PCS rules for the C Block to include a 25 percent bidding credit for small businesses only.

³⁶⁸ *Competitive Bidding Third Memorandum Opinion & Order & Further Notice* at ¶ 58.

entities.³⁶⁹ In IVDS, we permitted the use of bidding credits on both available channels, yet imposed a limit of one bidding credit per service area.³⁷⁰ Due to the characteristics of the 900 MHz SMR service, we will offer bidding credits for eligible designated entities on all channel blocks in each MTA, rather than limiting this measure to certain blocks. Due to the presence of incumbents throughout all blocks, it is difficult to choose certain blocks for bidding credits. Furthermore, it would be impossible to determine the least encumbered blocks, because they vary from market to market. Additionally, we believe that we will provide greater opportunities for small businesses by offering bidding credits across all blocks, and will not limit applicants from pursuing regional or nationwide strategies. Unless we offer bidding credits across all blocks, we would be depriving small businesses of the opportunity to pursue regional and nationwide strategies.

4. Reduced Down Payments/Installment Payments

166. Background. We noted in the *Competitive Bidding Second Report & Order* that allowing installment payments reduces the amount of private financing needed by prospective small business licensees and therefore mitigates the effect of limited access to capital by small businesses, especially those owned by minorities and/or women.³⁷¹ Thus, we proposed in the *Second R&O and Second Further Notice* to adopt an installment payment option for small businesses that are winning bidders in the 900 MHz SMR auction.³⁷² Additionally, we tentatively concluded that small businesses that are eligible for installment payments may pay a reduced down payment.³⁷³

167. Comments. AMTA, Celsmer, SBA and CICS support the Commission's proposal to offer reduced down payments and installment payments to small businesses.³⁷⁴ Celsmer comments that such options would ease the financial burden on small businesses that may have to rely on private sectors loans to meet the burdens of acquisition, construction, and maintenance.³⁷⁵ AMTA, however, suggests that the Commission limit these options to

³⁶⁹ *Competitive Bidding Third Report and Order* at ¶ 72 (narrowband PCS); *Competitive Bidding Fifth Report & Order* at ¶ 131 (broadband PCS).

³⁷⁰ *Competitive Bidding Fourth Report & Order* at ¶ 39.

³⁷¹ *Competitive Bidding Second Report & Order* at ¶¶ 231-232.

³⁷² *Second R&O and Second Further Notice* at ¶ 133.

³⁷³ *Id.* at ¶ 134.

³⁷⁴ AMTA Comments at 8; Celsmer Comments at 2-3; SBA Comments at 10; CICS Reply Comments at 7.

³⁷⁵ Celsmer Comments at 4-5.

unencumbered blocks, or to the three least encumbered blocks in each MTA.³⁷⁶

168. Discussion. We will adopt both the installment payment and reduced down payment options for small businesses that are winning bidders in the 900 MHz SMR auction. However, to encourage maximum small business participation, and for the reasons discussed at ¶¶ 164-165, *supra*, we reject AMTA's suggestion to limit these options to bidders for unencumbered blocks or the three least encumbered blocks. In light of the *Adarand* decision, and to avoid further delay in auctioning the 900 MHz SMR spectrum, our decision to limit installment payments and reduced down payments to small businesses not only is the best legal course, but most likely will confer those benefits on the majority of minority-owned and women-owned entities.

169. Small businesses, including those owned by minorities and women, face capital access difficulties not encountered by other firms. Thus, they require special measures to ensure their opportunity to participate in the 900 MHz SMR service, and we will provide an "enhanced" installment payment plan similar to the one set out in the *Competitive Bidding Fifth Report and Order*.³⁷⁷ Licensees who qualify for installment payments will be entitled to pay their winning bid amount in quarterly installments over the term of the license, with interest charges to be fixed at the time of licensing at a rate equal to the rate for ten-year U.S. Treasury obligations plus 2.5 percent. Pursuant to this enhanced installment payment plan, small businesses that fall under the \$15 million definition will be required to pay interest only for the first two years of the license term at the same interest rate as set forth in the rule. Interest will accrue at the Treasury note rate plus 2.5 percent. Small businesses that fall under the \$3 million definition will be able to make interest-only payments for five years. Interest will accrue at the Treasury note rate without the additional 2.5 percent. Timely payment of all quarterly installments will be a condition of the license grant, and failure to make such timely payment will be grounds for revocation of the license.

170. Licensees who qualify for reduced down payments will be required to pay five percent of the winning bid five days after the auction closes, with the remaining five percent down payment due five days after Public Notice that the Commission is prepared to award the license. The Commission will grant the license generally within ten (10) business days after receiving such down payment.

5. Transfer Restrictions and Unjust Enrichment Provisions

171. Discussion. In the *Competitive Bidding Fifth Report & Order*, we adopted restrictions on the transfer or assignment of entrepreneurs' block licenses to ensure that designated entities do not take advantage of special provisions by immediately assigning or

³⁷⁶ AMTA Comments at 8.

³⁷⁷ See, e.g., *Competitive Bidding Fifth Report and Order* at ¶ 139.

transferring control of their licenses.³⁷⁸ In the *Competitive Bidding Third Report and Order*, we adopted restrictions for narrowband PCS on the transfer of licenses to non-designated entities.³⁷⁹ Women and minority-owned and small business licensees who transferred licenses to non-qualifying designated entities were required to repay any benefits conferred prior to the transfer. As in the 900 MHz SMR service, narrowband PCS did not contain a separate entrepreneurs' block. In the *Second R&O and Second Further Notice*, we proposed to adopt these restrictions on transfer and assignment of licenses won by designated entities.³⁸⁰ We received no comments on this proposal.

172. The Commission's unjust enrichment provisions are integral to the success of the special provisions provided to designated entities in the various auctionable services. In the *Competitive Bidding Second Report & Order*, we outlined unjust enrichment provisions applicable specifically to designated entities. We established these provisions to deter speculation and participation in the licensing process by those who do not intend to offer service to the public, or who intend to use our provisions to obtain a license at a lower cost than they otherwise would have to pay, and later to sell it for a profit.³⁸¹

173. Licensees seeking to transfer their licenses to entities which do not qualify as small businesses, as a condition to approval of the transfer, must remit to the government a payment equal to a portion of the total value of the benefit conferred by the government. Thus, a small business that received bidding credits seeking transfer or assignment of a license to an entity that is not a small business or does not qualify as a smaller business under the definitions in § 90.814(b)(1), will be required to reimburse the government for the amount of the bidding credit, plus interest at the rate imposed for installment financing at the time the license was awarded, before transfer will be permitted. The amount of this payment will be reduced over time as follows: a transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit; in year three of the license term the payment will be 75 percent; in year four the payment will be 50 percent and in year five the payment will be 25 percent, after which there will be no payment. If a small business under the \$3 million definition seeks to transfer or assign a license to a small business under the \$15 million definition, for the purposes of determining the amount of payment, the value of the bidding credit is 5 percent, the difference between the 10 and 15 percent bidding credits. The 5 percent difference will be subject to the same percentage reductions over time as specified above. These assessments will have to be paid to the U.S. Treasury as a condition of approval of the assignment or transfer.³⁸²

³⁷⁸ *Competitive Bidding Fifth Report & Order* at ¶ 128.

³⁷⁹ *Competitive Bidding Third Report and Order* at ¶¶ 80,89.

³⁸⁰ *Second R&O and Second Further Notice* at ¶ 141-143.

³⁸¹ *Competitive Bidding Second Report and Order* at ¶ 259; 47 C.F.R. § 1.2111.

³⁸² See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Erratum to Third Memorandum Opinion and Order*, PP Docket No. 93-253, DA 94-1037, released September 21, 1994.

174. To ensure that large businesses do not become the unintended beneficiaries of measures meant for smaller firms, we propose to apply the unjust enrichment provisions adopted for narrowband PCS to installment payments for the 900 MHz SMR service.³⁸³ Specifically, if a licensee that was awarded installment payments seeks to assign or transfer control of its license during its term to an entity that does not meet either of the definitions set forth in Section 90.814(b)(1), we will require payment of the remaining principal and any interest accrued through the date of assignment as a condition of the license assignment or transfer. Moreover, if a small business that meets the \$3 million definition seeks to assign or transfer control of a license to a small business that meets the \$15 million definition (that does not qualify for as favorable an installment payment plan), the installment payment plan for which the acquiring entity qualifies will become effective immediately upon transfer. Thus, a higher interest rate and earlier payment of principal may begin to be applied. For example, a transfer of a license in the fourth year after license grant from a small business that meets the \$3 million definition to a small business that meets the \$15 million definition will require the transferee to begin principal payments and the balance will begin accruing interest at a rate 2.5 percent above the rate that had been in effect. However, a licensee may not switch its payment plan to a more favorable plan. Finally, if an investor subsequently purchases an "attributable" interest in the businesses and, as a result, the gross revenues or total assets of the business exceed the applicable financial caps, this unjust enrichment provision also will apply. We will apply these payment requirements for the entire license term to ensure that small businesses will look first to other small businesses when deciding to transfer their licenses.

6. Partitioning

175. Background. Congress directed the Commission to ensure that, together with other designated entities, rural telephone companies ("rural telcos") 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. Rural telcos, however, are well positioned because of their existing infrastructure to serve these areas. Therefore, we proposed a geographic partitioning scheme similar to that adopted in broadband PCS,³⁸⁴ which will encourage participation by rural telephone companies, thereby increasing the likelihood of rapid introduction of service to rural areas.³⁸⁵

176. Comments. Only two commenters addressed the Commission's proposal to allow partitioning by rural telephone companies. NTCA favors such partitioning as a means

³⁸³ See *Competitive Bidding Third Memorandum Opinion & Order & Further Notice* at ¶ 98.

³⁸⁴ *Competitive Bidding Fifth Report and Order* at ¶ 150.

³⁸⁵ *Second R&O and Second Further Notice* at ¶ 144-145.

to bring wireless services to rural areas and satisfy the statutory mandate.³⁸⁶ NTCA requests, however, that the Commission remove the presumption that a partitioned service area is reasonably related to the company's wireline service area if it contains no more than twice the population overlap.³⁸⁷ NTCA favors a policy that would approve the partitioning agreement as long as the partitioned area contained the rural telco's wireline service area, thereby giving consortia the flexibility they need to create efficient service areas while meeting the needs of sparsely populated areas.³⁸⁸ NTCA also notes that elimination of the presumption will eliminate the disposition of time-consuming waiver requests that can result in delayed service.³⁸⁹

177. Discussion. We will adopt the partitioning scheme as proposed in the *Second R&O and Second Further Notice*, and deny NTCA's request to change the "reasonably related" presumption for post-auction partitioning. This partitioning scheme will prevent rural telephone companies from having to bid on the entire MTA license to obtain licenses covering their wireline service areas. In addition, partitioning will provide rural telcos with the flexibility to serve areas in which they already provide service, while the remainder of the service area could be served by other providers.³⁹⁰

178. Rural telcos are permitted to acquire partitioned 900 MHz SMR licenses in either of two ways: (1) they may form bidding consortia to participate in auctions, and then partition the licenses won among consortia participants; and (2) they may acquire partitioned 900 MHz SMR licenses from other licensees through private negotiation and agreement either before or after the auction.³⁹¹ Each member of a consortium will be required to file a long-form application, following the auction, for its respective mutually agreed-upon geographic area. Partitioned areas must conform to established geopolitical boundaries (such as county lines). With respect to rural telcos, each area must include all portions of the wireline service area of the rural telco applicant that lies within MTA service area.³⁹² We also will use the definition for rural telcos implemented in the *Competitive Bidding Fifth Report & Order* for broadband PCS. Rural telcos are defined as local exchange carriers having 100,000 or fewer

³⁸⁶ NTCA Comments at 3.

³⁸⁷ NTCA Comments at 3-4.

³⁸⁸ NTCA Comments at 3-4.

³⁸⁹ NTCA Comments at 4.

³⁹⁰ *Id.*

³⁹¹ *Id.* at ¶ 151.

³⁹² *Id.*

access lines, including all affiliates.³⁹³

179. In addition, we deny NTCA's request to change the "reasonably related" presumption for rural telco post-auction partitioning. The rural telco post-auction partitioning scheme was developed in response to Section 309(j)(3) of the Communications Act's explicit mandate to promote economic opportunities for rural telcos. If "reasonably related" service was not required, there would be no justification for allowing only rural telcos to obtain partitioned licenses, because the rural telco would essentially be no different than any other applicant. However, the Commission intends to explore the issue as to whether to adopt a more general partitioning scheme in a future proceeding. Thus, if a rural telco receives a partitioned license post-auction from another MTA licensee, the partitioned area must be reasonably related to the rural telco's wireline service area that lies within the MTA service area. In our proposed rule in the *Second R&O and Second Further Notice*, we indicated that we would presume as "reasonably related" a partitioned area that contains no more than twice the population of that portion of a rural telco's wireline service area that lies within the MTA service area.³⁹⁴ NTCA's argument to change this presumption is unpersuasive. This presumption, adopted for post-auction partitioning for rural telcos in the broadband PCS service,³⁹⁵ has been unchallenged, and NTCA has not proffered a rationale that would justify distinguishing the post-auction partitioning procedures in PCS from that of the 900 MHz SMR service. Without such a limitation, a rural telco (or consortia thereof) easily could circumvent the auction process by obtaining practically the entire MTA license.

7. Reduced Upfront Payments

180. Discussion. We proposed not to adopt a reduced upfront payment option in the 900 MHz SMR service for designated entities.³⁹⁶ We received no comments on this proposal. Accordingly, we believe that a reduced upfront payment option is unnecessary in the 900 MHz SMR service, in light of the other provisions adopted here (*i.e.*, bidding credits, installments payments and reduced down payments). Moreover, this will encourage sincere bidding by all parties.

8. Set-aside Spectrum

181. Background. In the *Competitive Bidding Fifth Report & Order* we established entrepreneurs' blocks on which only qualified entrepreneurs, including designated entities,

³⁹³ *Id.* at ¶ 193; 47 C.F.R. § 1.2110(b)(3).

³⁹⁴ See *Second R&O and Second Further Notice*, Appendix B, proposed § 90.813(d)(3).

³⁹⁵ *Competitive Bidding Fifth Report and Order* at ¶ 151; 47 U.S.C. § 24.714(d).

³⁹⁶ *Second R&O and Second Further Notice* at ¶ 146.

could bid.³⁹⁷ We tentatively concluded not to adopt an entrepreneurs' block for the 900 MHz SMR auction, but requested comment on whether the capital requirements of this service were anticipated to be so substantial that we should insulate certain blocks from very large bidders in order to provide meaningful opportunities for designated entities.

182. Comments. In general, most commenters support the Commission's proposal not to create a separate entrepreneur's block for designated entities.³⁹⁸ Motorola cites 900 MHz's cost difference, spectrum availability, and small allocations as factors which will enhance the effectiveness of bidding credits, reduced down payments and installment payments and render the establishment of an entrepreneur's block unnecessary.³⁹⁹

183. SCCC supports creation of an entrepreneurs' block, stating that the absence of an entrepreneur's block will mean poor bidding odds for rural telephone companies.⁴⁰⁰ Monterey Telecommunications Technology ("Monterey") agrees with SCCC's conclusion.⁴⁰¹ According to SCCC, without an entrepreneur's block, rural telephone companies ("rural telcos") will have to bid against companies with deep pockets for scarce 900 MHz spectrum, effectively shutting the rural telcos out of the auction.⁴⁰² The SBA suggests that the Commission establish an entrepreneur's block (or increase the bidding credits for small businesses, discussed at ¶ 162, *infra*) if the Commission adopts the SBA's suggestion to postpone the adoption of the 900 MHz SMR rules until it has completed the rule making in the 800 MHz SMR docket.⁴⁰³

184. Discussion. We will not adopt an entrepreneur's block in the 900 MHz SMR service for several reasons. First, the large numbers of licenses available and relatively small spectrum allocations in the 900 MHz SMR service should allow for extensive small business participation. Second, unlike broadband PCS, the effectiveness of bidding credits, reduced down payments and installment payments will not be diluted, due to the smaller capital outlay anticipated for this service. With respect to SCCC's concern, we do not believe that we need to provide more enhancements for rural telcos which, in addition to having the existing infrastructure, may qualify as a small business or may take advantage of our partitioning

³⁹⁷ *Id.* at ¶¶ 113-123. These rules were further refined in the *Competitive Bidding Fifth Memorandum Opinion & Order*. See 47 C.F.R. § 24.709.

³⁹⁸ AMTA Comments at 6-8; RAM Comments at 3-7; Geotek Comments at 2-4; Motorola Comments at 6-7.

³⁹⁹ *Id.* at 8-9.

⁴⁰⁰ SCCC Comments at 8-9.

⁴⁰¹ Monterey Reply Comments at 2-3.

⁴⁰² SCCC Comments at 8-9.

⁴⁰³ SBA Comments at 10-11.

rules. We also reject the SBA's final suggestion as moot, as the Commission has determined not to postpone the adoption of 900 MHz SMR rules until the completion of the 800 MHz SMR rule making.

9. Other Matters

185. Although we did not request comment on this issue, the National Paging and Personal Communications Association ("NPPCA") suggests that the Commission establish a Telecommunications Development Fund ("TDF") to assist small businesses in accessing capital for build-out purposes.⁴⁰⁴ To that end, NPPCA suggests three alternative funding schemes for the TDF: (1) Upfront payments should be placed in an interest-bearing account, with the interest money used to fund the TDF; (2) Use part of the proceeds from the spectrum auctions to fund the TDF (as RTC did to support purchase of property by minorities); or (3) Use development banks on a domestic and international level, or other private sector funding.⁴⁰⁵ NPPCA also suggests the TDF could administer loans, and that funding small business ventures through a TDF would foster diversity in the telecommunications industry.⁴⁰⁶

186. Discussion. While we fully support the goal of "ensur[ing] that small businesses . . . are given the opportunity to participate in the provision of spectrum-based services" and recognize that access to capital is key to such opportunities, the small business financing proposal raised by NPPCA is beyond the scope of this proceeding. As such, it will not be addressed here.

VI. CONCLUSION

187. We believe that the auction rules adopted in this Order will promote the public policy goals set forth by Congress. The rules should facilitate the rapid implementation of the 900 MHz SMR service, thus advancing the public interest by fostering economic growth of competitive new services via efficient spectrum use. The rules will allow the public to recover a portion of the value of the public spectrum, and will promote access to 900 MHz SMR services by consumers, producers, and new entrants, by ensuring that designated entities will have genuine opportunities to participate in the auctions and in the provision of service.

VII. PROCEDURAL MATTERS AND ORDERING CLAUSES

188. The Final Regulatory Flexibility Analysis, as required by Section 604 of the Regulatory Flexibility Act is set forth in Appendix B.

⁴⁰⁴ NPPCA Comments at 1-2.

⁴⁰⁵ NPPCA Comments at 8-13.

⁴⁰⁶ *Id.* at 13.

189. Accordingly, IT IS ORDERED that, pursuant to the authority of 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, this *Second Order on Reconsideration and Seventh Report and Order* is adopted and Part 90 of the Commission's Rules IS AMENDED as set forth in the attached Appendix A.

190. IT IS FURTHER ORDERED that the rule amendments set forth in Appendix A WILL BECOME EFFECTIVE 30 days after publication in the Federal Register.

191. IT IS FURTHER ORDERED, that the Petitions for Reconsideration filed by Advanced Mobilecomm, Inc., American Mobile Telecommunications Association, Celsmer, DW Communications, Inc., Geotek Communications, Inc., Nextel, Personal Communications Industry Association, RAM Mobile Data Limited Partnership, and Southern California Edison Company are GRANTED to the extent discussed herein, and DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**APPENDIX A
FINAL RULES**

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

PART 90 -- PRIVATE LAND MOBILE RADIO SERVICES

1. The authority citation for Part 90 is revised to read as follows:

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

2. Section 90.7 is amended to read as follows:

§ 90.7 Definitions.

* * * * *

900 MHz SMR MTA-based license or MTA license. A license authorizing the right to use a specified block of 900 MHz SMR spectrum within one of the 47 Major Trading Areas ("MTAs"), as embodied in Rand McNally's Trading Area System MTA Diskette and geographically represented in the map contained in Rand McNally's *Commercial Atlas & Marketing Guide* (the "MTA Map"), with the following exceptions and additions:

- (1) Alaska is separated from the Seattle MTA and is licensed separately.
- (2) Guam and the Northern Mariana Islands are licensed as a single MTA-like area.
- (3) Puerto Rico and the United States Virgin Islands are licensed as a single MTA-like area.
- (4) American Samoa is licensed as a single MTA-like area.

* * * * *

2. Section 90.173 is amended by revising paragraph (k) to read as follows:

§ 90.173 Policies governing the assignment of frequencies.

* * * * *

(k) Notwithstanding any other provisions of this part, any eligible person may seek a dispositive preference for a channel assigned on an exclusive basis in the 220-222 MHz, 470-512 MHz, and 800 MHz bands by submitting information that leads to the recovery of channels in these bands. Recovery of such channels must result from information provided

regarding the failure of existing licensees to comply with the provisions of §§ 90.155, 90.157, 90.629, 90.631 (e) or (f), or 90.633 (c) or (d). Any recovered channels in the 900 MHz SMR service will revert automatically to the MTA licensee.

* * * * *

3. Section 90.617(d) is amended by revising Table 4B to read as follows:

§ 90.617 Frequencies in the 809.750-824/854.750-869 MHz, and 896-901/935-940 MHz bands available for trunked or conventional system use in non-border areas.

(d)* * * * *

Table 4B- SMR Category 896-901/935-940 MHz Band-Channels
(200 Channels):

Block	Channel Nos.
A	1-2-3-4-5-6-7-8-9-10
B	21-22-23-24-25-26-27-28-29-30
C	41-42-43-44-45-46-47-48-49-50
D	61-62-63-64-65-66-67-68-69-70
E	81-82-83-84-85-86-87-88-89-90
F	101-102-103-104-105-106-107-108-109-110
G	121-122-123-124-125-126-127-128-129-130
H	141-142-143-144-145-146-147-148-149-150
I	161-162-163-164-165-166-167-168-169-170
J	181-182-183-184-185-186-187-188-189-190
K	201-202-203-204-205-206-207-208-209-210
L	221-222-223-224-225-226-227-228-229-230
M	241-242-243-244-245-246-247-248-249-250
N	261-262-263-264-265-266-267-268-269-270
O	281-282-283-284-285-286-287-288-289-290
P	301-302-303-304-305-306-307-308-309-310
Q	321-322-323-324-325-326-327-328-329-330
R	341-342-343-344-345-346-347-348-349-350
S	361-362-363-364-365-366-367-368-369-370
T	381-382-383-384-385-386-387-388-389-390

* * * * *

4. Section 90.619(a)(5) is amended by revising Table 4B to read as follows:

§90.619 Frequencies available for use in the U.S./Mexico and U.S./Canada border areas.

(a) * * * * *

(5) * * * * *

**TABLE 4B - UNITED STATES-MEXICO BORDER AREA, SMR CATEGORY
896-901/935-940 MHZ BAND (200 CHANNELS):**

Channels numbered above 200 may be used only subject to the power flux density limits at or beyond the Mexican border stated in paragraph (a)(2) of this section:

Block	Channel Nos.
A	1-2-3-4-5-6-7-8-9-10
B	21-22-23-24-25-26-27-28-29-30
C	41-42-43-44-45-46-47-48-49-50
D	61-62-63-64-65-66-67-68-69-70
E	81-82-83-84-85-86-87-88-89-90
F	101-102-103-104-105-106-107-108-109-110
G	121-122-123-124-125-126-127-128-129-130
H	141-142-143-144-145-146-147-148-149-150
I	161-162-163-164-165-166-167-168-169-170
J	181-182-183-184-185-186-187-188-189-190
K	201-202-203-204-205-206-207-208-209-210
L	221-222-223-224-225-226-227-228-229-230
M	241-242-243-244-245-246-247-248-249-250
N	261-262-263-264-265-266-267-268-269-270
O	281-282-283-284-285-286-287-288-289-290
P	301-302-303-304-305-306-307-308-309-310
Q	321-322-323-324-325-326-327-328-329-330
R	341-342-343-344-345-346-347-348-349-350
S	361-362-363-364-365-366-367-368-369-370
T	381-382-383-384-385-386-387-388-389-390

* * * * *

5. Section 90.631 is amended by revising paragraphs (f) and (i) to read as follows:

§ 90.631 Trunked systems loading, construction and authorization requirements.

* * * * *

(f) If a station is not placed in permanent operation, in accordance with the technical parameters of the station authorization, within one year, except as provided in § 90.629, its license cancels automatically and must be returned to the Commission. For purposes of this section, a base station is not considered to be placed in operation unless at least two associated mobile stations, or one control station and one mobile station, are also placed in operation. An SMR licensee with facilities that have discontinued operations for 90 continuous days after the effective date of this rule is presumed to have permanently discontinued operations, unless the licensee notifies the FCC otherwise prior to the end of the 90 day period and provides a date on which operation will resume, which date must not be in excess of 30 additional days.

* * * * *

6. Section 90.665(c) and (d) are amended to read as follows:

§ 90.665 Authorization, construction and implementation of MTA licenses.

* * * * *

(c) Each MTA licensee in the 896-901/935-940 MHz band must, three years from the date of license grant, construct and place into operation a sufficient number of base stations to provide coverage to at least one-third of the population of the MTA. Further, each MTA licensee must provide coverage to at least two-thirds of the population of the MTA five years from the date of license grant or, alternatively, demonstrate through a showing to the Commission that it is providing substantial service. The MTA licensee must meet the population coverage benchmarks regardless of the extent to which incumbent licensees are present within the MTA block.

(d) MTA licensees who fail to meet the coverage requirements imposed at either the third or fifth years of their license term, or to make a convincing showing of substantial service, will forfeit the portion of the MTA license that exceeds licensed facilities constructed and operating on the date of the MTA license grant.

7. Section 90.667 is amended to read as follows:

§ 90.667 Grandfathering provisions for incumbent licensees.

(a) These provisions apply to all 900 MHz SMR licensees who obtained licenses or filed applications for secondary sites on or before August 9, 1994 ("incumbent licensees"), as well as to all 900 MHz SMR licensees who obtained authorizations pursuant to Section 90.173(k). An incumbent licensee's service area shall be defined by its originally-licensed 40 dBu field strength contour. Incumbent licensees are permitted to add new or modify transmit sites in this existing service area without prior notification to the Commission so long as their original 40 dBu field strength contour is not expanded.

(b) Incumbent licensees operating at multiple sites may, after grant of MTA licenses has been completed, exchange multiple site licenses for a single license, authorizing operations throughout the contiguous and overlapping 40 dBu field strength contours of the multiple sites. Incumbents exercising this license exchange option must submit specific information for each of their external base sites after the close of the 900 MHz SMR auction.

(c) Applications in the 900 MHz SMR service for secondary sites filed after August 9, 1994 shall be authorized on a secondary, non-interference basis to MTA licensee operations. No secondary sites shall be granted on this basis in an MTA once the MTA licensee has been selected.

6. A new subpart U consisting of §§ 90.801 through 90.814 is added to Part 90 to read as follows:

Subpart U -- Competitive Bidding Procedures for 900 MHz Specialized Mobile Radio Service

Sec.

- 90.801 900 MHz SMR subject to competitive bidding.
- 90.802 Competitive bidding design for 900 MHz SMR licensing.
- 90.803 Competitive bidding mechanisms.
- 90.804 Aggregation of 900 MHz SMR licenses.
- 90.805 Withdrawal, default and disqualification payments.
- 90.806 Bidding application (FCC Form 175 and 175-S Short-form).
- 90.807 Submission of upfront payments and down payments.
- 90.808 Long-form applications.
- 90.809 License grant, denial, default, and disqualification.
- 90.810 Bidding credits for small businesses.
- 90.811 Reduced down payment for licenses won by small businesses.
- 90.812 Installment payments for licenses won by small businesses.
- 90.813 Procedures for partitioned licenses.
- 90.814 Definitions.
- 90.815 Eligibility for small business status

§ 90.801 900 MHz SMR subject to competitive bidding.

Mutually exclusive initial applications to provide 900 MHz SMR service are subject to competitive bidding procedures. The general competitive bidding procedures found in 47 CFR Part 1, Subpart Q will apply unless otherwise provided in this part.

§ 90.802 Competitive bidding design for 900 MHz SMR licensing.

The Commission will employ a simultaneous multiple round auction design when choosing from among mutually exclusive initial applications to provide 900 MHz SMR service, unless

otherwise specified by the Wireless Telecommunications Bureau before the auction.

§ 90.803 Competitive bidding mechanisms.

- (a) Sequencing. The Wireless Telecommunications Bureau will establish and may vary the sequence in which 900 MHz SMR licenses will be auctioned.
- (b) Grouping. All 900 MHz SMR licenses for each of the MTAs will be auctioned simultaneously, unless the Wireless Telecommunications Bureau announces, by Public Notice prior to the auction, an alternative auction scheme.
- (c) Minimum Bid Increments. The Wireless Telecommunications Bureau will, by announcement before or during an auction, require minimum bid increments in dollar or percentage terms.
- (d) Stopping Rules. The Wireless Telecommunications Bureau will establish stopping rules before or during multiple round auctions in order to terminate an auction within a reasonable time.
- (e) Activity Rules. The Wireless Telecommunications Bureau will establish activity rules which require a minimum amount of bidding activity. In the event that the Commission establishes an activity rule in connection with a simultaneous multiple round auction, each bidder will be entitled to request and will be automatically granted a certain number of waivers of such rule during the auction.

§ 90.804 Aggregation of 900 MHz SMR licenses.

The Commission will license each 10-channel block in the 900 MHz SMR spectrum separately. Applicants may aggregate across spectrum blocks within the limitation specified in § 20.6(b) of this Chapter.

§ 90.805 Withdrawal, default and disqualification payments.

- (a) During the course of an auction conducted pursuant to § 90.802, the Wireless Telecommunications Bureau will impose payments on bidders who withdraw high bids during the course of an auction, who default on payments due after an auction closes, or who are disqualified.
- (b) Bid withdrawal prior to close of auction. A bidder who withdraws a high bid during the course of an auction will be subject to a payment equal to the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission. No withdrawal payment would be assessed if the subsequent winning bid exceeds the withdrawn bid. This payment amount will be deducted from any upfront payments or down payments that the withdrawing bidder has deposited with the Commission.

(c) Default or disqualification after close of auction. If a high bidder defaults or is disqualified after the close of such an auction, the defaulting bidder will be subject to the payment in paragraph (b) of this section plus an additional payment equal to three (3) percent of the subsequent winning bid. If the subsequent winning bid exceeds the defaulting bidder's bid amount, the 3 percent payment will be calculated based on the defaulting bidder's bid amount. These amounts will be deducted from any upfront payments or down payments that the defaulting or disqualified bidder has deposited with the Commission. If the default occurs within five business days after the bidding has closed, the Commission retains 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 the final bid levels.

§ 90.806 Bidding application (FCC Form 175 and 175-S Short-form).

All applicants to participate in competitive bidding for 900 MHz SMR licenses must submit applications on FCC Forms 175 and 175-S pursuant to the provisions of § 1.2105 of this Chapter. The Wireless Telecommunications Bureau will issue a Public Notice announcing the availability of 900 MHz SMR licenses and, in the event that mutually exclusive applications are filed, the date of the auction for those licenses. This Public Notice also will specify the date on or before which applicants intending to participate in a 900 MHz SMR auction must file their applications in order to be eligible for that auction, and it will contain information necessary for completion of the application as well as other important information such as the materials which must accompany the Forms, any filing fee that must accompany the application or any upfront payment that will need to be submitted, and the location where the application must be filed. In addition to identifying its status as a small business or rural telephone company, each applicant must indicate whether it is a minority-owned entity, as defined in § 90.814(g) and/or a women-owned entity.

§ 90.807 Submission of upfront payments and down payments.

(a) Each bidder in the 900 MHz SMR auction will be required to submit an upfront payment of \$0.02 per MHz per pop, for the maximum number of licenses (in terms of MHz-pops) on which it intends to bid pursuant to § 1.2106 of this Chapter and procedures specified by Public Notice.

(b) Each winning bidder in the 900 MHz SMR auction shall make a down payment to the Commission in an amount sufficient to bring its total deposits up to 20 percent of its winning bid within five business days after the auction closes, and the remaining balance due on the license shall be paid within five business days after Public Notice announcing that the Commission is prepared to award the license. The grant of the application required by § 90.808 is conditional upon receipt of full payment, except for small businesses that are winning bidders, which are governed by § 90.811. The Commission generally will grant the license within ten (10) business days after the receipt of the remaining balance due on the license.

§ 90.808 Long-form applications.

Each winning bidder will be required to submit a long-form application on FCC Form 600 within ten (10) business days after being notified by Public Notice that it is the winning bidder. Applications on FCC Form 600 shall be submitted pursuant to the procedures set forth in 90.119 of this Part and any associated Public Notices. Only auction winners (and rural telephone companies and incumbent 900 MHz SMR licensees seeking partitioned licenses pursuant to agreements with auction winners under § 90.813) will be eligible to file applications on FCC Form 600 for initial 900 MHz SMR licenses in the event of mutual exclusivity between applicants filing Form 175.

§ 90.809 License grant, denial, default, and disqualification.

(a) A bidder who withdraws its bid subsequent to the close of bidding, defaults on a payment due, or is disqualified, will be subject to the payments specified in § 90.805 of this Part or § 1.2109 of this Chapter, as applicable.

(b) MTA licenses pursued through competitive bidding procedures will be granted pursuant to the requirements specified in § 90.166.

§ 90.810 Bidding credits for small businesses.

(a) A winning bidder that qualifies as a small business or a consortium of small businesses, (as defined in § 90.814(b)(1)(i) may use a bidding credit of 15 percent to lower the cost of its winning bid on any of the blocks identified in § 90.617(d), Table 4B of this Part. A winning bidder that qualifies as a small business or a consortium of small businesses, (as defined in § 90.814(b)(1)(ii) may use a bidding credit of 10 percent to lower the cost of its winning bid on any of the blocks identified in § 90.617(d), Table 4B of this Part.

(b) Unjust Enrichment.

(1) A small business seeking transfer or assignment of a license to an entity that is not a small business under the definitions in § 90.814(b)(1), will be required to reimburse the government for the amount of the bidding credit, plus interest at the rate imposed for installment financing at the time the license was awarded, before transfer will be permitted. The amount of this payment will be reduced over time as follows: a transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit: in year three of the license term the payment will be 75 percent; in year four the payment will be 50 percent and in year five the payment will be 25 percent, after which there will be no assessment. If a small business as defined in § 90.814(b)(1)(i) seeks to transfer or assign a license to a small business as defined in § 90.814(b)(1)(ii), the value of the bidding credit to be repaid is five percent, the difference between the 10 and 15 percent bidding credits. The five percent difference will be subject to the percentage reductions over time specified above. These payments must be paid back to the U.S. Treasury as a condition of approval of the assignment or transfer

(2) If a small business that utilizes a bidding credit under this section seeks to assign or

transfer control of its license to a small business meeting the eligibility standards for lower bidding credits or seeks to make any other change in ownership that would result in the licensee qualifying for a lower bidding credit under this section, the licensee must seek Commission approval and reimburse the government for the difference between the amount of the bidding credit obtained by the licensee and the bidding credit for which the assignee, transferee or licensee is eligible under this section as a condition of the approval of such assignment, transfer or other ownership change.

§ 90.811 Reduced down payment for licenses won by small businesses.

Each winning bidder that qualifies as a small business shall make a down payment equal to ten percent of its winning bid (less applicable bidding credits); a winning bidder shall bring its total amount on deposit with the Commission (including upfront payment) to five percent of its net winning bid within five (5) business days after the auction closes, and the remainder of the down payment (five percent) shall be paid within five (5) business days following Public Notice that the Commission is prepared to award the license. The Commission generally will grant the license within ten (10) business days after receipt of the remainder of the down payment.

§ 90.812 Installment payments for licenses won by small businesses.

(a) Each licensee that qualifies as a small business may pay the remaining 90 percent of the net auction price for the license in quarterly installment payments pursuant to § 1.2110(e) of this Chapter. Licensees who qualify for installment payments are entitled to pay their winning bid amount in installments over the term of the license, with interest charges to be fixed at the time of licensing at a rate equal to the rate for ten-year U.S. Treasury obligations plus 2.5 percent. Payments shall include both principal and interest amortized over the term of the license. An MTA license issued to an eligible small business that elects installment payments will be conditioned on the full and timely performance of the license holder's quarterly payments. The additional following terms apply:

(1) An eligible licensee qualifying as a small business under Section 90.814(b)(1)(i) may make interest-only payments for five years. Interest will accrue at the Treasury note rate. Payments of interest and principal shall be amortized over the remaining five years of the license term.

(2) An eligible licensee qualifying as a small business under Section 90.814(b)(1)(ii) may make interest-only payments for the first two years of the license term. Interest will accrue at the Treasury note rate plus an additional 2.5 percent. Payments of interest and principal shall be amortized over the remaining eight years of the license term.

(b) Unjust Enrichment.

(1) If a licensee that utilizes installment financing under this section seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for installment payments, the licensee must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of assignment or transfer as a condition of approval.

(2) If a licensee that utilizes installment financing under this section seeks to make any

change in ownership structure that would result in the licensee losing eligibility for installment payments, the licensee shall first seek Commission approval and must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of such change as a condition of approval.

(3) If a licensee that utilizes installment financing under this section seeks to assign or transfer control of a license to an entity that does not qualify for as favorable an installment payment plan, the installment payment plan for which the acquiring entity qualifies will become effective immediately upon transfer.

§ 90.813 Procedures for partitioned licenses.

(a) Notwithstanding § 90.661, a rural telephone company, as defined in § 90.814, may be granted a 900 MHz SMR license that is geographically partitioned from a separately licensed MTA, so long as the MTA applicant or licensee has voluntarily agreed (in writing) to partition a portion of the license to the entity.

(b) If partitioned licenses are being applied for in conjunction with a license(s) to be awarded through competitive bidding procedures --

(1) The applicable procedures for filing short-form applications and for submitting upfront payments and down payments contained in this Part and Part 1 of this Chapter shall be followed by the applicant, who must disclose as part of its short-form application all parties to agreement(s) with or among other entities to partition the license pursuant to this section, if won at auction (*see* 47 CFR §1.2105(a)(2)(viii));

(2) Each rural telephone company that is a party to an agreement to partition the license shall file a long-form application for its respective, mutually agreed-upon geographic area together with the application for the remainder of the MTA filed by the auction winner.

(c) If the partitioned license is being applied for as a partial assignment of the MTA license following grant of the initial license, request for authorization for partial assignment of a license shall be made pursuant to § 90.153.

(d) Each application for a partitioned area (long-form initial application or partial assignment application) shall contain a partitioning plan that must propose to establish a partitioned area to be licensed that meets the following criteria:

- (1) Conforms to established geopolitical boundaries (such as county lines);
- (2) Includes the wireline service area of the rural telephone company applicant; and
- (3) Is reasonably related to the rural telephone company's wireline service area.

NOTE: A partitioned service area will be presumed to be reasonably related to the rural telephone company's wireline service area if the partitioned service area contains no more than twice the population overlap between the rural telephone company's wireline service area and the partitioned area.

(e) Each licensee in each partitioned area will be responsible for meeting the construction requirements in its area (*see* § 90.665).

§ 90.814 Definitions.

(a) Scope. The definitions in this section apply to §§ 90.810 through 90.813, unless

otherwise specified in those sections.

(b) Small Business: Consortium of Small Businesses.

(1) A small business is an entity that either:

(i) together with its affiliates, persons or entities that hold attributable interests in such entity, and their affiliates, has average gross revenues that are not more than \$3 million for the preceding three years; or

(ii) together with its affiliates, persons or entities that hold attributable interests in such entity, and their affiliates, has average gross revenues that are not more than \$15 million for the preceding three years.

(2) For purposes of determining whether an entity meets either the \$3 million or \$15 million average annual gross revenues size standard set forth in paragraph (b)(1) of this section, the gross revenues of the entity, its affiliates, persons or entities holding interests in the entity and their affiliates shall be considered on a cumulative basis and aggregated, subject to the exceptions set forth § 90.814(g).

(3) A small business consortium is a conglomerate organization formed as a joint venture between or among mutually-independent business firms, each of which individually satisfies either definition of a small business in paragraphs (b)(1) and (b)(2) of this section. In a consortium of small businesses, each individual member must establish its eligibility as a small business, as defined in this section.

(c) *Rural Telephone Company.* A rural telephone company is a local exchange carrier having 100,000 or fewer access lines, including all *affiliates*.

(d) *Gross Revenues.* For applications filed after December 31, 1994, *gross revenues* shall be evidenced by audited financial statements for the preceding relevant number of calendar or fiscal years. If an entity was not in existence for all or part of the relevant period, gross revenues shall be evidenced by the audited financial statements of the entity's predecessor-in-interest or, if there is no identifiable predecessor-in-interest, unaudited financial statements certified by the applicant as accurate.

(e) *Businesses Owned by Members of Minority Groups and/or Women.* A business owned by members of minority groups and/or women in which minorities and/or women who are U.S. citizens control the applicant, have at least 50.1 percent equity ownership and, in the case of a corporate applicant, a 50.1 percent voting interest. For applicants that are partnerships, every general partner either must be a minority and/or woman (or minorities and/or women) who are U.S. citizens and who individually or together own at least 50.1 percent of the partnership equity, or an entity that is 100 percent owned and controlled by minorities and/or women who are U.S. citizens. The interests of minorities and women are to be calculated on a fully-diluted basis; agreements such as stock options and convertible debentures shall be considered to have a present effect on the power to control an entity and shall be treated as if the rights thereunder already have been fully exercised. However, upon a demonstration that options or conversion rights held by non-controlling principals will not deprive the minority and female principals of a substantial financial stake in the venture or impair their rights to control the designated entity, a designated entity may seek a waiver of the requirement that the equity of the minority and female principals must be calculated on a fully-diluted basis.

(f) *Members of Minority Groups.* *Members of minority groups* includes Blacks, Hispanics,

American Indians, Alaskan Natives, Asians, and Pacific Islanders.

(g) *Attributable Interests.* Partnership and other ownership interests and any stock interest amounting to 20 percent or more of the equity, or outstanding stock, or outstanding voting stock of a licensee or applicant will be attributable.

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

(h) *Affiliate.*

(1) *Basis for Affiliation.* An individual or entity is an affiliate of an applicant or of a person holding an attributable interest in an applicant (both referred to herein as "the applicant") if such individual or entity:

- (i) Directly or indirectly controls or has the power to control the applicant, or
- (ii) Is directly or indirectly controlled by the applicant, or
- (iii) Is directly or indirectly controlled by a third party or parties that also controls or has the power to control the applicant, or
- (iv) Has an "identity of interest" with the applicant.

(2) *Nature of control in determining affiliation.*

(i) Every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative and it is immaterial whether it is exercised so long as the power to control exists.

Example for paragraph (h)(2)(i). An applicant owning 50 percent of the voting stock of another concern would have negative power to control such concern since such party can block any action of the other stockholders. Also, the bylaws of a corporation may permit a stockholder with less than 50 percent of the voting to block any actions taken by the other stockholders in the other entity. Affiliation exists when the applicant has the power to control a concern while at the same time another person, or persons, are in control of the concern at the will of the party or parties with the power of control.

(ii) Control can arise through stock ownership; occupancy of director, officer or key employee positions; contractual or other business relations; or combinations of these and other factors. A key employee is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

(iii) Control can arise through management positions where a concern's voting stock is so widely distributed that no effective control can be established.

Example for paragraph (h)(2)(iii). In a corporation where the officers and directors own various size blocks of stock totaling 40 percent of the corporation's voting stock, but no officer or director has a block sufficient to give him or her control or the power to control and the remaining 60 percent is widely distributed with no individual stockholder having a stock interest greater than 10 percent, management has the power to control. If persons with such management control of the other entity are persons with attributable interests in the applicant, the other entity will be deemed an affiliate of the applicant.

(3) *Identity of interest between and among persons.* Affiliation can arise between or among two or more persons with an identity of interest, such as members of the same family or persons with common investments. In determining if the applicant controls or is controlled by a concern, persons with an identity of interest will be treated as though they were one person.

Example 1. Two shareholders in Corporation Y each have attributable interests in the same SMR application. While neither shareholder has enough shares to individually control Corporation Y, together they have the power to control Corporation Y. The two shareholders with these common investments (or identity of interest) are treated as though they are one person and Corporation Y would be deemed an affiliate of the applicant.

Example 2. One shareholder in Corporation Y, shareholder A, has an attributable interest in a SMR application. Another shareholder in Corporation Y, shareholder B, has a nonattributable interest in the same SMR application. While neither shareholder has enough shares to individually control Corporation Y, together they have the power to control Corporation Y. Through the common investment of shareholders A and B in the SMR application, Corporation Y would still be deemed an affiliate of the applicant.

(i) *Spousal Affiliation.* Both spouses are deemed to own or control or have the power to control interests owned or controlled by either of them, unless they are subject to a legal separation recognized by a court of competent jurisdiction in the United States.

(ii) *Kinship Affiliation.* Immediate family members will be presumed to own or control or have the power to control interests owned or controlled by other immediate family members. In this context "immediate family member" means father, mother, husband, wife, son, daughter, brother, sister, father- or mother-in-law, son- or daughter-in-law, brother- or sister-in-law, step-father, or -mother, step-brother, or -sister, step-son, or -daughter, half brother or sister. This presumption may be rebutted by showing that

(A) The family members are estranged,

(B) The family ties are remote, or

(C) The family members are not closely involved with each other in business matters.

Example for paragraph (h)(3)(ii). A owns a controlling interest in Corporation X. A's sister-in-law, B, has an attributable interest in an SMR application. Because A and B have a presumptive kinship affiliation, A's interest in Corporation X is attributable to B, and thus to the applicant, unless B rebuts the presumption with the necessary showing.

(4) *Affiliation through stock ownership.*

(i) An applicant is presumed to control or have the power to control a concern if he or she owns or controls or has the power to control 50 percent or more of its voting stock.

(ii) An applicant is presumed to control or have the power to control a concern even though he or she owns, controls or has the power to control less than 50 percent of the concern's voting stock, if the block of stock he or she owns, controls or has the power to control is large as compared with any other outstanding block of stock.

(iii) If two or more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, the presumption arises that each one of these persons individually controls or has the power to control the concern; however, such presumption may be rebutted

by a showing that such control or power to control, in fact, does not exist.

(5) *Affiliation arising under stock options, convertible debentures, and agreements to merge.* Stock options, convertible debentures, and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures, and agreements will generally be treated as though the rights held thereunder had been exercised. However, neither an affiliate nor an applicant can use such options and debentures to appear to terminate its control over another concern before it actually does so.

Example 1 for paragraph (h)(5). If company B holds an option to purchase a controlling interest in company A, who holds an attributable interest in an SMR application, the situation is treated as though company B had exercised its rights and had become owner of a controlling interest in company A. The gross revenues of company B must be taken into account in determining the size of the applicant.

Example 2 for paragraph (h)(5). If a large company, BigCo, holds 70% (70 of 100 outstanding shares) of the voting stock of company A, who holds an attributable interest in an SMR application, and gives a third party, SmallCo, an option to purchase 50 of the 70 shares owned by BigCo, BigCo will be deemed to be an affiliate of company A, and thus the applicant, until SmallCo actually exercises its options to purchase such shares. In order to prevent BigCo from circumventing the intent of the rule which requires such options to be considered on a fully diluted basis, the option is not considered to have present effect in this case.

Example 3 for paragraph (h)(5). If company A has entered into an agreement to merge with company B in the future, the situation is treated as though the merger has taken place.

(6) *Affiliation under voting trusts.*

(i) Stock interests held in trust shall be deemed controlled by any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will.

(ii) If a trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the stock interests held in trust will be deemed controlled by the grantor or beneficiary, as appropriate.

(iii) If the primary purpose of a voting trust, or similar agreement, is to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control a concern in order that such concern or another concern may meet the Commission's size standards, such voting trust shall not be considered valid for this purpose regardless of whether it is or is not recognized within the appropriate jurisdiction.

(7) *Affiliation through common management.* Affiliation generally arises where officers, directors, or key employees serve as the majority or otherwise as the controlling element of the board of directors and/or the management of another entity.

(8) *Affiliation through common facilities.* Affiliation generally arises where one concern shares office space and/or employees and/or other facilities with another concern, particularly where such concerns are in the same or related industry or field of operations, or where such concerns were formerly affiliated, and through these sharing arrangements one concern has control, or potential control, of the other concern.

(9) *Affiliation through contractual relationships.* Affiliation generally arises where one concern is dependent upon another concern for contracts and business to such a degree that

one concern has control, or potential control, of the other concern.

(10) *Affiliation under joint venture arrangements.*

(i) A joint venture for size determination purposes is an association of concerns and/or individuals, with interests in any degree or proportion, formed by contract, express or implied, to engage in and carry out a single, specific business venture for joint profit for which purpose they combine their efforts, property, money, skill and knowledge, but not on a continuing or permanent basis for conducting business generally. The determination whether an entity is a joint venture is based upon the facts of the business operation, regardless of how the business operation may be designated by the parties involved. An agreement to share profits/losses proportionate to each party's contribution to the business operation is a significant factor in determining whether the business operation is a joint venture.

(ii) The parties to a joint venture are considered to be affiliated with each other.

§ 90.815 Eligibility for Small Business Status

(a) *Short-Form Applications: Certifications and Disclosure.*

Each applicant for an MTA license which qualifies as a *small business* or *consortium of small businesses* shall append the following information as an exhibit to its short-form application (Form 175):

(1) The identity of the applicant's *affiliates*, persons or entities that hold attributable interests in such entity, and their *affiliates*, and, if a *consortium of small businesses*, the members in the joint venture; and

(2) The applicant's *gross revenues*, computed in accordance with § 90.814.

(b) *Long Form Applications: Certifications and Disclosure.*

In addition to the requirements in subpart U of this part, each applicant submitting a long-form application for license(s) and qualifying as a *small business* shall, in an exhibit to its long-form application:

(1) Disclose separately and in the aggregate the *gross revenues*, computed in accordance with § 90.814, for each of the following: the applicant; the applicant's *affiliates*, the applicant's attributable investors, *affiliates* of its attributable investors, and, if a *consortium of small businesses*, the members of the joint venture;

(2) List and summarize all agreements or other instruments (with appropriate references to specific provisions in the text of such agreements and instruments) that support the applicant's eligibility as a *small business* under §§90.810 through 90.812, including the establishment of *de facto* and *de jure* control; such agreements and instruments include articles of incorporation and bylaws, shareholder agreements, voting or other trust agreements, franchise agreements, and any other relevant agreements (including letters of intent), oral or written; and

(3) List and summarize any investor protection agreements, including rights of first refusal, supermajority clauses, options, veto rights, and rights to hire and fire employees and to appoint members to boards of directors or management committees.

(c) *Records Maintenance.* All winning bidders qualifying as small businesses, shall maintain at their principal place of business an updated file of ownership, revenue and asset

information, including any documents necessary to establish eligibility as a *small business* and/or *consortium of small businesses* under § 90.814. Licensees (and their successors in interest) shall maintain such files for the term of the license.

(d) *Audits.*

(1) Applicants and licensees claiming eligibility as a *small business* or *consortium of small businesses* under §§ 90.810 through 90.812 shall be subject to audits by the Commission, using in-house and contract resources. Selection for audit may be random, on information, or on the basis of other factors.

(2) Consent to such audits is part of the certification included in the short-form application (Form 175). Such consent shall include consent to the audit of the applicant's or licensee's books, documents and other material (including accounting procedures and practices) regardless of form or type, sufficient to confirm that such applicant's or licensee's representations are, and remain, accurate. Such consent shall include inspection at all reasonable times of the facilities, or parts thereof, engaged in providing and transacting business, or keeping records regarding licensed 900 MHz SMR service and shall also include consent to the interview of principals, employees, customers and suppliers of the applicant or licensee.

(e) *Definitions.* The terms *affiliate*, *business owned by members of minority groups and/or women*, *consortium of small businesses*, *gross revenues*, *members of minority groups*, *nonattributable equity*, *small business* and *total assets* used in this section are defined in § 90.814.

APPENDIX B

FINAL REGULATORY FLEXIBILITY ANALYSIS

Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. § 603, the Commission incorporated an Initial Regulatory Flexibility Analysis (IRFA) into the *Further Notice of Proposed Rule Making*. Written public comments on the IRFA were requested. The Commission's final regulatory flexibility analysis for this *Seventh Report and Order* in PP Docket No. 93-253 is as follows:

A. NEED FOR AND PURPOSE OF RULES

1. This rule making proceeding was initiated to secure comment on proposals for establishing a flexible regulatory scheme for the 900 MHz Specialized Mobile Radio (SMR) service that would promote efficient licensing and enhance the service's competitive potential in the commercial mobile radio marketplace. The proposals adopted herein are also designed to implement Congress's goal of giving small businesses, rural telephone companies, and businesses owned by members of minority groups and women the opportunity to participate in the provision of spectrum-based services in accordance with 47 U.S.C. § 309(j)(4)(D).

B. ISSUES RAISED BY THE PUBLIC IN RESPONSE TO THE INITIAL ANALYSIS

2. No comments were submitted specifically in response to the Initial Regulatory Flexibility Analysis.

C. SIGNIFICANT ALTERNATIVES CONSIDERED

3. The *Second Further Notice of Proposed Rule Making* in this proceeding offered numerous proposals. All significant alternatives have been addressed in the *Seventh Report and Order*. The majority of commenters supported the major tenets of the proposed rules and some commenters suggested changes to some of the Commission's proposals. Any regulatory burdens we have adopted for applicants (for example, small businesses) in the 900 MHz SMR applicants are necessary to carry out our duties under the Communications Act of 1934, as amended, and the Omnibus Budget Reconciliation Act of 1993.

APPENDIX C

COMMENTERS

American Mobile Telecommunications Association, Inc. (AMTA)
Celsmer
Geotek
Minority Business Enterprise Legal Defense and Education Fund, Inc. (MBELDEF)
Motorola, Inc.
National Association of Black Owned Broadcasters (NABOB)
National Paging and Personal Communications Association (NPPCA)
National Telephone Cooperative Association (NTCA)
Nextel Communications, Inc.
Personal Communications Industry Association (PCIA)
Pro Tec Communications, Inc.
RAM Mobile Data USA Limited Partnership (RAM)
Small Common Carrier Coalition (SCCC)
Southern California Edison Company (SCE)
Office of the Chief Counsel for Advocacy of the United States Small Business Administration (SBA)

REPLY COMMENTERS

American Mobile Telecommunications Association, Inc (AMTA)
Celsmer
The Council of Independent Communications Suppliers (CICS)
Geotek Communications, Inc. (Geotek)
Monterey Telecommunications Technology (Monterey)
Motorola, Inc.
Personal Communications Industry Association (PCIA)
RAM Mobile Data USA Limited Partnership (RAM)

PETITIONERS

Advanced Mobilecomm, Inc. (AMI)
American Mobile Telecommunications Association (AMTA)
Celsmer
DW Communications, Inc. (DW)
Geotek Communications, Inc. (Geotek)
Nextel
Personal Communications Industry Association (PCIA)
RAM Mobile Data USA Limited Partnership (RAM)
Southern California Edison Company (SCE)

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

Re: Amendment 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 896-901 MHz and 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool (Second Order on Reconsideration and Seventh Report and Order)

By its action today, the Commission has adopted auction rules for the 900 MHz SMR service. In April of this year, the Commission adopted a Second Further Notice of Proposed Rulemaking ("Second Notice") which sought comment on, among other things, a proposal to incorporate bidding provisions for small businesses rather than definitive measures for minority and women-owned businesses.¹ The Commission reasoned that the capital requirements for the 900 MHz SMR service did not warrant measures that were specific to designated entities ("DE") other than small businesses. At that time, I warned the DE community to take heed of the Commission's action, view its proposed strategy as a signal of the Commission's intention to reduce measures, specifically, for minority and female DEs and to educate themselves about the potential impact of such a proposal.

In early June 1995, the Supreme Court rendered its decision in Adarand Constructors, Inc. v. Peña ("Adarand").² At that time, I was concerned that, in light of its tentative conclusions in the Second Notice and Adarand, the Commission would be reluctant to aggressively comply with its mandate to ensure participation by DEs in the new service spectrum that is subject to the Commission's auction authority. While I am pleased to note here that the Commission has determined to introduce the "tiered" small business approach as a way of creating provisional neutrality in its auction rules, I hope that the Commission views this scheme only as an interim means for satisfying its statutory obligation. More to the point, I would hope that we persevere in our commitment to the principle of diversity of ownership in the telecommunications industry despite the current judicial and legislative climates rather than expressly rely on a legislative directive that seeks to ensure these same goals. Though I applaud the effort made by the

¹Amendment 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 896-901 MHz and 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, Second Report and Order and Second Further Notice of Proposed Rule Making, PR Docket No. 89-553, PP Docket No. 93-253, DN Docket No. 93-252, released April 17, 1995, 60 FR 21987, 22023 (May 4, 1995). (Commissioner Barrett issuing a concurring statement.)

²115 S. Ct. 2097 (1995).

Commission today to enhance the ability of DEs to successfully participate in the 900 MHz spectrum auction, I stand prepared to take the appropriate steps to make diversity of ownership in the telecommunications marketplace a firm Commission objective, not simply an exercise for satisfying a statutory requirement.