

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 22 and 90

[WT Docket No. 96-18; PP Docket No. 93-253; FCC 97-59]

Facilitate Future Development of Paging Systems and Implementation of Section 309(j) of the Communications Act; Competitive Bidding

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this *Second Report and Order* the Commission adopts rules governing geographic area licensing of Common Carrier Paging (CCP) and exclusive 929 MHz Private Carrier Paging (PCP), and competitive bidding procedures for auctioning mutually exclusive applications for these licenses. This action is necessary to promote efficient licensing and competition in paging services. The Commission's objectives in this proceeding are to ensure that the paging service rules are consistent with the rules for competing services, so that competitive success is dictated by the marketplace, rather than by regulatory distinctions, and to ensure that the licensing process promotes the goals of competition and efficient use of spectrum.

EFFECTIVE DATE: May 12, 1997.

ADDRESSES: Federal Communications Commission, 1919 M Street, NW., Washington, DC 20554

FOR FURTHER INFORMATION CONTACT: Mika Savir, Commercial Wireless Division, Wireless Telecommunications Bureau, at (202) 418-0620, or Frank Stilwell, Auctions Division, Wireless Telecommunications Bureau, at (202) 418-0660.

SUPPLEMENTARY INFORMATION: This *Second Report and Order* in WT Docket 96-18 and PP Docket No. 93-252, adopted on February 19, 1997, and released on February 24, 1997, is available for inspection and copying during normal business hours in the FCC Reference Center, Room 239, 1919 M Street NW., Washington, DC 20554. The complete text may also be purchased from the Commission's copy contractor, International Transcription Service, Inc., 2100 M Street, NW., Suite 140, Washington, DC 20037 (202) 857-3800.

Paperwork Reduction Act: The collection of information requirements have been approved by the Office of Management and Budget and assigned OMB control number 3060-0697. The

FCC Form 175 is assigned OMB control number 3060-0600. The FCC Form 600 is assigned OMB control number 3060-0623.

Summary of Action

I. Background

1. In the *NPRM*, Revision of part 22 and part 90 of the Commission's rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, *Notice of Proposed Rulemaking*, 61 FR 6199 (February 16, 1996) (*NPRM*), the Commission proposed a transition to geographic area licensing for CCP and PCP channels pursuant to the statutory objective of regulatory symmetry for all Commercial Mobile Radio Services (CMRS) set forth in the Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, Title VI section 6002(b)(2) (A), (B), 107 Stat. 312 (largely codified at 47 U.S.C. 332 *et seq.*) (1993 Budget Act). The 1993 Budget Act mandated that substantially similar mobile services receive comparable regulatory treatment. In the *NPRM*, the Commission also proposed competitive bidding procedures for resolving mutually exclusive applications for these licenses pursuant to its statutory authority under the 1993 Budget Act, section 6002 (codified at 47 U.S.C. 309(j)).

2. In the *NPRM*, the Commission proposed a transition from site-by-site licensing to geographic area licensing for all exclusive, non-nationwide paging services. The Commission also proposed to adopt competitive bidding rules for the geographic area licenses. Due to the fundamental changes proposed in the *NPRM*, the Commission suspended acceptance of new applications for paging licenses as of February 8, 1996. The Commission observed that continuing to accept new applications after releasing the *NPRM* with the proposed rule changes would impair the objectives of the rulemaking proceeding. The Commission partially lifted the paging freeze for incumbent licensees by allowing incumbents to file applications for additional sites within 65 kilometers (40 miles) of operating sites in the *First Report and Order*, Revision of part 22 and part 90 of the Commission's rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, *First Report and Order*, 61 FR 21380 (May 10, 1996); *reconsideration in Order on Reconsideration of First Report and Order*, 61 FR 34375 (July 2, 1996). Additionally, the *First Report and Order* exempted Basic Exchange Telecommunications Radio Service (BETRS), Rural Radiotelephone Service,

and Special Emergency Radio Service (SERS) from the interim freeze.

3. In this *Second Report and Order*, the Commission adopts final rules governing geographic area licensing for channels in the 35-36 MHz, 43-44 MHz, 152-159 MHz, 454-460 MHz, 929-930 MHz, and 931-932 MHz bands allocated for paging; competitive bidding rules for granting geographic area non-nationwide licenses; and a standard methodology for providing protection to incumbent licensees from co-channel interference for the 929-930 MHz and 931-932 MHz paging bands. All pending mutually exclusive paging applications will be dismissed, including those filed under the interim rules. As of the adoption date of this *Second Report and Order*, February 19, 1997, no further applications for site-by-site licenses, other than for shared channels will be accepted (with the exception of applications filed pursuant to 47 CFR 22.369, 90.177, 1.1301 *et seq.*, and applications filed for coordination with Mexico and Canada).

II. Second Report and Order

A. Geographic Area Licensing for Non-Nationwide Paging Channels

1. Geographic Area Licensing for Exclusive 929 MHz and 931 MHz Bands

4. The Commission observes that geographic area licensing provides flexibility for licensees and ease of administration, facilitates further build-out of wide-area systems, and enables paging operators to act quickly to meet the needs of their customers. The Commission finds, therefore, that converting the 931 MHz channels and the exclusive 929 MHz channels to geographic area licensing will further the goal of giving carriers offering substantially similar services more flexibility to compete, and will enhance regulatory symmetry between paging and narrowband personal communications services (PCS). The Commission states that exclusive 929 MHz and 931 MHz licensees will be extended the same flexibility as narrowband PCS licensees in terms of the location, design, construction, and modification of their facilities throughout their geographic areas.

5. The Commission is implementing geographic area licensing in lieu of the current site-by-site licensing, with Major Trading Areas (MTAs) as the geographic area for the 931 MHz and exclusive 929 MHz channels. The Commission is licensing these channels using 51 MTA geographic areas. In addition to the 47 Rand McNally MTAs, the Commission is adding three MTAs for the U.S. territories of (1) Guam and the Northern

Mariana Islands, (2) Puerto Rico and the U.S. Virgin Islands, and (3) American Samoa. The Commission is also licensing Alaska as a single area separate from the Seattle MTA.

6. Geographic area licensees will have the flexibility to construct transmitters at any place within their license area, subject to the co-channel interference rules and will not be required to file applications for additional sites or modifications with the Commission. Geographic area licensees may add or modify sites consistent with this *Second Report and Order*. Applications must be filed with the Commission for coordination with Mexico or Canada and where required by §§ 22.369, 90.177, or 1.1301 *et seq.* Geographic area licensees will be able to act quickly to add sites or make modifications of existing sites to meet the needs of their customers. Due to the prevalence of wide-area paging systems on these channels and the flexibility geographic area licensing will afford paging licensees, the Commission believes that geographic area licensing for exclusive 929 MHz and 931 MHz channels, with MTAs as the geographic area, is consistent with the public interest, convenience and necessity, and the purposes of the Communications Act of 1934, as amended (Communications Act), and fulfills the objectives of section 309(j)(4)(c).

7. Spectrum recovered by the Commission within a geographic area will revert automatically to the geographic area licensee. The Commission will consider transfers and assignments between a geographic area licensee and an incumbent to be presumptively in the public interest. The Commission is also eliminating finders' preferences immediately for paging services, and will no longer accept finders' preferences requests following adoption of the *Second Report and Order*.

8. Mutually exclusive applications for geographic area licenses will be processed pursuant to the competitive bidding rules adopted in this *Second Report and Order*. All incumbent licensees will continue to operate under the existing authorizations with full protection from co-channel interference, and will not be required to file applications for additional internal sites.

2. Geographic Area Licensing for Common Carrier Paging Services in the 35–36 MHz, 43–44 MHz, 152–159 MHz, and 454–460 MHz Bands

a. Common Carrier Paging Services

9. The Commission believes that the advantages of geographic licensing—flexibility, enhanced regulatory symmetry with other CMRS, and eliminating the inefficiencies in the licensing process—are applicable to these channels, particularly for regional and wide-area paging services. One of the Commission's goals in this proceeding is to revise the paging rules so that substantially similar mobile services receive comparable regulatory treatment, to the extent feasible, in a manner consistent with the public interest, convenience, necessity, and the purposes of the Communications Act. The Commission notes that paging providers on these CCP channels generally have smaller paging systems than the 931 MHz band paging services, and therefore smaller market areas would be more appropriate than MTAs for these bands. The Commission finds that Economic Areas (EAs) would be an appropriate size for geographic licensing on these bands. The Bureau of Economic Analysis of the Department of Commerce has divided the United States into 172 EAs. See Final Redefinition of the BEA Economic Areas, Department of Commerce, Docket No. 950–3020–64–5064–01, 60 FR 13114 (March 10, 1995). The Commission adopts EAs as the geographic area for paging licenses. Geographic area licensees will have the flexibility to construct transmitters at any place within their EA, subject to the co-channel interference rules; however, geographic area licensees must file applications with the Commission if such filing is necessary for coordination with Canada or Mexico, or is required by § 22.369, 90.177, or 1.1301 *et seq.* The EA geographic area licenses will be assigned pursuant to the competitive bidding rules.

b. Other Services in the 152–159 MHz and 454–460 MHz Bands

10. The Commission concludes that Rural Radiotelephone Service licensees, including BETRS licensees, can participate in the geographic area licensing framework adopted for paging. Additionally, these licensees may obtain site licenses and operate facilities on a secondary basis. If any geographic area licensee subsequently notifies the Rural Radiotelephone or BETRS licensee that a secondary site must be shut down because it may cause interference to the paging licensee's existing or planned

facilities, the Rural Radiotelephone or BETRS licensee must discontinue use of the particular channel at that site no later than six months after such notice. Additionally, mobile two-way telephone service on the paging channels will also be subject to geographic area licensing and competitive bidding.

3. Shared Channels

11. The shared channels consist of five 929 MHz channels and thirteen Business Radio Service channels. The Commission concludes that the existing shared paging channels should continue to be licensed on a shared basis. The Commission is concerned about the consumer fraud and license application speculation issues and is seeking comment in a *Further Notice of Proposed Rulemaking* on changes in the license application and frequency coordination procedures. The Commission is eliminating the interim 40-mile rule for additional sites. Pending resolution of the fraud and speculation issues, the Commission is limiting applications for shared channels to (1) licensees expanding their commercial mobile radio systems; (2) applicants, including new applicants, for private, internal-use systems; and (3) Special Emergency Radio Services (SERS) providers on the shared channels.

4. Exempting Certain Incumbents From Competitive Bidding

12. The Commission believes that the market, not regulation, should determine participation in competitive bidding for geographic area licenses. Therefore, the Commission is adopting open eligibility for paging licenses. The Commission believes that this will be pro-competitive and potentially will result in further wide-area coverage of paging services.

B. Geographic Area Licensing for Nationwide Channels

13. Three 931 MHz channels, 931.8875 MHz, 931.9125 MHz, and 931.9375 MHz, were allocated for nationwide paging, and have been assigned to licensees on a nationwide basis. The Commission is granting nationwide geographic area licenses, without competitive bidding, to these three licensees. Additionally, 23 licensees have met requirements for nationwide exclusivity on 929 MHz channels under § 90.495 of the Commission's rules. The Commission is granting nationwide geographic area licenses, without competitive bidding, to those 929 MHz licensees who had constructed sufficient transmitters to obtain nationwide exclusivity under the

prior rules, and to those licensees who had sufficient authorizations as of February 8, 1996 and have since constructed sufficient transmitters to earn nationwide exclusivity. The Commission notes that these nationwide licensees have built out their paging systems to serve consumers, and the public interest would not be served in eliminating the nationwide authorizations that were previously granted by the Commission. Therefore, the Commission concludes that licensees on these channels will not be subject to competitive bidding for nationwide geographic area licenses.

14. The Commission declines to extend automatic nationwide geographic area licensing to MTel's 931.4375 MHz channel. The Commission notes that MTel has been extensively licensed on 931.4375 MHz; however, this channel has not been reallocated as a nationwide channel thus MTel has not built-out this channel in reliance on a grant of a nationwide license or nationwide exclusivity. The Commission notes that many paging carriers, including MTel, have extensive systems on channels that are not specifically designated as nationwide channels. Paging is a competitive industry, and to the extent that nationwide licensees not only compete with each other, but also with the paging carriers who provide local and regional service, the Commission does not believe it would be pro-competitive to automatically grant nationwide geographic area licenses to any additional licensees.

C. Protection for Incumbents

15. The Commission believes that the public interest would be served by allowing incumbent (non-geographic) paging licensees to continue to operate under their existing authorizations with full protection from co-channel interference, and similarly protecting the geographic area licensees from co-channel interference from the incumbent licensees. Therefore, consistent with the rules for 900 MHz Specialized Mobile Radio (SMR), the Commission will not allow incumbent (non-geographic) licensees to expand beyond their composite interference contour unless the incumbents and the geographic licensee have reached agreement on such modifications.

D. Coverage Requirements

16. The Commission notes that coverage requirements satisfy the mandate for performance requirements under section 309(j)(4)(B) of the Communications Act. The Commission is imposing the following coverage

requirements: for each MTA or EA, the geographic licensee must provide coverage to one-third of the population within three years of the geographic area license grant and to two-thirds of the population within five years of the geographic area license grant. In the alternative, the MTA or EA licensee may provide substantial service to the geographic license area within five years of license grant. Substantial service is defined as service that is sound, favorable, and substantially above a level of mediocre service which would barely warrant renewal. The failure to meet these coverage requirements will result in automatic cancellation of the geographic license. The Commission will reinstate any licenses held prior to auction for sites that were authorized, constructed, and operating at the time of the cancellation of the geographic area license.

E. Co-Channel Interference Protection

1. Co-Channel Interference Protection—Incumbent Licensees

17. The Commission is persuaded that the advantages of adopting the formulas proposed in the NPRM are outweighed by the disadvantages noted by the commenters. As the commenters observed, changing from Tables E-1 and E-2 to the proposed formulas would, in most cases, reduce the service area and composite interference contour that incumbent licensees have relied on in developing their systems to date. Additionally, the proposed formulas may underestimate the actual reliable coverage of the paging systems. Using the fixed distances in Tables E-1 and E-2 in § 22.537 for the 929 MHz and 931 MHz channels would maintain the status quo for 931 MHz channels and conform 929 MHz channels to the current procedure for 931 MHz. Therefore, the Commission is adopting the fixed distances in Tables E-1 and E-2 in § 22.537 for the exclusive 929 MHz and 931 MHz channels. Geographic area licensees must provide co-channel protection to all incumbent licensees, including incumbents in other geographic areas. The Commission will allow geographic and incumbent licensees to use short-spaced locations pursuant to mutual written consent. The Commission will continue to use the current formulas for the CCP channels below 931 MHz.

2. Co-Channel Interference Protection—Adjacent Geographic Licensees

18. Geographic licensees generally are not required to file applications with the Commission, therefore it is possible that a geographic licensee with a transmitter

at or close to the border of the MTA or EA could unknowingly cause interference to a neighboring geographic licensee. It is in the interest of the geographic licensees to find mutually beneficial ways to accommodate their needs in providing service within their respective MTAs and EAs. Instead of specifying a minimum distance a geographic licensee's transmission site must be from the geographic border, which may result in unserved areas, the Commission is allowing geographic licensees to negotiate mutually acceptable agreements with all adjacent geographic area licensees if the interfering contour of one geographic area licensee will extend into the adjacent geographic area or areas. Adjacent geographic area licensees have a duty to negotiate with each other in good faith regarding co-channel interference protection. The Commission believes that informal negotiations between parties in determining mutually agreeable arrangements between adjacent MTAs and EAs will achieve the most expeditious and effective resolution of co-channel interference. The lack of adequate service to the public due to failure to negotiate reasonable solutions to co-channel interference problems with adjacent geographic area licensees could reflect negatively on licensees seeking renewal.

3. Maximum Power and Height-Power Limit

19. The Commission believes that the 931 MHz and 929 MHz bands should operate under the same power and height-power rules. Conforming these rules will allow paging operators to design their systems in the most economical manner. Most of the commenters addressing this issue contend that the Commission should eliminate the disparity between the 931 and 929 MHz channels, and conform the maximum effective radiated power (ERP) limit and the height-power limit in these bands. The Commission is eliminating the height-power limit for 929 MHz systems, to conform them to the 931 MHz systems. The Commission is also increasing the permitted maximum ERP for all 929 MHz systems to 3500 Watts, to conform these systems with the nationwide 929 MHz systems and the 931 MHz systems. With respect to the CCP bands below 931 MHz, the Commission is maintaining the current power and height-power limits for these channels.

F. Licensing in Mexican and Canadian Border Areas

20. The Commission notes that commenters agree with the proposal that border areas should be treated like any other area for licensing purposes and carriers can determine whether spectrum is usable in border areas under applicable treaties and protocols. Therefore, the Commission will not distinguish between border and non-border areas in geographic licensing. Geographic licensees will be responsible for advising the Commission of any transmitter site changes or additions if site-by-site coordination is required by Canada or Mexico.

G. Eligibility to Participate in Competitive Bidding

21. The Commission believes that it is important to allow all parties to participate in the competitive bidding process for geographic area licenses, and accordingly, apart from foreign ownership limitations, eligibility will not be restricted. The Commission believes that non-incumbents should be allowed to bid for available spectrum, or to enter into joint ventures with incumbents for purposes of bidding in a geographic area. The competitive bidding process itself should deter speculation by those not genuinely interested in providing service to the public. In addition, the Commission believes that the open eligibility for the geographic area licenses will be pro-competitive and potentially will result in a diverse group of entities providing paging services to the public.

H. Channel Aggregation Limit

22. The Commission has imposed a spectrum aggregation cap of 45 MHz as the total amount of combined PCS, cellular, and SMR spectrum classified as CMRS in which an entity may have an attributable interest in any geographic area at any point in time. Narrowband radio services, including paging, are not included in the spectrum cap because it is highly unlikely that one entity could ever accumulate as much as 5 MHz in any given geographic market. The Commission now concludes that a channel aggregation limit is unnecessary for paging services. The paging market is highly competitive and diversified, making it unlikely that any one licensee could accumulate sufficient spectrum to dominate the paging market, much less the CMRS market as a whole. The Commission does not find any evidence that excessive channel aggregation has occurred in the paging industry; to the contrary, paging channel use is highly dispersed among numerous competing

licensees. Additionally, the Commission anticipates that many applicants for geographic area paging licenses will be incumbents seeking to obtain geographic area licenses where their existing facilities reside. Thus, the Commission does not believe that geographic area licensing is likely to increase market concentration in the paging industry. Finally, the Commission believes that a cap could arbitrarily limit a carrier's capacity to provide services that may require multiple channels. Therefore, the Commission is not imposing a spectrum or channel aggregation cap on paging licenses at this time.

I. Competitive Bidding

1. Competitive Bidding Design

a. Bidding Methodology

23. Based on the record in this proceeding and its successful experience conducting simultaneous multiple round auctions for other services, the Commission believes this type of auction is most appropriate for paging licenses. The Commission believes that, for certain bidders, these licenses will be significantly interdependent because of the desirability of aggregation across spectrum blocks and geographic areas and because some licenses are likely to be substitutes. Given such interdependence, simultaneous multiple round bidding generates more information about license values during the course of the auction and provides bidders with more flexibility to pursue back-up strategies than if the licenses were auctioned separately or through sealed bidding. The Commission also expects the value of paging licenses to be sufficiently high to warrant simultaneous multiple round bidding. The Commission retains the discretion, however, to use a different methodology if that proves to be more efficient administratively. Prior to the auction, information will be provided about the bidding design to be used.

b. License Grouping

24. Although it may be desirable to hold a single simultaneous multiple round auction for all paging licenses, such an auction is not currently feasible from an operational standpoint because there will be more than 15,000 paging licenses available for auction. The Commission finds that there is significant interdependence among licenses in the 929 MHz and 931 MHz services, and similar interdependency among the licenses of the lower band paging services. The Commission also believes that grouping interdependent

licenses and putting them up for bid at the same time promotes awarding licenses to bidders who value them most highly. The Commission therefore will award the paging licenses in a series of simultaneous multiple round auctions, grouping them based on interdependency and operational feasibility. The Commission reserves the discretion to decide on specific license groupings as administrative circumstances dictate.

c. Bidding Procedures

25. *Bid increments and tie bids.* The Commission will announce, by Public Notice prior to the auction, general guidelines for minimum bid increments. Minimum bid increments for individual paging licenses or groups of licenses may vary over the course of the auction and will be announced before or during the auction. In the case of a tie bid, the high bidder will be determined by the order in which the bids are received by the Commission.

26. *Stopping rules.* With more than ten times the largest number of licenses the Commission has ever auctioned simultaneously, there is an increased risk of an excessively prolonged auction if a significant proportion of the licenses are auctioned simultaneously using a simultaneous stopping rule. To reduce this risk and to promote expeditious service to the public, while at the same time preserving most of the efficiency benefits of a simultaneous stopping rule, the Commission adopts a hybrid simultaneous/license-by-license stopping rule. The hybrid rule has three phases. During Phase I, which lasts one month, or 100 rounds, whichever comes later, the Commission will employ its standard simultaneous stopping rule whereby bidding will remain open on all licenses 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 are submitted. This provides bidders some protection against the risk that bidding on a license will be closed before they have sufficient information to start bidding on it as a back up strategy. In Phase II, the Wireless Telecommunications Bureau will assess the extent to which bidders are pursuing back up strategies and implement a license-by-license stopping rule if the Bureau determines that the use of back up strategies is minimal. Under the license-by-license stopping rule, bidding on a license will close whenever 10 consecutive rounds pass with no new valid bids for that license. The remaining licenses will close according to the standard simultaneous stopping rule—when a round passes

with no new valid bids on any license. Phase III begins after two months and 100 rounds have passed. If the auction has not closed by then, the Commission intends to implement the license-by-license stopping rule that is discretionary in the second phase. This approach balances concerns about the time to complete the paging auction and the benefits of preserving back up strategies which give bidders the flexibility to acquire licenses that are consistent with their business plans. The Commission reserves the discretion not to employ this hybrid stopping rule in future paging auctions based on its experience in this auction and depending on the circumstances in future auctions with respect to factors such as the number of licenses and degree that licenses are encumbered.

27. The Commission further retains the discretion, in Phase III, to declare after 200 rounds that the auction will end after some specified number of additional rounds. If this method is employed, bids will be accepted only on licenses where the high bid has increased in the last three rounds. This will provide the Commission with a mechanism to end the auction in the unlikely event that a small number of bidders are continuing to bid on a few low value licenses solely to delay the closing of the auction. The Commission will declare the imminent end of the auction only in the case of extremely dilatory bidding.

28. *Revealing bidders' identities.* In the *Competitive Bidding Second Memorandum Opinion and Order*, 59 FR 44272 (August 26, 1994), because of the advantages of providing more information to bidders, and the difficulties involved in ensuring that bidder identities remain confidential, the Commission determined that it generally would release the identities of bidders before each auction. However, the Commission reserved the option to withhold bidder identities on an auction-by-auction basis if further experience showed that it would be feasible and desirable to do so.

29. In the case of the upcoming paging auctions, the Commission believes that shielding certain information from the bidders will help to speed the bidding since there will be less of an opportunity for strategic gaming practices to occur. The Commission will announce by Public Notice prior to the auction the precise information that will be revealed to bidders during the auction. This information may be limited to the high bids (no identities of bidders) and may also include the total number of bids on each license. The loss of efficiency from denying bidders the

identities of likely winners of adjacent licenses should be minimal because, in contrast to broadband personal communications services, paging does not provide for roaming and there is little uncertainty about technologies (i.e., GSM versus CDMA technology).

30. *Activity Rule.* The Commission will employ the Milgrom-Wilson activity rules for the paging auctions. These rules discourage delay by bidders and expedite simultaneous multiple round auctions in which a simultaneous stopping rule is used. Under the Milgrom-Wilson rules, the auction is divided into three stages and the minimum required activity level, measured as a fraction of the bidder's eligibility in the current round, will increase during the course of the auction.

31. In each round of Stage One, a bidder that wishes to maintain its current eligibility is required to be active on licenses encompassing at least 60 percent of the activity units for which it is currently eligible. The number of activity units for a given license is calculated by multiplying the amount of spectrum (in MHz) by the population of the market. A bidder's eligibility is determined by multiplying the activity units by a specified monetary figure. Failure to maintain the requisite activity level will result in a reduction in the amount of activity units upon which a bidder will be eligible to bid in the next round of bidding (unless an activity rule waiver is used). During Stage One, if bidding activity is below the required minimum level, eligibility in the next round will be calculated by multiplying the current round activity by five-thirds (5/3). Eligibility for each applicant at the start of the auction is determined by the amount of the upfront payment received and the licenses identified in its auction application.

32. In each round of Stage Two, a bidder that wishes to maintain its current eligibility is required to be active on at least 80 percent of the activity units for which it is eligible in the current round. During Stage Two, if activity is below the required minimum level, eligibility in the next round will be calculated by multiplying the current round activity by five-fourths (5/4).

33. In each round of Stage Three, a bidder that wishes to maintain its current eligibility must be active on licenses encompassing at least 98 percent of the activity units for which it is eligible in the current round. In Stage Three, if activity in the current round is below 98 percent of current eligibility, eligibility in the next round will be calculated by multiplying the

current round activity by fifty forty-ninths (50/49).

34. The Commission reserves 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.

35. For paging auctions, the Commission will use the following general transition guidelines. The auction will start in Stage One and typically will move to Stage Two when the auction activity level is below ten percent for three consecutive rounds in Stage One. In general, the auction will move from Stage Two to Stage Three when the auction activity level is below ten percent for three consecutive rounds in Stage Two. In no case can the auction revert to an earlier stage. The Commission retains 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 activity units) on which there are new bids, the number of new bids, and the percentage increase in revenue.

36. To avoid the consequences of clerical errors and to compensate for unusual circumstances that might delay a bidder's bid preparation or submission in a particular round, bidders will be provided 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. 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 service area.

37. Bidders will be afforded an opportunity to override the automatic waiver mechanism when they place a bid, if they wish to reduce their bidding eligibility and do not want to use a waiver to retain their eligibility at its current level. 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. If a bidder submits a proactive waiver in a round in which no other bidding activity occurs, the auction will remain open.

38. The Commission retains the discretion to issue additional waivers during the course of an auction for circumstances beyond a bidder's control. The Commission 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.

39. *Duration of bidding rounds.* The Commission retains the discretion to vary the duration of the bidding rounds or the interval at which bids are accepted in order to move the auction to closure more quickly. The duration of and intervals between bidding rounds will be announced either by Public Notice prior to the auction or by announcement during the auction.

2. Procedural and Payment Issues

a. Pre-auction Application Procedures

40. The Commission will use the pre-auction application procedures established in the *Competitive Bidding Second Report and Order*, 59 FR 22980 (May 4, 1994), for the paging services. A Public Notice announcing the auction 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 also specify, *inter alia*, the short-form filing deadline.

41. The Commission adopts the same general bidding procedures used for the PCS, 900 MHz SMR, and Multipoint Distribution Service (MDS) auctions. Under these procedures, bidders will be able to submit bids remotely, either electronically or by telephone. The Commission has established a schedule of fees that participants in the competitive bidding process will be assessed for certain on-line computer services, bidding software, and Bidder Information Packages. Bidders will be permitted to bid electronically only if they have filed a short-form application electronically. Bidders who file their short-form applications manually may bid only telephonically.

b. Short-form Applications

42. Section 309(j)(5) of the Communications Act provides that no person 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." 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) and sections 308(b) and 310" of the Communications Act. 47 U.S.C. 309(j)(5). The Commission will, therefore, dismiss applications not meeting the requirements of its rules prior to the auction.

43. The Commission disagrees with commenters who state that it should not permit bidders to apply for all market areas by checking the "all" markets box on their FCC Form 175. The Commission believes bidders should have the flexibility to pursue back-up strategies if they are unable to obtain their first choice of licenses. Moreover, any potential problems associated with so-called blanket bidding will be cured through the Commission's eligibility rules and the submission of a corresponding upfront payment. Finally, because the Commission has permitted incumbents to expand their systems pending the commencement of the auction, it believes that current application rules will have no impact on planned expansions by incumbents. The Commission sees no reason to change its current application procedures at this time.

44. If only one application that is acceptable for filing is received for a particular market, and thus there is no mutual exclusivity, the Commission will issue a Public Notice cancelling the auction for that license and establish a date for the filing of a long-form application, the acceptance of which will trigger the procedures permitting petitions to deny.

c. Amendments and Modifications

45. Applicants for paging auctions will be provided with an opportunity to correct minor defects in their short-form applications prior to the auction. After review of the short-form applications, a Public Notice will be issued listing all defective applications. Applicants with minor defects in their applications will be given an opportunity to cure them and resubmit a corrected version.

d. Upfront Payments

46. The Commission believes that a specific upfront payment amount should be established for each license upon which bids are to be made. It is important, as commenters point out, to deter speculation and ensure, to the greatest extent practicable, that only sincere bidders participate in the auction. The Commission delegates to

the Wireless Telecommunications Bureau the authority and discretion to determine an appropriate upfront payment for each license being auctioned, taking into account such factors as the population and the approximate amount of unencumbered spectrum in each geographic license area. The Commission expects that the Bureau will follow the guidelines laid out in the *Competitive Bidding Second Report and Order*, and establish upfront payments equal to approximately five percent of the expected amounts of winning bids for the various licenses. In no event will the upfront payment for any license be less than \$2,500, the minimum suggested in the *Competitive Bidding Second Report and Order*, and the Bureau will retain the flexibility to modify this minimum if experience demonstrates that a higher amount would better deter speculative filings.

47. Prior to a paging license auction, the Bureau will issue a Public Notice listing the upfront payment amounts corresponding to the licenses to be auctioned. The number of activity units determines the amount of the upfront payment for a license. A prospective bidder must submit an upfront payment equal to the largest combination of activity units on which the bidder anticipates being active in any single round. Although a bidder may file applications for every license being auctioned, the total upfront payment submitted by each applicant will determine the combinations on which the applicant will actually be permitted to be active in any single round of bidding. Upfront payments will be due by a date specified by Public Notice, but generally no later than 14 days before the scheduled auction.

e. Down Payments

48. The Commission concludes that winning bidders (including winners that are small businesses, as discussed below) 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 amount on deposit is greater than 20 percent of the winning bid amount after deducting any bid 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 withdrawal or default payment cannot yet be determined, the bidder will be required to make a deposit of up to 20 percent of the amount bid. When it becomes possible to calculate and assess the payment, any excess deposit will be refunded. Monies on account will be applied to bid withdrawal and default

payments due before being applied toward the bidder's down payment on licenses the bidder has won and seeks to acquire.

49. Winning bidders, except small businesses, must submit the required down payment by cashier's check or by wire transfer to the Commission's lock-box bank within 10 business days following release of a Public Notice announcing the close of bidding. All auction winners, except those that qualify for installment payments, will be required to make full payment of the balance of their winning bids within 10 business days following Public Notice that licenses are ready for grant.

f. Bid Withdrawal, Default, and Disqualification

50. The Commission will apply its general bid withdrawal, default, and disqualification rules in paging license auctions. 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 a license which is the subject of withdrawal or default is offered to the highest losing bidders in the initial auction, as opposed to being re-auctioned, the "winning bid" refers to the bid of the highest bidder who accepts the offer. In the unlikely event that there is more than one bid withdrawal on the same license, the Commission will hold each withdrawing bidder responsible for the difference between its withdrawn bid and the amount of the winning bid the next time the licenses are offered for auction. If a license winner defaults or is otherwise disqualified after an auction is closed, the Commission will exercise its discretion to hold a new auction or offer the license to the second highest bidder.

51. 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.

52. The Wireless Telecommunications Bureau has recently instituted an additional procedure that warns bidders of the possibility of a mistaken bid, and this procedure will be utilized in the paging license auctions. The Commission also recently addressed the issue of how its bid withdrawal payment provisions apply to bids that

are mistakenly placed and withdrawn. See Atlanta Trunking Associates, Inc. and MAP Wireless L.L.C. Request to Waive Bid Withdrawal Payment Provisions, 61 FR 25807 (May 23, 1996), *recon. pending*.

g. Long-form Applications

53. In the *Competitive Bidding Second Report and Order*, the Commission established rules requiring winning bidders to submit a long-form application. These procedures, which are set forth in § 1.2107 of the Commission's rules, 47 CFR 1.2107, will be followed if the winning bidder makes the down payment in a timely manner.

h. Petitions to Deny and Limitations on Settlements

54. The petition to deny procedures in §§ 22.130 and 90.163 of the Commission's rules, 47 CFR 22.130 and 90.163, will apply to the paging services. A party filing a petition to deny against a paging license application will be required to demonstrate standing and meet all other applicable filing requirements. Sections 90.162 and 22.129 of the Commission's rules, 47 CFR 90.162 and 22.129, prevent the filing of speculative applications and pleadings for purposes of extracting money from applicants. Thus, the Commission will limit the consideration that an individual or entity is permitted to receive for agreeing to withdraw an application or petition to deny to the legitimate and prudent expenses of the withdrawing applicant or petitioner. To the extent §§ 22.129 and 90.162 conflict with § 1.2105 of the Commission's rules, 47 CFR 1.2105, these provisions should not apply to paging licenses awarded through competitive bidding. Therefore, the Commission will amend these provisions to prohibit agreements to withdraw mutually exclusive applications, or pleadings filed by one applicant against another applicant for a license in the same geographic area, after the deadline for filing short-form applications.

3. Regulatory Safeguards

a. Anti-Collusion Rules

55. The Commission will require paging licensees to comply with the reporting requirements and rules prohibiting collusion embodied in §§ 1.2105 and 1.2107 of the Commission's rules, 47 CFR 1.2105 and 1.2107. Thus, after the FCC Form 175 filing deadline, applicants may not discuss the substance of their bids or bidding strategies with other applicants, other than those identified on their short-form applications, that are bidding

in the same license areas, even if they are not bidding for the same spectrum blocks.

56. 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, in addition to any penalties they incur under the antitrust laws, or who are found to have violated the Commission's rules in connection with their participation in the auction process, may be subject to a variety of sanctions, including forfeiture of their down payment or their full bid amount, revocation of their license(s), and possible prohibition from participating in future auctions.

b. Transfer Disclosure Requirements

57. Section 1.2111(a), 47 CFR 1.2111(a), will apply to all paging licenses obtained through the competitive bidding process. The Commission sees nothing disruptive in requiring the disclosure of this information, and believes these disclosure requirements are necessary to the enforcement of its unjust enrichment provisions. The Commission also agrees with the Federal Trade Commission that speculation in connection with the acquisition of paging licenses is a major concern. By enabling the Commission to monitor license transfers, the disclosure requirements of §§ 1.2111(a), which implements section 309(j)(4)(E) of the Communications Act, (47 U.S.C. 309(j)(4)(E)), will assist in eliminating the problem of speculation while providing safeguards to those who might otherwise fall victim to deceptive practices used to induce them to invest in paging licenses.

4. Treatment of Designated Entities

a. Small Businesses

58. Congress specifically cited the needs of small businesses in enacting § 309(j) of the Communications Act, 47 U.S.C. 309(j), directing the Commission to promote economic opportunities for small businesses. While a number of small businesses are successfully participating in the paging industry, the Commission concludes that it is appropriate to establish special provisions in its paging rules for competitive bidding by small businesses.

b. *Minority- and Women-Owned Businesses*

59. In the paging service, as in other auctionable services, the Commission is committed to meeting the statutory objectives of promoting economic opportunity and competition, of avoiding excessive concentration of licenses, and of ensuring access to new and innovative technologies by disseminating licenses among a wide variety of applicants, including businesses owned by members of minority groups and women. Commenters failed to provide record evidence sufficient to support special provisions for minorities under the strict scrutiny standard of judicial review, which applies to federal race-based programs. The Commission is also concerned that the record would not support gender-based provisions under intermediate scrutiny, which is the standard of judicial review that applies to such provisions. Balancing its obligation to provide opportunities for women- and minority-owned businesses to participate in spectrum-based services against its statutory duties to facilitate the rapid delivery of new services to the American consumer and promote efficient use of the spectrum, the Commission concludes that it should not delay the paging service auctions for the amount of time it would take to adduce sufficient evidence to support race- and gender-based provisions. Moreover, the Commission believes that most minority- and women-owned businesses will be able to take advantage of the specific provisions adopted for small businesses.

c. *Bidding Credits*

60. While bidding credits do not guarantee the success of small businesses, the Commission believes that they at least provide such bidders with an opportunity to successfully compete against larger, well-financed bidders. The Commission also concludes that it is appropriate to adopt tiered bidding credits for paging auction participants based on the size of the small business. Such an approach will further the Commission's mandate under section 309(j) of the Communications Act to disseminate licenses to a variety of applicants.

61. The Commission therefore will define a small business as either (1) an entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years of not more than \$3 million, or (2) an entity that, together with affiliates and controlling principals, has average

gross revenues for the three preceding years of not more than \$15 million. The Commission will give small businesses that, together with affiliates and controlling principals, have average gross revenues for the three preceding years of not more than \$3 million, a 15 percent bidding credit. The Commission will give small businesses that, together with affiliates and controlling principals, have average gross revenues for the three preceding years of not more than \$15 million, a bidding credit of 10 percent. These bidding credits take into account the difficulties smaller businesses have in accessing capital. Bidding credits at these levels also achieve a reasonable compromise between the arguments of commenters advocating greater credits and those of commenters advocating no credits.

62. For purposes of the definitions adopted here, the Commission will consider the gross revenues of the applicant, all controlling principals in the applicant, and affiliates of the applicant. The Commission chooses not to impose specific equity requirements on controlling principals but will require that, in order for an applicant to qualify as a small business, qualifying small business principals must maintain both *de jure* and *de facto* control of the applicant. For this purpose, the Commission will borrow from certain Small Business Administration (SBA) rules that are used to determine when a firm should be deemed an affiliate of a small business. Typically, *de jure* control is evidenced by ownership of 50.1 percent of an entity's voting stock. *De facto* control is determined on a case-by-case basis. An entity must demonstrate at least the following indicia of control to establish that it retains *de facto* control of the applicant: (1) The entity constitutes or appoints more than 50 percent of the board of directors or partnership management committee; (2) the entity has authority to appoint, promote, demote and fire senior executives that control the day-to-day activities of the licensee; and (3) the entity plays an integral role in all major management decisions. The Commission cautions that while it is not imposing specific equity requirements on small business principals, the absence of significant equity could raise questions about whether the applicant qualifies as a bona fide small business.

63. Eligible small businesses will be permitted to form consortia and not aggregate their gross revenues. Additionally, a small corporation that has dispersed voting stock ownership and no controlling affiliates will not be required to aggregate with its own revenues the revenues of each shareholder for purposes of small

business status. Thus, the Commission clarifies that such an applicant may qualify—even in the absence of identifiable control being held by particular investors.

d. *Installment Payments and Down Payments*

64. The Commission adopts installment payments for small business winners in the paging license auctions. The Commission recognizes that small businesses, including those owned by women and minorities, face capital access difficulties not encountered by other firms. Thus, they require special measures to ensure their participation in the paging service. Licensees who qualify as small businesses in paging license auctions 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. The rate for ten-year U.S. Treasury obligations will be determined by taking the coupon rate of interest on the ten-year U.S. Treasury notes most recently auctioned by the Treasury Department before licenses are conditionally granted. These licensees will be able to make interest-only payments for the first two years of the license term. Timely payment of all installments will be a condition of the license grant, and failure to make such timely payments will be grounds for revocation of the license.

65. The Commission declines to adopt a second installment payment plan with a longer interest-only period for small businesses with average gross revenues of not more than \$3 million. The Commission believes that the two-year interest-only period in the single plan it adopts will provide small businesses with the appropriate level of financing to overcome difficulties in attracting capital. Given that it is making additional financial assistance available to very small businesses in the form of a 15 percent bidding credit, the Commission does not think a longer interest-only period is justified.

66. The Commission also concludes that it should provide for late payment fees in connection with its installment payment plan for paging licensees. Therefore, when licensees are more than fifteen days late in their scheduled installment payments, a late payment fee equal to 5 percent of the amount of the past due payment will be charged. For example, if a \$50,000 payment is due on June 1, then on June 16 \$2,500 is due in addition to the payment. Without such a fee licensees may not have adequate financial incentives to

make installment payments on time and may attempt to maximize their cash flow at the government's expense by paying late. The 5 percent payment adopted is an approximation of late payment fees applied in typical commercial lending transactions. Payments will be applied in the following order: late charges, interest charges, principal payments.

67. The Commission believes that small businesses should be required to pay a down payment of 20 percent. Such a requirement is consistent with ensuring that winning bidders have the financial capability of building out their systems and will provide the Commission with stronger assurance against default than a 10 percent down payment. Increasing the amount of the bidder's funds at risk in the event of default discourages insincere bidding and therefore increases the likelihood that licenses are awarded to parties who are best able to serve the public. A 20 percent down payment should also cover the required payments in the unlikely event of default. Thus, small business licensees will be required to bring their deposit up to ten percent of the winning bid within ten business days of the close of the auction. Prior to licensing, they will be required to pay an additional ten percent. Specific procedures for payment will be provided in a Public Notice issued by the Wireless Telecommunications Bureau. The Commission declines to adopt reduced upfront payment rules for small businesses participating in paging license auctions. The Commission believes a uniform upfront payment provision for all bidders in the auction is necessary in order to deter speculation and to ensure that only sincere bidders participate in the auction.

e. Partitioning

68. Based on the strong support expressed by commenters for granting broad partitioning rights to paging licensees, the Commission will permit all MTA and EA paging licensees to partition to any party eligible to be a paging licensee. The Commission takes this action with respect to partitioning because of its conclusion that allowing holders of paging licenses to partition their geographic service areas will facilitate the provision of services in small markets and rural areas. Partitioning will also furnish providers of paging service with operational flexibility that will serve to promote the most efficient use of the spectrum and encourage participation by a wide variety of service providers. The Commission will permit partitioning of

paging licenses awarded through competitive bidding based on any license area defined by the parties.

69. Due to the paucity of comments on the subject, and uncertainty as to whether it is technically feasible, the Commission will not, at this time, authorize spectrum disaggregation for the paging services. Instead, the Commission seeks information regarding the technical feasibility and appropriateness of spectrum disaggregation for the paging services in a *Further Notice of Proposed Rulemaking*.

70. Providers of paging service will be permitted to acquire partitioned licenses in either of two ways: (1) By forming bidding consortia to participate in auctions, and then partitioning the licenses won among consortium members; or (2) by acquiring partitioned licenses from other licensees through private negotiation and agreement either before or after the auction. 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. With regard to partitioning by small businesses, the Commission seeks comment in the *Further Notice of Proposed Rulemaking* regarding the treatment of bidding credits and installment payments. In the event the Commission receives applications requesting FCC consent to partitioning transfers from small businesses to non-small businesses or to small businesses that qualify for less favorable bidding credits, action on such applications will be deferred until the adoption of rules governing the treatment of bidding credits and installment payments.

f. Unjust Enrichment Provisions for Full Transfers

71. The Commission adopts unjust enrichment rules for paging. These rules provide that, during the initial license term, licensees utilizing bidding credits and seeking to assign or transfer control of a license to an entity that does not meet the eligibility criteria for bidding credits will be required to reimburse the government for the value of the benefit conferred by the government, that is, the amount of the bidding credit, plus interest at the rate imposed for installment financing at the time the license was awarded, before the assignment or transfer will be approved by the Commission. Licensees utilizing a bidding credit and seeking to assign or transfer control of a license to a small business that meets the eligibility standards for a lower bidding credit will be required to reimburse the U.S. government for the difference between

the amount of the bidding credit obtained by the original licensee and the bidding credit for which the assignee, transferee or new licensee is eligible, plus interest at the rate imposed for installment financing at the time the license was awarded as a condition of Commission approval of such assignment or transfer. If a licensee that utilizes bidding credits seeks to make any change in ownership structure that would render the licensee ineligible for bidding credits, or eligible only for a lower bidding credit, the licensee must first seek Commission approval and reimburse the government for the amount of the bidding credit, or the difference between its original bidding credit and the bidding credit for which it is eligible after the ownership change, plus interest at the rate imposed for installment financing at the time the license was awarded. The amount of this payment will be reduced over time as follows: (1) 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 (or the difference between the bidding credit obtained by the original licensee and the bidding credit for which the new licensee is eligible); (2) in year three of the license term the payment will be 75 percent; (3) in year four the payment will be 50 percent, and (4) in year five the payment will be 25 percent, after which there will be no required payment. These payments will have to be paid to the U.S. Treasury as a condition of approval of the assignment, transfer, or ownership change.

72. In addition, if a licensee that qualifies for installment payments seeks to assign or transfer control of its license during its term to an entity that does not meet the small business definition, the Commission 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. Also, if an investor subsequently purchases an interest in the business and, as a result, the gross revenues of the business exceed the applicable financial caps, these unjust enrichment provisions will apply. The Commission will apply these payment requirements for the entire license term to ensure that small businesses look first to other small businesses when deciding to transfer their licenses. However, the Commission will not impose a holding period or other transfer restrictions on these licensees.

g. Spectrum Set-aside

73. The Commission will not adopt an entrepreneurs' block for paging licenses. The large number of licenses of different

sizes that will be available in the paging auctions should allow for extensive participation of small businesses without an entrepreneurs' block. Moreover, the special provisions for small businesses that the Commission adopts, including installment payments and tiered bidding credits, will give small businesses a significant opportunity to acquire paging licenses through the auctions.

III. Conclusion

74. The Commission concludes that the paging rules and geographic area licensing adopted in this *Second Report and Order* will facilitate future development of paging systems and foster competition between paging and other CMRS in general.

IV. Procedural Matters and Ordering Clauses

A. Regulatory Flexibility Analysis

75. As required by section 603 of the Regulatory Flexibility Act, 5 U.S.C. 603 (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rulemaking (NPRM)* in WT Docket No. 96-18. The Commission sought written public comment on the proposals in the *NPRM*, including the IRFA. The Commission's Final Regulatory Flexibility Analysis in this *Second Report and Order* conforms to the RFA, as amended by the Contract With America Advancement Act of 1996, Pub. L. 104-121, 110 Stat. 847 (1996). (CWAA, Subtitle II of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) codified at 5 U.S.C. 601 *et seq.*)

Need for and Purpose of This Action

76. In the *Second Report and Order*, in WT Docket No. 96-18, the Commission adopts rules to establish geographic area licensing and competitive bidding for Common Carrier Paging (CCP) and exclusive 929 MHz Private Carrier Paging (PCP) services. These rules are adopted to establish a flexible regulatory scheme for paging services, which will promote efficient licensing and competition in the Commercial Mobile Radio Services (CMRS) marketplace. The competitive bidding rules adopted in the *Second Report and Order* are pursuant to section 309(j) of the Communications Act of 1934, as amended (Communications Act), which grants authority to the Commission to use auctions to select among mutually exclusive applications for initial licenses for subscriber-based services.

Summary of Issues Raised in Response to the Initial Regulatory Flexibility Analysis

77. Several commenters submitted comments in response to the IRFA. These commenters contend that the Commission did not assess how the proposals for market area licensing and competitive bidding will impact small businesses; that market area licensing will alleviate some administrative burdens but the savings will mainly be seen by the largest paging operators; and that market area licensing will impose administrative burdens and additional costs on small businesses. In addition to the comments specifically submitted in response to the IRFA, several commenters raised issues in their comments to the *NPRM* regarding the effects of the proposals in the *NPRM* on small businesses. These commenters do not support geographic area licensing for the exclusive 929 MHz and 931 MHz paging channels. These commenters contend that geographic area licensing would be disruptive to existing licensees, as well as to the public, without providing any overriding benefit. The Commission addresses these issues in the *Second Report and Order*, and concludes that geographic area licensing using Major Trading Areas (MTAs) as the geographic area for these bands, is in the public interest. The Commission also observes that small businesses will be able to use bidding credits and installment payments in order to compete with larger entities in the auction process.

78. Additionally, several commenters are opposed to geographic area licensing for the 35-36 MHz, 43-44 MHz, 152-159 MHz, and 454-460 MHz bands and claim that geographic area licensing would prevent the continued growth of small paging businesses. Several commenters are also opposed to geographic area licensing for other services, such as Basic Exchange Telecommunications Radio Service (BETRS). Commenters argue that it is not in the public interest to use competitive bidding to select between applications for BETRS and paging, as this may leave some rural areas without any local exchange service. Commenters contend that requiring local exchange carriers to bid for BETRS spectrum would defy the requirements in the Communications Act for universal service and would jeopardize the Commission's goal to increase subscriber penetration. The Commission addresses these issues in the *Second Report and Order*, and concludes that geographic area licensing, using Economic Areas (EAs) as the geographic

area for these bands, is in the public interest. The Commission notes that EAs, which are smaller than MTAs, will provide more opportunities for small paging businesses. The Commission also observes that small businesses will be able to use bidding credits and installment payments in order to compete with larger entities in the auction process. The Commission concludes that rural areas will not be deprived of service because existing BETRS systems will remain in place and the new partitioning rules adopted in the *Second Report and Order* will allow BETRS operators to enter into partitioning agreements with the geographic area paging licensees. Additionally, the Commission notes that BETRS operators will be able to obtain additional sites on a secondary basis.

79. Commenters are also opposed to geographic licensing for the shared channels and request that the Commission maintain the present system of site-by-site licensing for these channels. The commenters observe that these channels are predominantly used by small businesses. The Commission finds that the concerns raised by these commenters regarding the shared channels are well-founded and therefore declines to impose geographic area licensing for the shared channels.

Description and Number of Small Entities Involved

80. The rules adopted in this *Second Report and Order* will apply to current paging operators and new entrants into the paging market. Under these rules, exclusive 929 MHz paging licenses and licenses for all CCP channels will be granted on a market area basis, instead of site-by-site, and mutually exclusive applications will be resolved through competitive bidding procedures. In order to ensure the more meaningful participation of small business entities in the auction for mutually exclusive geographic area paging licenses the Commission has adopted a two-tier definition of small businesses. A small business will be defined for these purposes as either (1) an entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years of not more than \$3 million, or (2) an entity that, together with affiliates and controlling principals, has average gross revenues for the three preceding years of not more than \$15 million. The Small Business Administration (SBA) has not yet approved this definition for paging services. The Commission will utilize the SBA's definition applicable to radiotelephone companies, i.e., an entity employing less than 1,500

persons. See 13 CFR 121.201, Standard Industrial Classification Code 4812.

81. The Commission anticipates that a total of 16,630 non-nationwide geographic area licenses will be auctioned. The geographic area licenses subject to auction will consist of 2,550 MTA licenses and 14,080 EA licenses. In addition to the 47 Rand McNally MTAs, the Commission is adding three MTAs for the U.S. territories of (1) Guam and the Northern Mariana Islands, (2) Puerto Rico and the U.S. Virgin Islands, and (3) American Samoa. The Commission is also licensing Alaska as a single MTA separate from the Seattle MTA. There will be a total of 51 MTA licenses auctioned for each non-nationwide 931 MHz and exclusive 929 MHz channel. Auctions of paging licenses have not yet been held, and there is no basis to determine the number of licenses that will be awarded to small entities. Given the fact that nearly all radiotelephone companies have fewer than 1,000 employees, and that no reliable estimate of the number of prospective paging licensees can be made, the Commission assumes, for purposes of the evaluations and conclusions in this *Final Regulatory Flexibility Analysis*, that all the auctioned 16,630 geographic area paging licenses will be awarded to small entities, as that term is defined by the SBA. See U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC 92-S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms: 1992, SIC Code 4812 (issued May 1995).

Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements

82. Geographic area paging licensees may be required to report information concerning the location of their transmission sites under some circumstances, although generally they will not be required to file applications on a site-by-site basis. Additionally, geographic area license applicants will be subject to reporting and recordkeeping requirements to comply with the competitive bidding rules. Specifically, applicants will apply for paging license auctions by filing a short-form application (FCC Form 175). Winning bidders will file a long-form application (FCC Form 600) at the conclusion of the auction. Additionally, entities seeking treatment as small businesses will need to submit information pertaining to the gross revenues of the small business applicant and its affiliates and controlling

principals. Such entities will also need to maintain supporting documentation at their principal place of business.

83. Section 309(j)(4)(E) of the Communications Act directs the Commission to "require such transfer disclosures and anti-trafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits." 47 U.S.C. 309(j)(4)(E). The Commission adopted safeguards designed to ensure that the requirements of this section are satisfied, including a transfer disclosure requirement for paging licenses obtained through the competitive bidding process. An applicant seeking approval for a transfer of control or assignment of a license within three years of receiving a new license through a competitive bidding procedure must, together with its application for transfer of control or assignment, file with the Commission a statement indicating that its license was obtained through competitive bidding. Such applicant must also file with the Commission the associated contracts for sale, option agreements, management agreements, or other documents disclosing the total consideration that the applicant would receive in return for the transfer or assignment of its license.

84. With respect to small businesses, the Commission has adopted unjust enrichment 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 the competitive bidding process to obtain a license at a lower cost than they would otherwise have to pay and to later sell it at a profit, and to ensure that large businesses do not become the unintended beneficiaries of measures meant to help small firms. Small business licensees seeking to transfer their licenses to entities which do not qualify as small businesses (or which qualify for a lower bidding credit), as a condition of approval of the transfer, must remit to the government a payment equal to a portion of the value of the benefit conferred by the government.

85. Finally, applicants and licensees claiming eligibility for competitive bidding as a small business are subject to audits by the Commission. Selection for audit may be random, on information, or on the basis of other factors. Consent to such audit is part of the certification included in the short-form application (FCC Form 175).

Steps Taken to Minimize Burdens on Small Entities

86. Section 309(j)(3)(B) of the Communications Act, 47 U.S.C. 309(j)(3)(B), provides that in establishing eligibility criteria and bidding methodologies the Commission shall, *inter alia*, promote economic opportunity and competition and ensure that new and innovative technologies are readily accessible 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. Section 309(j)(4)(A) of the Communications Act, 47 U.S.C. 309(j)(4)(A), provides that in order to promote such 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. In awarding geographic area paging licenses the Commission is committed to meeting the statutory objectives of promoting economic opportunity and competition, of avoiding excessive concentration of licenses, and of ensuring access to new and innovative technologies by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. The Commission finds that it is appropriate to establish special provisions in the paging rules for competitive bidding by small businesses. The Commission believes that small businesses applying for paging licenses should be entitled to bidding credits and should be permitted to pay their bids in installments.

87. In order to ensure the more meaningful participation of small business entities in paging auctions, the Commission has adopted a two-tiered definition of small businesses. This approach will give qualifying small businesses bidding flexibility. A small business will be defined as either (1) an entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years of not more than \$3 million, or (2) an entity that, together with affiliates and controlling principals, has average gross revenues for the three preceding years of not more than \$15 million. The Commission will require that in order for an applicant to qualify as a small business, qualifying small business principals must maintain control of the applicant. The Commission has established bidding credits consistent

with the two-tiered definition of a small business. Small businesses that, together with affiliates and controlling principals, have average gross revenues for the three preceding years of not more than \$3 million will receive a 15 percent bidding credit. Small businesses that, together with affiliates and controlling principals, have average gross revenues for the three preceding years of not more than \$15 million will receive a bidding credit of 10 percent.

88. Additionally, licensees who qualify as small businesses in the geographic area paging license auction 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. Licensees who qualify for this installment payment plan will be permitted to make interest-only payments for the first two years of the license term. Timely payment of all installments will be a condition of the license grant, and failure to make such timely payments will be grounds for revocation of the license.

89. The Commission is also extending geographic partitioning of MTA and EA license areas to all entities eligible to be paging licensees. The Commission believes that this provision will allow paging licensees to tailor their business strategies and allow them to use the spectrum more efficiently, will allow more entities to participate in the provision of paging services, and will facilitate market entry by small entities that have the ability to provide service only to a limited population. Additionally, the Commission is maintaining the current site-by-site licensing procedure for the shared channels.

Significant Alternatives Considered and Rejected

90. The Commission considered and rejected a proposal for geographic area licensing using MTAs for all licenses. Commenters opposed this proposal, contending that MTAs were too large for the smaller paging systems. The Commission believes that the advantages of geographic area licensing—flexibility, enhanced regulatory symmetry with other CMRS, and eliminating the inefficiencies in the licensing process—are applicable to the UHF and VHF channels, particularly for regional paging services offered on these bands. Based on the record in this proceeding, the Commission concludes that EAs would be more appropriate than MTAs for the paging channels below 931 MHz. The Commission agrees

with the commenters that the geographical definition used should correspond as much as possible to the geographic area that the paging licensees seek to serve, and concludes that EAs, which are smaller than MTAs, would facilitate the ability of paging operators of smaller systems to participate in geographic area licensing.

91. Additionally, the Commission considered and rejected converting all or some of the shared channels to exclusive use and implementing geographic area licensing. The Commission also considered and rejected limiting the number of licensees on the shared channels. In the *NPRM*, the Commission asked for comment on whether to (1) convert the shared channels to exclusive use and implement geographic licensing; (2) limit the number of licenses per shared channel and use competitive bidding to choose among applications once the limit is reached; or (3) retain the *status quo*. Most commenters opposed geographic area licensing for the shared channels, because paging systems on these channels are smaller paging systems, not wide-area systems. The Commission observed that smaller paging systems have been able to utilize these channels effectively on a shared basis. Most of the commenters requested that the Commission maintain the present system of site-by-site licensing. The Commission noted that attempting to superimpose a geographic licensing scheme on channels that have historically been shared could cause significant disruption to existing operations. Additionally, the Commission declined to adopt a cap on licensing shared channels, or to convert certain shared channels to exclusive licensing. The difficulty with a licensing cap, as noted by several commenters, is that it is the amount of time a paging channel is used and the transmission equipment and protocol used, not the number of licensees, that determines the capacity limits of a channel. The Commission was also concerned that picking certain shared channels to be designated as exclusive would only cause greater pressure on the remaining shared channels and therefore could limit opportunities for entry by smaller systems. The Commission concluded that the shared channels should not be converted to exclusive use, and the number of licensees should not be limited in order to provide continued opportunities for paging operators, particularly small businesses.

92. With respect to competitive bidding rules, the Commission considered using a market-by-market stopping rule, which many commenters

avored in order to facilitate bringing an earlier end to the auction and permitting the earlier close of uncontested markets. The Commission adopted instead a hybrid simultaneous/license-by-license stopping rule, which combines the advantages of a simultaneous stopping rule and a license-by-license stopping rule. This approach will prevent the auction from being unreasonably long while also preserving bidders' flexibility to pursue back up strategies and acquire licenses that are consistent with their business plans.

93. The Commission also considered allowing small businesses that are winning bidders to pay a lower down payment than non-small businesses. The Commission concluded, however, that all winning bidders should pay a down payment of 20 percent of their winning bids. The Commission believes that a substantial down payment is necessary to ensure that winning bidders have the financial capability of building out their systems, and will provide stronger assurance against defaults than a reduced down payment. Increasing the amount of the bidder's funds at risk in the event of default discourages insincere bidding and therefore increases the likelihood that licenses are awarded to parties who are best able to serve the public. The Commission also believes that a 20 percent down payment should cover the required payments in the unlikely event of default.

94. The Commission requested comment on whether, in addition to small business provisions, separate provisions should be adopted for minority- and women-owned entities. Few comments were received on this issue, and commenters failed to provide record evidence of discrimination sufficient to support race-based provisions under the strict scrutiny standard of judicial review. The Commission is also concerned that the record would not support gender-based provisions under intermediate scrutiny. Balancing its obligation to provide opportunities for women- and minority-owned businesses to participate in spectrum-based services against its statutory duties to facilitate the rapid delivery of new services to the American consumer and promote efficient use of the spectrum, the Commission concluded that it should not delay paging service auctions for the amount of time it would take to adduce sufficient evidence to support race- and gender-based provisions. The Commission believes that most minority- and women-owned businesses will be able to take advantage of the

specific provisions that it has adopted for small businesses.

95. The Commission proposed, with respect to installment payments, that small businesses with not more than \$3 million in average gross revenues for the preceding three years be permitted to make interest-only payments for the first five years of the license term, while small businesses with not more than \$15 million in average gross revenues for the preceding three years be permitted to make interest-only payments during the first two years. The Commission concluded, however, that all licensees qualifying for installment payments should be allowed to make interest-only payments only for the first two years of the license term. The Commission declined to adopt a longer interest-only period for small businesses with average gross revenues of not more than \$3 million. The Commission believes that the two-year interest-only period provides small businesses with the appropriate level of financing to overcome difficulties in attracting capital. Given that additional financial assistance is being made available to very small businesses in the form of a 15 percent bidding credit, the Commission does not think a longer interest-only period is needed.

96. The Commission sought comment on the need, if any, for a reduced upfront payment for entities qualifying as a small business. The Commission did not, however, adopt reduced upfront payment rules for small businesses participating in the paging license auction because it believes that a uniform upfront payment provision for all bidders in the auction is necessary in order to deter speculation and to ensure that only sincere bidders participate in the auction.

97. Finally, the Commission considered but elected not to adopt a spectrum set-aside for entrepreneurs. In the *NPRM*, the Commission tentatively concluded that it was not necessary to adopt an entrepreneurs' block for paging license auctions, and most commenters opposed the creation of an entrepreneurs' block or other form of spectrum set-aside for paging license auctions. The Commission believes that the large number of licenses of different sizes that will be available in the paging auctions should allow for extensive participation of small businesses without an entrepreneurs' block. Moreover, the Commission believes that the special provisions for small businesses that it has adopted, including installment payments and tiered bidding credits, will give small businesses a significant opportunity to

acquire paging licenses through auctions.

Report to Congress

98. The Commission shall send a copy of this *Final Regulatory Flexibility Analysis*, along with this *Second Report and Order*, in a report to Congress pursuant to the *Small Business Regulatory Enforcement Fairness Act of 1996*, 5 U.S.C. 801(a)(1)(A).

B. Paperwork Reduction Act

99. This collection of information requirements have been approved by the Office of Management and Budget and assigned OMB control number 3060-0697. The FCC Form 175 is assigned OMB control number 3060-0600. The FCC Form 600 is assigned OMB control number 3060-0623.

C. Authority

100. The above action is authorized under the Communications Act, sections 4(i), 303(r), 309(c), 309(j), and 332, 47 U.S.C. 154(i), 303(r), 309(c), 309(j), and 332, as amended.

D. Ordering Clauses

101. Accordingly, it is ordered that, pursuant to the authority of sections 4(i), 303(g), 303(r), and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(g), 303(r), and 332(a), part 22 of the Commission's rules, 47 CFR part 22, is amended as set forth below.

102. It is further ordered that, pursuant to the authority of sections 4(i), 303(g), 303(r), and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(g), 303(r), and 332(a), part 90 of the Commission's rules, 47 CFR part 90, is amended as set forth in below.

103. It is further ordered that the rules adopted in this *Second Report and Order and Further Notice of Proposed Rulemaking* will be effective May 12, 1997.

104. It is further ordered that, pursuant to 47 U.S.C. 155(c), the Chief, Wireless Telecommunications Bureau, is granted delegated authority to implement and modify auction procedures in the part 22 and part 90 paging services, including the general design and timing of an auction, the number and grouping of authorizations to be offered in any particular auction, the manner of submitting bids, the amount of minimum opening bids and bid increments, activity and stopping rules, and application and payment requirements, including the amount of upfront payments, and to announce such procedures by Public Notice.

105. It is further ordered that, pursuant to 47 U.S.C. 155(c), the Chief, Wireless Telecommunications Bureau, is granted delegated authority to dismiss all mutually exclusive paging applications filed as of the adoption date of this *Second Report and Order* and grant or dismiss all non-mutually exclusive paging applications filed as of the adoption date of this *Second Report and Order*.

List of Subjects

47 CFR Part 22

Communication common carriers, Reporting and recordkeeping requirements.

47 CFR Part 90

Common carriers, Reporting and recordkeeping requirements.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

Rules Changes

1. Part 22 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

Part 22—PUBLIC MOBILE SERVICES

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

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

Section 22.99 is revised by adding the following definitions (in alphabetical order), and revising the definition for the term "unserved areas", to read as follows:

§ 22.99 Definitions.

* * * * *

Paging geographic area authorization.

An authorization conveying the exclusive right to establish and expand one or more stations throughout a paging geographic area or, in the case of a partitioned geographic area, throughout a specified portion of a paging geographic area, on a specified channel allocated for assignment in the Paging and Radiotelephone Service. These are subject to the conditions that no interference may be caused to existing co-channel stations operated by other licensees within the paging geographic area and that no interference may be caused to existing or proposed co-channel stations of other licensees in adjoining paging geographic areas.

Paging geographic areas. Standard geographic areas used by the FCC for administrative convenience in the licensing of stations to operate on channels allocated for assignment in the

Paging and Radiotelephone Service. See § 22.503(b).

* * * * *

Unserved areas. With regard to a channel block allocated for assignment in the Cellular Radiotelephone Service: Geographic area in the District of Columbia, or any State, Territory or possession of the United States of America that is not within the CGSA of any cellular system authorized to transmit on that channel block. With regard to a channel allocated for assignment in the Paging and Radiotelephone Service: Geographic area within the District of Columbia, or any State, Territory or possession of the United States of America that is not within the service contour of any base transmitter in any station authorized to transmit on that channel.

* * * * *

The heading of Subpart B is revised to read as follows:

Subpart B—Licensing Requirements and Procedures

4. A new center heading preceding § 22.101 is added to read as follows:

Applications and Notifications

5. Section 22.115 is amended by revising the introductory text of paragraph (a) to read as follows:

§ 22.115 Content of applications.

* * * * *

(a) *Site-specific requirements.* The following requirements apply to all Public Mobile Service applications that involve specific transmitting antenna sites.

* * * * *

6. Section 22.123 is amended by revising paragraphs (e)(1) and (e)(2), to read as follows:

§ 22.123 Classification of filings as major or minor.

* * * * *

(e) * * *

(1) Request that a paging geographic area authorization be issued to the filer on a requested channel;

(2) Request an authorization that would establish for the filer a new fixed transmission path or service area (a new station) on a requested channel, unless the new service area would be totally within a paging geographic area for which the filer holds the paging geographic area authorization for the requested channel;

* * * * *

7. Section 22.129 is amended by adding paragraph (e) to read as follows:

§ 22.129 Agreements to dismiss applications, amendments, and pleadings.

* * * * *

(e) Notwithstanding the provisions of this section, any payments made or received in exchange for withdrawing a short-form application for an FCC authorization awarded through competitive bidding shall be subject to the restrictions set forth in § 1.2105(c) of this chapter.

8. Section 22.131 is amended by revising paragraphs (c)(4)(ii)(A) and (c)(4)(ii)(B), and by adding a new paragraph (d)(2)(v), to read as follows:

§ 22.131 Procedures for mutually exclusive applications.

* * * * *

(c) * * *

(4) * * *

(ii) * * *

(A) If all of the mutually exclusive applications in a 30-day notice and cut-off filing group are applications for initial authorization, the FCC administers competitive bidding procedures in accordance with § 22.201 through § 22.227 and subpart Q of part 1 of this chapter, as applicable. After such procedures, the application of the successful bidder may be granted and the other applications may be dismissed without prejudice.

(B) If any of the mutually exclusive applications in a 30-day notice and cut-off filing group is an application for modification, the Commission may attempt to resolve the mutual exclusivity by facilitating a settlement between the applicants. If a settlement is not reached within a reasonable time, the FCC may designate all applications in the filing group for comparative consideration in a hearing. In this event, the result of the hearing disposes all of the applications in the filing group.

* * * * *

(d) * * *

(2) * * *

(v) Any "short-form" application (filed on FCC Form 175) requesting a new paging geographic area authorization.

* * * * *

9. Section 22.165 is amended by revising paragraph (d)(1) to read as follows:

§ 22.165 Additional transmitters for existing systems.

* * * * *

(d) * * *

(1) The interfering contours of the additional transmitter(s) must be totally encompassed by the composite interfering contour of the existing station (or stations under common control of the applicant) on the same

channel, except that this limitation does not apply to nationwide network paging stations or in-building radiation systems.

* * * * *

10. A new center heading consisting of §§ 22.201 through 22.227 is added to read as follows:

Competitive Bidding Procedures

Sec.

- 22.201 Scope of competitive bidding rules.
- 22.203 Competitive bidding design for paging licensing.
- 22.205 Competitive bidding mechanisms.
- 22.207 Withdrawal, default, and disqualification payments.
- 22.209 Bidding applications (FCC Form 175 and 175-S short-form).
- 22.211 Submission of upfront payments and down payments.
- 22.213 Long-form applications (FCC Form 600).
- 22.215 Authorization grant, denial, default, and disqualification.
- 22.217 Bidding credits for small businesses.
- 22.219 Installment payments for licenses won by small businesses.
- 22.221 Eligibility for partitioned licenses.
- 22.223 Definitions concerning competitive bidding process.
- 22.225 Certifications, disclosures, records maintenance and audits.
- 22.227 Petitions to deny and limitation on settlements.

Competitive Bidding Procedures

§ 22.201 Scope of competitive bidding rules.

Sections 22.201 through 22.227, inclusive (and, unless otherwise specified in this part, the procedures set forth in part 1, subpart Q, of this chapter), apply only to competitive bidding ("auction") procedures for authorizations as follows:

- (a) Paging geographic area authorizations issued pursuant to this part or to part 90 of this chapter.
- (b) [Reserved].

§ 22.203 Competitive bidding design for paging licensing.

A simultaneous multiple round auction will be used to choose from among mutually exclusive initial applications for paging geographic area authorizations, unless the FCC specifies otherwise by Public Notice prior to the competitive bidding procedure.

§ 22.205 Competitive bidding mechanisms.

- (a) *Sequencing.* The FCC will establish and may vary the sequence in which paging geographic area authorizations are auctioned.
- (b) *Grouping.* The FCC will determine which licenses will be auctioned simultaneously or in combination based on interdependency and administrative circumstances.

(c) *Minimum Bid Increments.* The FCC may, by public announcement before or during an auction, require minimum bid increments in dollar or percentage terms.

(d) *Stopping Rules.* The FCC may establish stopping rules before or during an auction in order to terminate the auction within a reasonable time.

(e) *Activity Rules.* The FCC may establish activity rules which require a minimum amount of bidding activity. In the event that the FCC establishes an activity rule in connection with a simultaneous multiple round auction, each bidder may request waivers of such rule during the auction. The FCC may, by public announcement either before or during an auction, specify or vary the number of waivers available to each bidder.

§ 22.207 Withdrawal, default, and disqualification payments.

The FCC will impose payments on bidders who withdraw high bids during the course of an auction, who default on payments due after an auction terminates, or who are disqualified. When the FCC conducts a simultaneous multiple round auction, payments will be calculated as set forth in §§ 1.2104(g) and 1.2109 of this chapter. When the amount of such a payment cannot be determined, a deposit of up to 20 percent of the amount bid on the license will be required.

§ 22.209 Bidding applications (FCC Form 175 and 175-S Short-form).

Each applicant to participate in competitive bidding for paging geographic area authorizations must submit an application (FCC Forms 175 and 175-S) pursuant to the provisions of § 1.2105 of this chapter.

§ 22.211 Submission of upfront payments and down payments.

(a) The FCC will require applicants to submit an upfront payment prior to the start of a paging auction. The amount of the upfront payment for each geographic area license auctioned and the procedures for submitting it will be set forth by the Wireless Telecommunications Bureau in a Public Notice in accordance with § 1.2106 of this chapter.

(b) Each winning bidder in a paging auction must submit a down payment to the FCC in an amount sufficient to bring its total deposits up to 20 percent of its winning bid. All winning bidders except small businesses will be required to make such payment within ten business days following the release of a Public Notice announcing the close of bidding. Small businesses must bring their deposits up to 10 percent of their

winning bids within ten business days following the release of a Public Notice announcing the close of bidding, and must pay an additional 10 percent prior to licensing, by a date and time to be specified by Public Notice.

§ 22.213 Long-form applications (FCC Form 600).

Each successful bidder for a paging geographic area authorization must submit a "long-form" application (FCC Form 600) within ten business days after being notified by Public Notice that it is the winning bidder. Applications for paging geographic area authorizations on FCC Form 600 must be submitted in accordance with § 1.2107 of this chapter, all applicable procedures set forth in the rules in this part, and any applicable Public Notices that the FCC may issue in connection with an auction. After an auction, the FCC will not accept long-form applications for paging geographic area authorizations from anyone other than the auction winners and parties seeking partitioned licenses pursuant to agreements with auction winners under § 22.221.

§ 22.215 Authorization grant, denial, default, and disqualification.

(a) Each winning bidder, except those eligible for installment payments, will be required to pay the full balance of its winning bid within ten business days following Public Notice that the FCC is prepared to award the authorization.

(b) A bidder that withdraws its bid subsequent to the close of bidding, defaults on a payment due, or is disqualified, is subject to the payments specified in § 22.207, § 1.2104(g), or § 1.2109 of this chapter, as applicable.

§ 22.217 Bidding credits for small businesses.

(a) A winning bidder that qualifies as a small business or a consortium of small businesses as defined in § 22.223(b)(1)(i) may use a bidding credit of 15 percent to lower the cost of its winning bid. A winning bidder that qualifies as a small business or a consortium of small businesses as defined in § 22.223(b)(1)(ii) may use a bidding credit of ten percent to lower the cost of its winning bid.

(b) Unjust Enrichment:

(1) If a small business that utilizes a bidding credit under this section seeks to transfer control or assign an authorization to an entity that is not a small business under § 22.223(b)(1), or seeks to make any other change in ownership that would result in the licensee losing eligibility as a small business, the small business must seek FCC approval and reimburse the U.S.

government for the amount of the bidding credit (plus interest at the rate imposed for installment financing at the time the license was awarded), as a condition of approval of such assignment, transfer, or other ownership change.

(2) If a small business that utilizes a bidding credit under this section seeks to transfer control or assign an authorization to a small business meeting the eligibility standards for a lower bidding credit, 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 FCC approval and reimburse the U.S. 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 (plus interest at the rate imposed for installment financing at the time the license was awarded), as a condition of the approval of such assignment, transfer, or other ownership change.

(3) The amount of payments made pursuant to paragraphs (b)(1) and (b)(2) of this section 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 (or the difference between the bidding credit obtained by the original licensee and the bidding credit for which the post-transfer licensee is eligible); in year 3 of the license term the payment will be 75 percent; in year 4 the payment will be 50 percent; and in year 5 the payment will be 25 percent, after which there will be no assessment.

§ 22.219 Installment payments for licenses won by small businesses.

(a) Each licensee that qualifies as a small business under § 22.223(b)(1) may pay the remaining 80 percent of the net auction price for the license in installment payments over the term of the authorization. Interest charges shall 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. An eligible licensee may make interest-only payments for two years. Payments of interest and principal shall be amortized over the remaining eight years of the license term.

(b) Late Installment Payment.

(1) Any licensee that submits a scheduled installment payment more than 15 days late will be charged a late payment fee equal to 5 percent of the amount of the past due payment.

(2) Payments will be applied in the following order: late charges, interest charges, principal payments.

(c) **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 financing, the licensee must seek FCC approval and make full payment of the remaining unpaid principal and unpaid interest accrued through the date of assignment or transfer as a condition of FCC 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 FCC approval before making such a change in ownership structure and must make full payment of the remaining unpaid principal and unpaid interest accrued through the date of such change in ownership structure as a condition of FCC approval.

§ 22.221 Eligibility for partitioned licenses.

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

(a) The applicable procedures for filing short-form applications and for submitting upfront payments and down payments contained in 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));

(b) Each party to an agreement to partition the license must file a long-form application (FCC Form 600) for its respective, mutually agreed-upon geographic area together with the application for the remainder of the MTA or EA filed by the auction winner.

(c) If the partitioned license is being applied for as a partial assignment of the MTA or EA license following grant of the initial license, request for authorization for partial assignment of a license shall be made pursuant to § 22.137.

§ 22.223 Definitions concerning competitive bidding process.

(a) *Scope.* The definitions in this section apply to §§ 22.201 through 22.227, 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 and controlling principals has average gross revenues that are not more than \$3 million for the preceding three years; or

(ii) Together with its affiliates and controlling principals 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, and controlling principals shall be considered on a cumulative basis and aggregated.

(3) A consortium of small businesses is a conglomerate organization formed as a joint venture between or among mutually independent business firms, each of which individually satisfies the definition of a small business in paragraph (b)(1) of this section. Each individual member must establish its eligibility as a small business, as defined in this section. Where an applicant (or licensee) is a consortium of small businesses, the gross revenues of each small business shall not be aggregated.

(c) *Gross Revenues.* Gross revenues shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (e.g., cost of goods sold). Gross revenues are evidenced by audited financial statements for the relevant number of calendar or fiscal years preceding the filing of the applicant's short-form application. 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. When an applicant does not otherwise use audited financial statements, its gross revenues may be certified by its chief financial officer or its equivalent.

(d) *Affiliate.*—(1) *Basis for Affiliation.* An individual or entity is an affiliate of an 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 who also control or have 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 (d)(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 stock 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 if the voting stock is so widely distributed that no effective control can be established.

Example for paragraph (d)(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/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 controlling principals of 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.

(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 (d)(3)(ii). A owns a controlling interest in Corporation X. A's sister-in-law, B, has a controlling interest in a paging geographic area authorization 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/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/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/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 (d)(5). If company B holds an option to purchase a controlling interest in company A, who holds a controlling interest in a paging geographic area authorization 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 (d)(5). If a large company, BigCo, holds 70% (70 of 100 outstanding shares) of the voting stock of company A, who holds a controlling interest in a paging geographic area authorization 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 (d)(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.

§ 22.225 Certifications, disclosures, records maintenance and audits.

(a) *Short-form applications: certifications and disclosure.* In addition to certifications and disclosures required by part 1, subpart Q, of this chapter, each applicant for a paging license which qualifies as a small business or consortium of small businesses shall append the following information as an exhibit to its FCC Form 175:

(1) The identity of the applicant's controlling principals and 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 § 22.223.

(b) *Long form applications: certifications and disclosure.* Each applicant submitting a long-form application for a paging geographic area authorization 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 § 22.223, for each of the following: the applicant, the applicant's affiliates, the applicant's controlling principals, 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 §§ 22.217 through 22.223, including the establishment of *de facto* and *de jure* control; such agreements and instruments include, but are not limited to, 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 § 22.223. Licensees (and their successors-in-interest) shall maintain such files for the term of the license. Applicants that do not obtain the license(s) for which they applied shall maintain such files until the grant of such license(s) is final, or one year from the date of the filing of their short-form application (FCC Form 175), whichever is earlier.

(d) *Audits.* (1) Applicants and licensees claiming eligibility as a small business or consortium of small businesses under §§ 22.217 through 22.223 shall be subject to audits by the Commission. 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 (FCC 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 paging 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, small business, consortium of small businesses, and gross revenues, used in this section are defined in § 22.223.

§ 22.227 Petitions to deny and limitations on settlements.

(a) Procedures regarding petitions to deny long-form applications in the paging service will be governed by §§ 1.2108(b) through 1.2108(d) of this chapter, § 22.130, and § 90.163.

(b) The consideration that an individual or an entity will be permitted to receive for agreeing to withdraw an application or a petition to deny will be limited by the provisions set forth in § 22.129, § 90.162, and § 1.2105(c) of this chapter.

11. Section 22.313 is amended by revising paragraphs (a)(4), (a)(5) and adding new paragraph (a)(6) to read as follows:

§ 22.313 Station identification.

* * * * *

(a) * * *

(4) Stations using Basic Exchange Telephone Radio Systems in the Rural Radiotelephone Service;

(5) Nationwide network paging stations operating on 931 MHz channels; or,

(6) Stations operating pursuant to paging geographic area authorizations.

* * * * *

12. Section 22.352 is amended by revising the introductory paragraph to read as follows:

§ 22.352 Protection from interference.

Public Mobile Service stations operating in accordance with FCC rules that provide technical channel assignment criteria for the radio service and channels involved, all other applicable FCC rules, and the terms and conditions of their authorizations are normally considered to be non-interfering. If the FCC determines, however, that interference that significantly interrupts or degrades a radio service is being caused, it may, in accordance with the provisions of sections 303(f) and 316 of the Communications Act of 1934, as amended, (47 U.S.C. 303(f), 316), require modifications to any Public

Mobile station as necessary to eliminate such interference.

* * * * *

13. A new § 22.503 is added, to read as follows:

§ 22.503 Paging geographic area authorizations.

The FCC considers applications for and issues paging geographic area authorizations in the Paging and Radiotelephone Service in accordance with the rules in this section. Each paging geographic area authorization contains conditions requiring compliance with paragraphs (h) and (i) of this section.

(a) *Channels.* The FCC may issue a paging geographic area authorization for any channel listed in § 22.531 of this part or for any channel pair listed in § 22.561 of this part.

(b) *Paging geographic areas.* The paging geographic areas are as follows:

(1) The Nationwide paging geographic area comprises the District of Columbia and all States, Territories and possessions of the United States of America.

(2) The Major Trading Areas (MTAs) as defined in the Rand McNally 1992 *Commercial Atlas & Marketing Guide*, 123rd Edition, at pages 38–39, with the following changes and additions:

(i) The Seattle paging geographic area does not include Alaska.

(ii) Alaska is a paging geographic area.

(iii) Guam and the Northern Mariana Islands (combined) are a paging geographic area.

(iv) Puerto Rico and the United States Virgin Islands (combined) are a paging geographic area.

(v) American Samoa is a paging geographic area.

(3) The Economic Areas (EAs), as defined by the Department of Commerce, Bureau of Economic Analysis.

(c) *Availability.* The FCC may determine whether to issue a paging geographic area authorization for any specific channel or channel pair in any specific paging geographic area. The FCC may replace existing site specific authorizations for facilities on a channel or channel pair located in a paging geographic area with a paging geographic area authorization for that channel or channel pair, if in its sole discretion, the FCC determines that the public interest would be served by such replacement.

(d) *Filing windows.* The FCC accepts applications for paging geographic area authorizations only during filing windows. The FCC issues Public Notices announcing in advance the dates of the filing windows, and the

specific paging geographic areas and channels for which applications may be accepted.

(e) *One grant per geographic area.* The FCC may grant one and only one application for a paging geographic area authorization for any specific channel or channel pair in any specific paging geographic area defined in paragraph (b) of this section. Selection from among mutually exclusive applications for a paging geographic area authorization will be made in accordance with the procedures in §§ 22.131 and 22.200 through 22.299. If after the selection process but prior to filing a "long form" application, a successful bidder decides to partition the paging geographic area, the FCC may require and accept multiple "long form" applications from the consortium members.

(f) *Exclusive right to expand.* During the term of a paging geographic area authorization, the FCC does not accept, from anyone other than the paging geographic area licensee, any major application for authorization to operate a facility that would serve unserved area within the paging geographic area specified in that paging geographic area authorization, on the channel specified in that paging geographic area authorization, unless any extension of the interfering contour of the proposed facility falls:

(1) Within the composite interfering contour of another licensee; or,

(2) Into unserved area and the paging geographic area licensee consents to such extension.

(g) *Subsequent applications not accepted.* During the term of a paging geographic area authorization, the FCC does not accept any application for authorization relating to a facility that is or would be located within the paging geographic area specified in that paging geographic area authorization, on the channel specified in that paging geographic area authorization, except in the following situations:

(1) FCC grant of an application authorizing the construction of the facility could have a significant environmental effect as defined by § 1.1307 of this chapter. See § 22.115(a)(5).

(2) Specific international coordination procedures are required, prior to assignment of a channel to the facility, pursuant to a treaty or other agreement between the United States government and the government of Canada or Mexico. See § 22.169.

(3) The paging geographic area licensee or another licensee of a system within the paging geographic area applies to assign its authorization or for FCC consent to a transfer of control.

(h) *Adjacent geographic area coordination required.* Before constructing a facility for which the interfering contour (as defined in § 22.537 or § 22.567, as appropriate for the channel involved) would extend into another paging geographic area, a paging geographic area licensee must obtain the consent of the relevant co-channel paging geographic area licensee, if any, into whose area the interfering contour would extend. In the event that there is no co-channel paging geographic area licensee from whom to obtain consent in the area into which the interfering contour would extend, the facility may be constructed and operated subject to the condition that, at such time as the FCC issues a paging geographic area license for that adjacent geographic area, either consent must be obtained or the facility modified or eliminated such that the interfering contour no longer extends into the adjacent geographic area.

(i) *Protection of existing service.* All facilities constructed and operated pursuant to a paging geographic area authorization must provide co-channel interference protection in accordance with § 22.537 or § 22.567, as appropriate for the channel involved, to all co-channel facilities of other licensees within the paging geographic area that were authorized on May 12, 1997 and have remained authorized continuously since that date.

(j) *Site location restriction.* The transmitting antenna of each facility constructed and operated pursuant to a paging geographic area authorization must be located within the paging geographic area specified in the authorization.

(k) *Coverage requirements.* Failure by a paging geographic area licensee to meet either of the coverage requirements in paragraphs (k)(1) and (k)(2) of this section, or alternatively, the substantial service requirement in paragraph (k)(3) of this section, may result in automatic termination or non-renewal of a paging geographic area license. For the purpose of this paragraph, to "cover" area means to include geographic area within the composite of the service contour(s) determined by the methods of §§ 22.537 or 22.567, as appropriate for the particular channel involved. Licensees may determine the population of geographic areas included within their service contours using either the 1990 census or the 2000 census, but not both.

(1) No later than three years after the initial grant of a paging geographic area authorization, the licensee must construct or otherwise acquire and operate sufficient facilities to cover one third of the population in the paging

geographic area. The licensee must notify the FCC (FCC Form 489), no later than 15 days after the end of the three year period, either that it has satisfied this requirement or that it plans to satisfy the alternative requirement to provide substantial service in accordance with paragraph (k)(3) of this section.

(2) No later than five years after the initial grant of a paging geographic area authorization, the licensee must construct or otherwise acquire and operate sufficient facilities to cover two thirds of the population in the paging geographic area. The licensee must notify the FCC (FCC Form 489), no later than 15 days after the end of the five year period, either that it has satisfied this requirement or that it has satisfied the alternative requirement to provide substantial service in accordance with paragraph (k)(3) of this section.

(3) As an alternative to the coverage requirements of paragraphs (k)(1) and (k)(2) of this section, the paging geographic area licensee may demonstrate that, no later than five years after the initial grant of its paging geographic area authorization, it provides substantial service to the paging geographic area. "Substantial service" means service that is sound, favorable, and substantially above a level of mediocre service that would barely warrant renewal.

14. Section 22.507 is revised to read as follows:

§ 22.507 Number of transmitters per station.

This section concerns the number of transmitters licensed under each station authorization in the Paging and Radiotelephone Service, other than paging geographic area authorizations.

(a) *Operationally related transmitters.* Each station must have at least one transmitter. There is no limit to the number of transmitters that a station may comprise. However, transmitters within a station should be operationally related and/or should serve the same general geographical area. Operationally related transmitters are those that operate together as a system (e.g., trunked systems, simulcast systems), rather than independently.

(b) *Split of large systems.* The FCC may split wide-area systems into two or more stations for administrative convenience. Except for nationwide paging and other operationally related transmitters, transmitters that are widely separated geographically are not licensed under a single authorization.

(c) *Consolidation of separate stations.* The FCC may consolidate separately authorized stations upon request (FCC

Form 600) of the licensee, if appropriate under paragraph (a) of this section.

(d) *Replacement of site-by-site authorizations with single authorization.* After a paging geographic area authorization for a channel has been issued, the FCC may, on its own motion, replace the authorization(s) of any other licensee (for facilities located within that paging geographic area on that channel) with a single replacement authorization.

15. Section 22.529 is revised to read as follows:

§ 22.529 Application requirements for the Paging and Radiotelephone Service.

In addition to information required by Subparts B and D of this part, applications for authorization in the Paging and Radiotelephone Service must contain the applicable information and data described in this section.

(a) *Administrative information.* The following information, associated with Form FCC 600, Schedule A, is required as indicated. Each application of any type, including applications for paging geographic area authorizations, must contain one and only one Schedule A.

(1) The purpose of the filing is required for each application of any type.

(2) The geographic area designator, channel and geographic area name are required only for each application for a paging geographic area authorization.

(3) The FCC control point number, if any, the location (street address, city or town, state), the telephone number and an indication of the desired database action are required only for each application proposing to add or delete a control point.

(4) The FCC location number, file number and location (street address, city or town, state) of authorized facilities that have not been constructed are required only for each application requesting an extension of time to construct those facilities.

(b) *Technical data.* The following data, associated with FCC Form 600, Schedule B, are required as indicated for each application that is not an application for a paging geographic area authorization. Applications for a paging geographic area authorization must not contain Schedule B. Other type of applications may contain as many Schedule Bs as are necessary for the intended purpose.

(1) For each transmitting antenna site to be added, deleted or modified, the following are required: An indication of the desired database action, the FCC location number, if any, the street address or other description of the transmitting antenna site, the city,

county and state, the geographical coordinates (latitude and longitude), correct to ± 1 second, of the transmitting antenna site (NAD 27 required, NAD 83 optional), and in the case of a proposed relocation of a transmitting antenna, the FCC location number and geographical coordinates, correct to ± 1 second, of the current transmitting antenna site, and an indication of the datum (NAD 27 or NAD 83) to which the geographical coordinates of the current location are referenced.

(2) For each transmitting antenna site to be added, deleted or modified, the following supplementary information is required: An indication as to whether or not the transmitting antenna site is within 200 kilometers (124 miles) of the U.S.-Mexico border, and an indication as to whether or not the transmitting antenna site is North of Line A or East of Line C. Line A and Line C are defined in § 2.1 of this chapter. For each adjacent geographic area within 200 kilometers (124 miles) of each transmitting antenna site to be added, deleted or modified, the geographic area designator and name, and the shortest distance (in kilometers) to the boundary of that geographic area.

(3) For each antenna to be added, deleted or modified, the following is required: An indication of the desired database action, an indication of whether the antenna already exists or is merely proposed, the FCC antenna number, if any, the type of antenna (e.g., collinear, Yagi, half-wave, corner reflector, panel, etc.), the name of the antenna manufacturer and the model number of the antenna, the height (in meters) above average terrain of the center of radiation of the antenna, the beamwidth of the main lobe of the horizontal radiation pattern of the electric field of the antenna, the height (in meters) to the tip of the antenna above ground level, a polar plot of the horizontal gain pattern of the antenna, the antenna gain in the maximum lobe and the electric field polarization of the wave emitted by the antenna when installed as proposed.

(i) For each transmitter to be added, deleted or modified, the following is required: the FCC transmitter number, if any, an indication of the desired database action, the center frequency of the requested channel, the transmitter classification (e.g. base, fixed mobile), the designator for any non-standard emission type to be used, including bandwidth and modulation type, and the maximum effective radiated power.

(ii) For each of the eight cardinal radials, the antenna height above the average elevation along the radial, and

the effective radiated power of each transmitter in the direction of the radial.

(iii) For each transmitter proposed to transmit on a channel reserved for point-to-multipoint operation involving transmission to four or more points of communications (i.e. base transmitters), the following is required for each point of communication: an indication of the desired database action, the FCC transmitter number or other key indicator (e.g., I, II, III, IV), the location (city or town, state), and the geographical coordinates (latitude and longitude, NAD 27).

16. Section 22.531 is amended by revising the preceding centered heading, the section heading and introductory text, and adding a new paragraph (f), to read as follows:

Paging Operation

§ 22.531 Channels for paging operation.

The following channels are allocated for assignment to base transmitters that provide paging service, either individually or collectively under a paging geographic area authorization. Unless otherwise indicated, all channels have a bandwidth of 20 kHz and are designated by their center frequencies in MegaHertz.

* * * * *

(f) For the purpose of issuing paging geographic area authorizations, the paging geographic areas used for the UHF channels are the MTAs (see § 22.503(b)(2)), and the paging geographic areas used for the low and high VHF channels are the EAs (see § 22.503(b)(3)).

17. Section 22.539 is amended by revising paragraph (e) to read as follows:

§ 22.539 Additional channel policies.

* * * * *

(e) *Additional transmitters on same channel.* Notwithstanding other provisions of this section, the following applications are not considered to be requests for an additional paging channel:

(1) Applications for transmitters to be located in the same geographic area as an authorized station controlled by the applicant, and to operate on the same paging channel;

(2) Applications for transmitters to be located within a paging geographic area for which the applicant holds the paging geographic area authorization for the requested channel; and,

(3) Applications for paging geographic area authorizations.

* * * * *

Section 22.551 is revised to read as follows:

§ 22.551 Nationwide network paging service.

The rules in this section govern the application for and provision of nationwide network paging service on the channels reserved specifically for such service in § 22.531(b).

(a) *Nationwide network providers; organizers.* If and when a nationwide network paging channel becomes available for assignment, the FCC will issue a Public Notice inviting applications from eligibles seeking to provide or organize a nationwide network paging service. The Public Notice will provide complete details regarding application requirements and procedures.

(b) *Licensing.* The FCC may issue a paging geographic area authorization to the nationwide network provider or organizer. All transmissions of nationwide network messages on the channels reserved for such service in § 22.531(b) are authorized solely under the authorization(s) of the nationwide network provider or organizer, notwithstanding whether or not the messages pass through facilities owned, operated or licensed to affiliated local carriers.

Section 22.559 is amended by revising the heading and introductory text to read as follows:

§ 22.559 Paging application requirements.

In addition to information required by Subparts B and D and § 22.529, applications for authorization to operate a paging transmitter on the channels listed in § 22.531, other than applications for a paging geographic area authorization, must contain the applicable supplementary information described in this section.

* * * * *

Section 22.561 is amended by revising the introductory text to read as follows:

§ 22.561 Channels for one-way or two-way mobile operation.

The following channels are allocated for paired assignment to transmitters that provide (or support other transmitters that provide) one-way or two-way public land mobile service, either individually or collectively under a paging geographic area authorization. The paging geographic areas used for these channels are the EAs (see § 22.503(b)(3)). These channels may be assigned for use by mobile or base transmitters as indicated, and or by fixed transmitters (including control, repeater or other fixed transmitters). The mobile channels may also be assigned for use by base or fixed transmitters under certain circumstances (see § 22.567(h)). Unless otherwise indicated, all channels have a

bandwidth of 20 kHz and are designated by their center frequencies in MegaHertz.

* * * * *

Section 22.569 is amended by revising paragraph (d) to read as follows:

§ 22.569 Additional channel policies.

* * * * *

(d) *Additional transmitters on same channel.* Notwithstanding other provisions of this section, the following applications are not considered to be requests for an additional channel:

(1) Applications for transmitters to be located in the same geographic area as an authorized station controlled by the applicant, and to operate on the same paging channel;

(2) Applications for transmitters to be located within a paging geographic area for which the applicant holds the paging geographic area authorization for the requested channel; and,

(3) Applications for paging geographic area authorizations.

* * * * *

Section 22.589 is amended by revising the introductory text to read as follows:

§ 22.589 One-way or two-way application requirements.

In addition to information required by subparts B and D and § 22.529, applications for authorization to operate a paging transmitter on the channels listed in § 22.531, other than applications for a paging geographic area authorization, must contain the applicable supplementary information described in this section.

* * * * *

§ 22.717 [Amended]

Section 22.717 is amended by removing paragraph (c).

A new § 22.721 is added to read as follows:

§ 22.721 Geographic area authorizations.

Eligible persons may apply for a paging geographic area authorization in the Rural Radiotelephone Service, on the channel pairs listed in § 22.725, by following the procedures and requirements set forth in § 22.503 for paging geographic area authorizations.

25. A new § 22.723 is added to read as follows:

§ 22.723 Secondary site-by-site authorizations.

Authorizations for new facilities (including new sites and additional channel pairs for existing sites) in the Rural Radiotelephone Service (including BETRS facilities) may be granted after May 12, 1997 only on the condition that such authorizations shall be secondary to any existing or future co-channel paging geographic area

authorization in the Paging and Radiotelephone Service or the Rural Radiotelephone Service. If the paging geographic area licensee notifies the Rural Radiotelephone Service licensee that operation of a co-channel secondary facility must be discontinued because it may cause interference to existing or planned facilities, the Rural Radiotelephone Service licensee must discontinue operation of that facility on the particular channel pair involved no later than six months after such notice.

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

1. The authority citation for part 90 continues to read as follows:

PART 90—PRIVATE LAND MOBILE RADIO SERVICES

Authority: Sec. 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 90.162 is amended by adding paragraph (f) to read as follows:

§ 90.162 Agreements to dismiss applications, amendments, or pleadings

* * * * *

(f) Notwithstanding the provisions of this section, any payments made or received in exchange for withdrawing a short-form application for an FCC authorization awarded through competitive bidding shall be subject to the restrictions set forth in section § 1.2105(c) of this chapter.

3. A new § 90.493 is added to read as follows:

§ 90.493 Paging operations on exclusive channels in the 929–930 MHz band.

Paging operations on the exclusive channels in the 929–930 MHz band are subject to the rules set forth in this section.

(a) *Exclusive channels.* The center frequencies of the channels in the 929–930 MHz band that may be assigned on an exclusive basis are as follows: 929.0125, 929.1125, 929.1375, 929.1875, 929.2125, 929.2375, 929.2875, 929.3125, 929.3375, 929.3625, 929.3875, 929.4125, 929.4375, 929.4625, 929.4875, 929.5125, 929.5375, 929.5625, 929.5875, 929.6125, 929.6375, 929.6625, 929.6875, 929.7125, 929.7375, 929.7625, 929.7875, 929.8125, 929.8375, 929.8625, 929.8875, 929.9125, 929.9375, 929.9625, and 929.9875 MHz.

(b) *Part 22 licensing, construction and operation rules apply.* Licensing, construction and operation of paging stations on the exclusive channels in the 929–930 MHz band are subject to the application filing, licensing procedure, auction procedure, construction, operation and notification rules and requirements that are set forth in part 22

of this chapter for paging stations operating in the 931–932 MHz band, instead of procedures elsewhere in this part.

(c) *Part 22 power limits apply; type acceptance required.* Paging operations on the exclusive channels in the 929–930 MHz band are subject to the transmitting power limits set forth in part 22 of this chapter for paging stations operating in the 931–932 MHz band, instead of power limits elsewhere in this part. Transmitters used on the exclusive channels in the 929–930 MHz band must be of a type accepted under either part 22 of this chapter or this part (or both).

4. Section 90.494 is amended by revising the heading, paragraphs (a), (f) and (g), to read as follows:

§ 90.494 Paging operations on shared channels in the 929–930 MHz band.

(a) This section applies to licensing of paging stations on the shared (non-exclusive) channels in the 929–930 MHz band. The center frequencies of these channels are listed in paragraph (b) of this section.

* * * * *

(f) The effective radiated power for base stations providing paging service on the shared channels must not exceed 3500 Watts.

(g) Licenses may be granted on these shared paging channels only for expansion (addition of new sites or

relocation of existing sites) or other modification, assignment or transfer of control of existing, licensed private (including Special Emergency Radio Service) or commercial paging systems, and for new private (including Special Emergency Radio Service), internal-use paging systems. Any application for authority to operate a new commercial paging system on any of these shared channels is unacceptable for filing.

§ 90.495 [Removed]

5. Section 90.495 is removed.

§ 90.496 [Removed]

6. Section 90.496 is removed.

[FR Doc. 97–6092 Filed 3–11–97; 8:45 am]

BILLING CODE 6712–01–P