FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 90

[PR Docket No. 93–144; FCC 97–223]

Future Development of SMR Systems in the 800 MHz Frequency Band

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This *Second Report and Order* resolves issues raised in the *Second Further Notice of Proposed Rulemaking* and completes the process by establishing technical and operational rules for the lower 230 800 MHz channels. Specifically, this order establishes the U.S. Department of Commerce Bureau of Economic Analysis Economic Areas (EAs) as the relevant geographic service area for licensing these channels and defines the rights of incumbent SMR licensees already operating on the lower 230 channels. It also provides further details concerning the mandatory relocation rules adopted in the *800 MHz Report and Order,* and establishes rules for partitioning and disaggregation of EA licenses. Coupled with the rules adopted in the *800 MHz Report and Order,* the decisions reached in this order complete the process of converting to new rules for the 800 MHz SMR service and enable us to commence geographic area licensing of the service. These rule revisions not only eliminate a cumbersome and outdated regulatory regime, they will promote competition and provide SMR licensees with flexibility to deploy multiple technologies in response to a changing marketplace, and they further the Congressionally mandated goal of establishing regulatory symmetry between 800 MHz SMR licensees and other competing providers of Commercial Mobile Radio Services (CMRS).

EFFECTIVE DATE: September 29, 1997.

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SUPPLEMENTARY INFORMATION: This *Second Report and Order* in PR Docket No. 93–144, GN Docket No. 93–252, and PP Docket No. 9–253, adopted June 23, 1997, and released July 10, 1997, is available for inspection and copying during normal business hours in the FCC Dockets Branch, Room 230, 1919 M Street, NW., Washington, DC. The complete text may be purchased from the Commission's copy contractor, International Transcription Service, Inc., 2100 M Street, NW., Suite 140, Washington, DC 20037 (telephone (202) 857–3800).

I. Background

1. As described in the *800 MHz Report and Order* in PR Docket 93–144, 61 FR 6138 (February 16, 1996), the Commission formerly used a site-by-site licensing approach for 800 MHz SMR channels, which were primarily used to provide dispatch radio service. In recent years, however, a number of SMR licensees have expanded the geographic scope of their services, aggregated channels, and developed digital networks to enable them to provide a type of service comparable to that provided by cellular and Personal Communications Service (PCS) operators. This trend led us to rethink our site-by-site licensing procedures, which were very cumbersome for systems comprised of several hundred sites because licensees were required to receive individual Commission approval for each site. We were concerned that site-by-site licensing procedures also impaired an SMR licensee's ability to respond to changing market conditions and consumer demand. We concluded that granting licenses through waivers and other case-by-case mechanisms was administratively burdensome and had resulted in a licensing regime that lacked uniformity. Accordingly, we initiated this proceeding to transition to a geographic area licensing approach for the 800 MHz SMR service. At the same time, we emphasized the need to consider the interests of incumbent SMR licensees, many of whom continue to provide traditional dispatch service and do not seek to develop services comparable to cellular or PCS.

2. In the *800 MHz Report and Order,* the Commission established an EA-based licensing procedure for the upper 200 channels in the 800 MHz SMR band. That procedure will enable an EA licensee to, among other things, construct facilities at any available site within its EA and to add, remove or relocate sites within the EA without prior Commission approval. The new rules also give the EA licensee flexibility to determine the channelization of available spectrum within the authorized channel block, the right to use any spectrum within its EA block that is recovered by the Commission from an incumbent licensee (*i.e.,* the incumbent's license is terminated for some reason), and establishes a presumption that assignments from incumbents to the relevant EA licensee are in the public interest. In addition, the *800 MHz Report and Order* adopted a 10-year license term, and a five-year construction period with three-year and five-year coverage requirements for EA licensees on the upper 200 channels. We also created a mechanism for relocation of incumbent licensees on the upper 200 channels, delineated the parameters of unrelocated incumbents' expansion rights, and reallocated the former General Category channels to the 800 MHz SMR service. Finally, we established competitive bidding procedures for 525 EA licenses in the upper 200 channel block.

3. In the *Second Further Notice of Proposed Rulemaking,* in PP Docket 93–253, 61 FR 6212 (February 16, 1996), we sought comment on additional service rules for the upper 200 channels, and on instituting geographic area licensing for the lower 230 800 MHz SMR channels. With respect to the upper 200 channels, we asked commenters to address whether EA licensees should be permitted to partition and disaggregate their spectrum blocks. We also proposed additional procedures and clarifications regarding mandatory relocation of incumbent licensees from the upper 200 channels. With respect to the lower 230 channels, we proposed geographic area licensing procedures and auction rules similar to those adopted for the upper 200 channels. We declined to propose a mandatory relocation plan for incumbents on the lower 230 channels, however, and we proposed to adopt operating parameters for incumbents that would give them a reasonable opportunity to expand their businesses. We further proposed to establish competitive bidding rules for licensing the General Category and lower 80 channels with special provisions to encourage participation by designated entities in the auction of that spectrum.

4. Sixty-five parties filed initial comments and fifty-eight parties filed reply comments in response to the *Second Further Notice of Proposed Rulemaking.* Numerous written ex parte presentations also have supplemented the record. Notably, in reply comments, AMTA, SMR WON and Nextel offered a proposal (''Industry Proposal'') for licensing the lower 230 channels through a pre-auction process that would allow incumbents to obtain rights to unlicensed spectrum through settlement agreements with one another. The parties submit that the Industry Proposal represents a consensus of the SMR industry and takes into account

the interests of wide-area licensees as well as site-by-site incumbents.

II. Discussion

A. Service Rules for the Lower 230 Channels

1. Geographic Area Licensing

5. We adopt geographic area licensing for the lower 230 channels. Geographic area licensing will increase the flexibility afforded to licensees to manage their spectrum, and will reduce administrative burdens and operating costs by allowing licensees to modify, move, or add to their facilities within specified geographic areas without need for prior Commission approval. Geographic area licensing will also ensure that licensees on these channels have operational flexibility similar to that afforded to SMR licensees on the upper 200 channels as well as to cellular and PCS licensees.

6. We reject the view that the heavy use of the lower 230 channels by incumbents renders geographic area licensing impractical. To the contrary, incumbents benefit from geographic area licensing because it will make it far easier for them to fill in gaps in their current systems, make modifications to meet shifting market demands, and expand into unserved areas. Even where a licensee's ability to expand is limited by the presence of adjacent systems, geographic licensing is preferable to site-specific licensing because it affords the same degree of protection from interference but allows licensees greater flexibility within their existing service areas. We also do not agree with the view that the prospective relocation of SMR incumbents from the upper 200 channels to the lower 230 is an obstacle to geographic licensing. Upon moving to the lower 230 channels, relocated licensees will be able to take advantage of the flexibility in our rules to the same extent as other licensees.

7. We also disagree with UTC and other commenters who contend that geographic area licensing is inappropriate because of the presence of non-SMRs on the lower 230 channels. While non-SMR operators may not require geographic licenses to operate systems designed for internal communications, geographic area licensing remains the most efficient and logical licensing approach for the majority of licensees in the band. We are not persuaded that we should forego the benefits of geographic licensing to accommodate the interests of a small minority of systems. In any event, systems that are not SMR systems will remain fully protected under our geographic licensing rules. In addition, non-SMRs can obtain spectrum to suit their internal communications needs by forming joint bidding consortia or by entering into partitioning and disaggregation agreements with EA licensees.

2. Service Areas

8. We adopt EAs as the basis for geographic licensing of the lower 230 channels. EAs are generally recognized by the SMR industry as being optimally sized for geographic licensing in this band, because EAs approximate the coverage of most SMR systems except the largest wide-area operations. As we stated in the *800 MHz Report and Order,* EAs will encourage a diverse group of prospective bidders, because they are small enough that licensees seeking to serve small markets can bid on areas they wish to serve, but are large enough that they can also form the basis for wide-area systems. By encouraging more diverse bidders in the auction, we believe we will fulfill the mandate of section 309(j)(3)(B) & (4)(C) of the Communications Act to disseminate licenses among a wide variety of applicants and to ensure economic opportunities for a wide variety of applicants. In addition, having the same geographic area licenses for the upper 200 and lower 230 channels makes it easier for licensees to develop systems that use both upper 200 and lower 230 channels in a common licensing area.

3. Channel Blocks

a. Lower 80 Channels

9. We adopt our proposal to license the lower 80 channels in five-channel blocks. The non-contiguous nature of these channels makes it impractical to impose any other channel plan. This approach will also provide opportunities for incumbents and applicants that base their systems on trunking of non-contiguous channels, in keeping with the mandate of section 309(j)(4)(C) of the Communications Act to make equitable distribution of licenses and provide economic opportunities for a wide variety of entities. Furthermore, we find that this will be the less disruptive method for smaller incumbent licensees since they have acquired their channels in five channel increments. Therefore, we will license the lower 80 channels in sixteen five-channel blocks as set forth in § 90.617(d) of our rules.

b. General Category Channels

10. We understand the needs of those providers who want contiguous spectrum to implement frequency re-use technology, and those that want non-contiguous spectrum because the spectrum is highly encumbered, or because it suits their current technology. If we were to adopt very large contiguous blocks of spectrum we would preclude smaller entities from participating in the auction because presumably bigger blocks of spectrum would require larger bids to acquire than smaller blocks of spectrum. On the other hand, if we were to auction EAs on a channel-by-channel basis, as suggested by Fresno, it would be difficult to accumulate contiguous spectrum and would require all licensees interested in accumulating spectrum to keep track of 150 auctions at one time. If one entity wanted to acquire five channel blocks in three EAs, the licensee would have to potentially keep track of 450 simultaneous auctions.

11. To accommodate licensees who want contiguous as well as those licensees that want large blocks of spectrum, we will adopt the Industry Proposal and allot three contiguous 50-channel blocks. We expect a significant amount of the former General Category channels to continue to be used for traditional SMR systems and retaining the contiguity of these channels will permit alternative offerings that may require multiple, contiguous channels. In addition, we find that allotting 50 channel blocks will allow bidders to aggregate even larger contiguous blocks of spectrum. We find that adopting such a channel plan strikes a balance between licensees with different spectrum allocation needs and allows licensees with different goals to pursue spectrum in the General Category. Once again, this fulfills the mandate of section 309(j)(4)(C) of the Communications Act that we distribute licenses in such a way so as to ensure economic opportunities for a wide variety of entities. While we do not adopt Fresno's or Sierra's proposals, small system licensees will have the opportunity to acquire smaller amounts of spectrum compatible with their existing technology through the newly-created disaggregation rules we adopt herein. Meanwhile licensees seeking to deploy contiguous spectrum technology will have the opportunity to acquire a 100 or 150 channel block of contiguous spectrum. Adopting this channel plan addresses the competing demands of trunked systems and wide-area systems that require contiguous spectrum.

4. Channel Aggregation Limits

12. We conclude that no aggregation limit is necessary for the lower 230 channels. In both the *CMRS Third Report and Order* and the *800 MHz*

Report and Order, we observed that the 800 MHz SMR service is just one of many competitive services in the CMRS marketplace. If a single licensee were to acquire all 230 channels in a single market, it would hold an aggregated 11.5 MHz of spectrum, not all of which would be contiguous. Even if a single licensee combined this spectrum with spectrum from the upper 200 channels, it would fall well short of the 45 MHz spectrum cap, and would have less spectrum than PCS and cellular providers in the same market. The total potential aggregation of spectrum in the 800 MHz SMR service, combined with the General Category, is 21.5 MHz of spectrum, not all of which is contiguous. We do not believe that this level of aggregation would enable an SMR licensee to have an anticompetitive effect on the CMRS market. Moreover, we are concerned that limiting the ability of SMR providers to aggregate spectrum could handicap their efforts to compete with other services. As a practical matter, the presence of numerous incumbents on the lower 230 channels reduces the likelihood that significant aggregation of this spectrum will occur. However, we conclude that the marketplace, not our rules, should determine whether these channels will be used on an aggregated or disaggregated basis.

13. We also decline to limit SMR applicants on the lower 230 channels to obtaining one channel block at a time. This is inconsistent with our approach to licensing of other CMRS, including cellular, PCS, 900 MHz SMR, and the upper 200 channels in the 800 MHz band. In addition, the use of competitive bidding to resolve mutually exclusive geographic area licenses on the lower 230 channels provides a strong incentive for licenses to utilize the channels.

5. Licensing in the Mexican and Canadian Border Areas

14. In the *800 MHz Report and Order,* we acknowledged that in the Canadian and Mexican border areas, some upper 200 channels would not be available or would be subject to power and height restrictions. Nevertheless, we did not distinguish between border and non-border areas for the upper 200 channels in our EA licensing plan, because we concluded that EA applicants could best determine the effect of such restrictions on the value of the spectrum. We adopt the same approach for the lower 230 channels as well. Thus, EA licensees on the lower 230 channels of EAs that are adjacent to Canada or Mexico will be entitled to use any available channels within their spectrum blocks, except where use of such channels is restricted by international agreement.

15. In addition, we clarify that SMR and General Category channels assigned to non-SMR pools in the border areas are not available for use by EA licensees in those regions. Thus, non-SMR licensees operating on those channels in border areas may continue to operate and will not be subject to relocation. Moreover, EA licensees must afford full interference protection to non-SMR licensees operating on these channels. We admonish potential applicants for EA licenses to carefully evaluate these limitations on spectrum availability when determining their bidding strategies for blocks of spectrum adjacent to the Mexican and Canadian borders.

16. Finally, we note that there are some non-SMR channels in the non-border areas that in the Canadian and Mexican border areas are available soley to SMR eligibles. These channels will be associated with specific SMR and General Category spectrum blocks in these border areas. Prospective bidders on EAs near the Canadian and Mexican borders should be aware that these channels, which are not available to them anywhere else except in the border regions, will be assigned for their use in the Canadian and Mexican border regions. EA licensees must also afford full interference protection to non-SMR licensees operating in adjacent areas on these channels.

6. Construction and Coverage Requirements for the Lower 230 Channels

a. Requirements for EA Licensees

17. We adopt the construction requirements proposed in the *Second Further Notice of Proposed Rulemaking* for the lower 230 channels. We believe that adoption of such flexible construction requirements will enhance the rapid deployment of new technologies and services and will expedite service to rural areas. We disagree with those commenters that contend that adoption of stricter construction requirements for the lower 230 channels will better serve the public interest. We find that more flexible construction requirements will allow EA licensees in the encumbered lower 230 channels to respond to market demands for service and thus eliminate the need for an EA licensee to meet construction requirements based on population alone. We disagree with those commenters that believe that strict construction requirements are necessary to deter speculation and warehousing. We believe that, by participating in the auction, licensees will have shown that they are genuinely interested in acquiring spectrum to utilize and not warehouse. At the same time, we continue to believe that licensees should be held to some type of construction requirement in order to encourage expedited construction and foster service to rural areas. Therefore, EA licensees in the lower 230 channel blocks, just as their counterparts in the upper 200 channels, will be required to provide coverage to one-third of the population within three years of the license grant, and to two-thirds of the population within five years of the license grant. However, in the alternative, EA licensees in the lower 230 channel block may provide ''substantial service'' to the geographic license area within five years of license grant. ''Substantial service'' will be defined as service that is sound, favorable, and substantially above a level of mediocre service, which would barely warrant renewal. For example, a licensee may demonstrate that it is providing a technologically innovative service or that it is providing service to unserved or underserved areas. This flexibility will allow EA licensees to expedite service to rural areas that may have a higher service demand than a heavily populated urban area with less demand. As we proposed in the *Second Further Notice of Proposed Rulemaking,* we will not adopt a channel usage requirement for licensees in the lower 230 channel block. In addition, we decline to adopt PCIA's proposal to require that construction requirements be met on a ''per-channel'' basis. We believe EA licensees should have the flexibility to respond to market-based demands for service and that adopting a ''per-channel'' construction requirement would greatly interfere with licensees' ability to respond to such demands.

18. The failure to meet these performance requirements will result in automatic termination of the geographic area license. This is consistent with our rules for broadband PCS, 900 MHz SMR services, Multipoint Distribution Services (MDS), and most recently for paging. We will individually license any incumbent facilities that were authorized, constructed, and operating at the time of termination of the geographic area license.

b. Requirements for Site-Based Licensees

19. As a result of our decision to convert to EA-based licensing of the lower 230 channels, the only instances in which future site-based applications will be necessary are those few instances where site approval continues

to be required, *e.g.*, for sites at environmentally sensitive locations that require Commission approval under NEPA. In such instances, we will require incumbent licensees to construct facilities and commence service within 12 months in accordance with our proposal. EA licensees that are required to seek separate approval for environmentally sensitive locations within their geographic areas will be permitted to include those sites in their geographic area license and will not be subject to the 12 month construction deadline.

20. We also take this opportunity to clarify two points. First, we note the applicability of the 12-month construction requirement to incumbents on the lower 230 channels holding site-based authorizations with construction periods that have not yet expired. In general, SMR licensees with site specific authorizations have 12 months from the grant date to complete construction and commence service, unless the authorization is part of a system that has received an extended implementation grant. Pursuant to the new rules we adopt herein, interior sites added within an incumbent's existing footprint will not be subject to construction requirements because they do not require separate authorizations.

c. Transfers and Assignments of Unconstructed Site-Specific Licenses

21. We agree with SMR WON and Digital that temporary waiver of our restrictions against assignment or transfer of unconstructed site-specific SMR licenses would facilitate the relocation process and geographic licensing. We believe that there is good cause to support waiver of the rule in this case. The special circumstances that exist with this innovative approach to licensing support temporary waiver of § 90.609(b) of the rules. That rule was designed to prevent trafficking in site-specific licenses and spectrum warehousing by taking back unused spectrum. However, in this proceeding, we seek to encourage rapid migration of incumbents, preferably through voluntary negotiations, from the upper 200 channels to lower band 800 MHz channels. If we were to rigidly apply § 90.609(b) in such circumstances, licensees holding unconstructed site-specific licenses on the lower channels would not be able to transfer their authorizations for relocation purposes unless they had constructed them first. Therefore, it is more efficient to waive the rule and allow licensees who have unconstructed lower channels suitable for relocation of upper channel incumbents to transfer them without prior construction, so that the relocated licensees can construct facilities suitable to their needs.

22. In addition, relaxing our transfer restrictions facilitates geographic licensing of the lower channels themselves. We expect that in many instances, incumbents on the lower channels will bid for EA licenses on those channels to consolidate their existing holdings. However, because we are adopting new channel blocks for geographic licensing, particularly in the General Category, incumbents may find it advantageous to their bidding strategy to modify their holdings in advance of the auction through transfers or channel swaps. In addition, allowing transfer of unconstructed as well as constructed spectrum provides an opportunity for new entrants to position themselves for the auction by acquiring existing licenses in areas where they intend to bid.

23. Therefore, to facilitate relocation and geographic licensing, we will temporarily waive the prohibition on assignment or transfer of unconstructed authorizations on the lower 80 and General Category channels. Thus, licensees on these channels may apply to transfer or assign their authorizations regardless of construction. Where unconstructed spectrum is transferred, the assignee or transferee will be subject to the same construction deadline as the transferor/assignor. We will, however, allow licensees with extended implementation authority to apply their system-wide construction deadlines to licenses acquired by transfer that are within their pre-existing footprint. This waiver will remain in effect until six months after the conclusion of the upper band EA auction. We believe this period will provide sufficient time for licensees to identify suitable lower band spectrum for transfer as part of voluntary relocation agreements, and for potential bidders in the lower band auction to negotiate transfers as part of their pre-auction strategy.

24. We will extend this waiver to all holders of unconstructed spectrum on the lower 80 and General Category channels, including both SMR and non-SMR licensees. We will also allow these licensees to transfer or assign their authorizations to any eligible entity. Although Nextel argues that such transfers should be allowed only if they are between wide-area SMR incumbents and EA licensees, we believe such restrictions are unnecessary and unduly restrictive. First, we see no reason to allow only wide-area licensees to transfer unconstructed spectrum. The purpose of this policy is to facilitate the rapid assignment of all lower band spectrum—not just spectrum held by wide-area licensees—to those who are most likely to use it. Similarly, we will not restrict holders of unconstructed spectrum to dealing with EA licensees. Although we expect that many transfers will in fact be to EA licensees, we do not believe that incumbents should be prevented from negotiating transfers to other parties who value the spectrum. In any event, such a restriction would prevent incumbents from negotiating transfers prior to the conclusion of the auction because EA winners will not be identified until then.

25. We recognize that relaxing transfer restrictions makes it more difficult to take action against speculators who have not constructed facilities on their spectrum but instead have sought to warehouse spectrum for profit. However, we believe that the benefits of this approach for relocation and future geographic licensing in this service outweigh the potential cost. First, not all 800 MHz licensees who have failed to construct are necessarily speculators: our application freeze and uncertainty caused by the lengthy pendency of this proceeding have also made it difficult for legitimate licensees to develop their systems. Moreover, even in the case of licensees who acquired spectrum through application mills, allowing unconstructed spectrum to be transferred rapidly and efficiently to those who value it most allows development of the service to proceed and provides potential benefits to prospective bidders in the auction. This approach will also not compromise the objectives of geographic area licensing: because only currently licensed spectrum can be transferred, there is no impact on unlicensed spectrum that will be awarded to EA licensees. In addition, EA licensees are not obliged by this policy to negotiate with incumbents they believe have no intention of constructing facilities; if an incumbent fails to construct and commence operations within the period required by its license, the unused spectrum reverts to the EA licensee.

B. Rights and Obligations of EA Licensees in the Lower 230 Channels

1. Operational Restrictions

26. Except for using the 18 dBμV/m contour to define the interference protection obligations of EA licensees with respect to lower 230 incumbents (discussed in § IV–B–3–b, *infra.*), we will apply the same operational rules to EA licensees on the lower 230 channels that are applicable to the upper 200 channels. No commenter has suggested that EA licensees on the lower 230 channels should not have the right to

modify their facilities without prior Commission approval, and we see no reason to treat the lower 230 channels differently in this regard. We also adopt the same notification requirements applicable to the upper 200 channels with respect to system additions, deletions, and modifications.

2. Spectrum Management Rights—Acquisition and Recovery of Channels Within Spectrum Blocks

27. In light of our decision to extend EA licensing to the lower 230 channels, we adopt the same rules for these channels with respect to recovery of unused spectrum and transfers and assignments of spectrum from incumbents to EA licensees. For the same reasons, we dismiss all wait-listed applications for these channels. Our action today will not apply to any application that is currently pending that includes a request for waiver of the processing freeze. We shall resolve those applications by separate action.

3. Treatment of Incumbents

a. Mandatory Relocation of Lower Channel Incumbents

28. We will not adopt mandatory relocation procedures for either SMR or non-SMR incumbents on the lower 230 channels. The record supports our tentative conclusion that requiring incumbents to migrate off this spectrum would be impractical because there is no identifiable alternative spectrum to accommodate such migration. In addition, it is likely that many of the incumbents who will operate on these channels will have relocated from the upper 200 channels, and we have already determined that such relocatees should not be required to relocate more than once. Therefore, EA licensees on the lower 230 channels will not have the right to move incumbents off of their spectrum blocks unless the incumbent voluntarily agrees to move.

b. Incumbent Operations

i. Expansion and Flexibility Rights of Lower Channel Incumbents

29. In the *Further Notice of Proposed Rulemaking* in this proceeding, we recognized that the geographic licensing scheme we designed for the upper 200 channels could result in some incumbent licensees remaining in this channel block, despite our mandatory relocation provisions. To avoid interference between these incumbent licensees and the new EA licensees in the upper 200 channel block, we concluded in our *800 MHz Report and Order* that it was necessary to limit the ability of incumbent licensees to expand their systems after geographic licensing had occurred. At the same time, we concluded that incumbents should be afforded operational flexibility to add sites or make system modifications within those areas already licensed to them. We concluded that, for the upper 200 channel block, incumbent licensees would be allowed to make modifications within their current 22 dBμV/m interference contour and would be allowed to add new transmitters in their existing service areas without prior notification to the Commission. However, incumbents would be required to notify the Commission of any changes in technical parameters or additional stations constructed, including agreements with an EA licensee to expand beyond their signal strength contour, through a minor modification of their license.

30. In the *Second Further Notice of Proposed Rulemaking,* we acknowledged that transitioning to a geographic licensing scheme in the lower 230 channels raises similar issues with respect to the rights of incumbents. We proposed to limit expansion rights of incumbent SMR licensees in the lower 230 channels in the same manner as we did in the upper 200 channel block. Under our proposal, incumbent licensees on the lower 230 channels would be allowed to modify or add transmitters in their existing service area without prior notification to the Commission, so long as they did not expand their 22 dBμV/m interference contour. We proposed that incumbents would not be allowed to expand beyond the 22 dBμV/m contour and into the geographic area licensee's territory without obtaining the prior consent of the geographic area licensee or unless the incumbent is the geographic area licensee for the relevant channel. We sought comment on this proposal and asked commenters to discuss whether a basis other than the 22 dBμV/m interference contour should be used to determine an incumbent's service area.

31. We agree with the supporters of the Industry Proposal that the public interest would be served by giving incumbents on the lower 230 channels some flexibility to expand beyond their 22 dBμV/m contours. However, we decline to adopt the Industry Proposal in its entirety. The settlement concept would, in essence, allow incumbents to divide all remaining unlicensed spectrum on the lower 230 channels among themselves, with no opportunity for new entrants to obtain or even compete for such spectrum. As set forth below, this raises both statutory and policy concerns that prevent us from endorsing the proposal.

32. First, by restricting the settlement process to incumbents, the Industry Proposal would foreclose new entrants from obtaining spectrum on any of the lower 230 channels that are subject to a settlement among incumbents. In any market where all of the channels in an EA were allocated by such settlements, the result would be that no opportunities for geographic licensing would be available to new entrants. The Industry Proposal would also preclude competition in the licensing process and restrict the number of potential applicants who can obtain licenses. Thus, it could yield a higher concentration of licenses than would result if non-incumbents were allowed to compete for the spectrum at the same time. We conclude that allowing only incumbent licensees to obtain rights to an entire EA while foreclosing opportunities for new entrants would be at odds with our goals of promoting economic competition in the 800 MHz SMR service and avoiding an undue concentration of licenses. The approach we adopt herein, unlike the Industry Proposal, would encourage participation of new entrants, including small businesses, and, therefore, promote vigorous economic competition and avoid excessive concentration of licenses.

33. Furthermore, the Industry Proposal provides no method for the Commission to recover a portion of the value of public spectrum pursuant to section 309(j)(3)(C) of the Communications Act. Instead, incumbent licensees who negotiate expansion rights among themselves could obtain a windfall by obtaining rights to an entire EA without having to pay for such expanded rights. We disagree with commenters who attempt to justify this potential windfall by arguing that the proposed settlement procedure complies with the directive in section 309(j)(6)(E) for the Commission to avoid mutual exclusivity through ''engineering solutions, negotiation, threshold qualifications, service regulations, and other means'' section 309(j)(6)(E) requires us to adopt such methods where we find them to be ''in the public interest.'' We do not believe it is in the public interest to ''resolve'' the competing claims of incumbents and non-incumbents for spectrum by establishing a settlement mechanism that is limited to incumbents and excluding non-incumbents from the process.

34. The Industry Proposal would also be inconsistent with the approach we have adopted in other services where we have converted from site-by-site licensing to geographic area licensing.

In our 900 MHz SMR proceeding and our recent paging proceeding, for example, we adopted similar rules for licensing on a geographic basis while protecting the existing operations of incumbent operators. In neither instance did we give incumbents the unrestricted right to obtain available spectrum through a pre-auction settlement process that excluded non-incumbents. We also rejected this and similar alternatives for the upper 200 channels of the 800 MHz band. For all of these reasons, we conclude that the Industry Proposal would not serve the public interest.

35. While we reject the specific settlement procedure described in the Industry Proposal, we note that many of the positive aspects of the proposal can still be accomplished through the auction process we are establishing for the lower 230 channels. For example, incumbents on these channels are free to enter into partnerships, joint ventures, or consortia for purposes of applying for EA licenses on the lower 230 channels in the areas where they currently operate. Incumbents may also negotiate transfers, swaps, partitioning arrangements, or similar agreements with respect to spectrum that is currently licensed to them. In some instances, taking these steps may result in only one entity applying for a given EA license. Where that occurs, no auction will be necessary because there will be no mutually exclusive applications to resolve. At the same time, providing all parties, incumbents and non-incumbents alike, with the *opportunity* to compete for EA licenses will ensure that the spectrum is awarded to the party that values it the most.

36. We also conclude that while geographic licensing is appropriate for the lower 230 channels, some additional flexibility is appropriate for incumbents on these channels to facilitate modifications and limited expansion of their systems. First, allowing incumbent licensees on the lower 230 channels such flexibility will facilitate the relocation of incumbent licensees on the upper 200 channels. Licensees who are faced with relocation will have a significant incentive to relocate rapidly and voluntarily if they know they will have greater flexibility to modify and expand their systems on the channels to which they are relocating. This will promote our objectives for enabling EA licensees on the upper 200 channels to make flexible use of their spectrum, while also protecting the interests of incumbents who relocate.

37. In addition, affording greater flexibility to lower 230 incumbents is appropriate because these channels are subject to an application freeze and geographic licensing of these channels will not occur until after the upper 200 channel auction is concluded and incumbents have had an opportunity to relocate to the lower channels. Because the upper 200 channels will be licensed first, EA winners on these channels will obtain the ability to expand within their geographic areas earlier than lower channel licensees. Allowing lower channel incumbents limited flexibility to expand prior to the auction will help to compensate for the fact that upper 200 licensees will obtain the benefits of geographic licensing sooner.

38. Therefore, we adopt our proposal to allow incumbents on the lower 230 channels to make system modifications within their interference contours without prior Commission approval. Incumbent licensees who currently utilize the 40 dBu signal strength contour for their service area contour and 22 dBu signal strength contour for their interference contour will be permitted to utilize their existing 18 dBu signal strength contour for their interference contour as long as they obtain the consent of all affected parties to do so. *See* § IV–B–4–a. Thus, an incumbent licensee, with the concurrence of all affected incumbents, that desires to make modifications to its existing system will be able to make such modifications such as adding new transmitters, and altering its coverage area, so long as such incumbent does not expand the 18 dBu interference contour of its system. Moreover, licensees who do not receive the consent of all incumbent affected licensees, will be able to make similar modifications within their 22 dBu signal strength interference contour. Licensees that do not desire to make modifications may also continue to operate with their existing systems. We find that this approach will not only enable incumbents to fill in ''dead spots'' in coverage or to reconfigure their systems to increase capacity, but will also allow for some incremental expansion of their systems.

39. In the *800 MHz Report and Order*, some commenters stated that smaller SMR entities only need to make smaller incremental changes to their service areas to better serve their customers. We believe that adopting the 18 dBu standard will allow such entities to make the incremental changes they desire. At the same time, we find that the 18 dBu standard is superior to the Industry Proposal because it preserves opportunities for new entrants in areas that are currently unserved and that are not reasonably proximate to existing facilities. The 18 dBu standard is more flexible than the 22 dBu standard and will thereby increase opportunities for lower 230 incumbents to modify their existing operations to meet technological changes and market demands for service. This additional flexibility will also facilitate the relocation of incumbent SMR licensees from the upper 200 to the lower 230 channels by providing these licensees with more flexibility to modify their existing systems than they would possess if they remained on the upper 200 channels.

40. Because our prior rules governing separation of 800 MHz facilities are based on a 40/22 dBμV/m standard, we recognize that the 18 dBμV/m standard adopted here may have little practical significance in portions of the United States areas where incumbents are already operating in close proximity to one another, *e.g.,* most markets east of the Mississippi. Therefore, as discussed in § IV–B–4–a, we will continue to use the current separation tables and short-spacing rules based on the 40/22 dBμV/m ratio to define the interference protection rights of incumbents against other incumbents, except where incumbents consent to the use of a more relaxed standard. In less densely populated areas, however, we expect the 18 dBμV/m standard to be beneficial to incumbent systems seeking greater operational flexibility. In addition, as discussed in § IV–B–4–b, we will use the incumbent's 36 dBμV/m as opposed to 40 dBμV/m contour as the basis for protection from interference by adjacent EA licensees.

ii. Converting Site-Specific Licenses to Geographic Licenses

41. We will allow lower 230 channel incumbents to combine their site-specific licenses into single geographic licenses as proposed. This option will provide incumbents with the same flexibility and reduced administrative burden that geographic licensing affords to EA licensees, and will simplify the licensing process for the Commission. Because we have adopted the 18 dBu contour rather than the 22 dBu contour, where the incumbent licensee has obtained the consent of all affected parties, as the benchmark for defining an incumbent licensee's protected service area, we will use the contiguous and overlapping 18 dbu contours of the incumbent's previously authorized sites to define the scope of the incumbent's geographic license. Therefore, after the auction of the lower 230 channels has been completed, incumbents in the lower 230 channels may convert their current multiple site licenses to a single

license. Incumbents seeking such reissued licenses must make a one-time filing of specific information for each of their external base station sites to update our database. Such filings should be made on FCC Form 600 and should include a detailed map of the area the system will cover. We also will require evidence that such facilities are constructed and placed in operation. Once the geographic license has been issued, facilities that are later added or modified that do not extend the licensees' 18 dBu interference contour will not require prior approval or subsequent notification under this procedure. Such facilities should not receive interference because they will be protected by the presence of the licensee's external co-channel stations. Licensees who do not receive the consent of all affected parties may also follow the same process utilizing their 22 dBu signal strength interference contour, rather than the 18 dBu contour.

4. Co-Channel Interference Protection

a. Incumbent SMR Systems

42. Our interference protection proposals in the *Second Further Notice of Proposed Rulemaking* assumed that we would use the 22 dBμV/m contour as the basis for determining the area in which lower 230 incumbents could operate. As noted in § IV–B–3–b, *supra,* we have decided instead to allow all incumbents on the lower 230 channels to use the 18 dBμV/m contour as the basis for modifying and expanding their systems, provided that they obtain the consent of all co-channel incumbents potentially affected by the use of this standard. Because the 18 dBμV/m standard gives incumbents greater flexibility to expand, we must apply stricter interference protection criteria to EA licensees to ensure that they do not interfere with incumbent operations. Specifically, we will require EA licensees either: (1) to locate their stations at least 173 km (107 miles) from the licensed coordinates of any incumbent, or (2) to comply with co-channel separation standards based on a 36/18 dBμV/m standard rather than the previously applicable 40/22 dBμV/m standard. The 36 dBμV/m desired signal strength contour is determined from the R–6602, F(50,50) curves for Channels 7–13 in § 73.699 of the Commission's rules (Figure 10), with a 9 dB correction factor for antenna height differential. The 18 dBμV/m undesired signal strength contour is calculated using the R–6602, F(50,10) curves for Channels 7–13 found in § 73.699 of the Commission's rules (Figure 10a), with a 9 dB correction factor for antenna height differential. In PR Docket No. 93–60, the Commission determined that a protection ratio of 18 dB would result in co-channel station spacings that provide reasonable protection from co-channel interference and, at the same time, provide for efficient reuse of valuable spectrum. Thus, EA licensees are required to ensure that the 18 dBμV/m undesired signal strength contour of a proposed station does not encroach upon the 36 dBμV/m desired signal strength contour of an existing incumbent station. Furthermore, in the opposite situation, EA licensees will have their 36 dBμV/m desired signal strength contour protected with an 18 dB ratio, since the undesired signal strength contour limit for incumbents that have reached consent of all other affected parties shall be 18 dBμV/m.

43. We emphasize that this revised interference standard protects incumbents only against EA licensees, not against other incumbents. As noted above, incumbents who seek to use the 18 dBμV/m standard must obtain the consent of other affected incumbents to do so. In the absence of such consent, the protection that one incumbent must afford another continues to be governed by § 90.621(b) of the Commission's rules, i.e., incumbents must locate their stations at least 113 km (70 miles) from the facilities of any other incumbent or comply with the co-channel separation standards based on the 40/22 dBμV/m standard set forth in our prior short-spacing rules.

b. Adjacent EA Licensees

44. We adopt the same interference protection standards for the lower 230 channels that we previously adopted for the upper 200 channels. Thus, EA licensees on the lower 230 channels must limit their signal strength at their EA borders to 40 dBμV/m, unless affected adjacent EA licensees agree to higher signal strength. We emphasize that this rule applies only to resolving interference issues between EA licensees. Thus, an EA licensee who complies with this rule may nevertheless be required to limit its operations further in order to comply with the rules governing protection of incumbents (see § IV–B–4–a, *infra*).

c. Emission Masks

45. In response to a request for reconsideration from Ericcson, again supported by Motorola, we are further modifying our emission mask rule for the upper 200 channels in the accompanying *Memorandum Opinion and Order.* We conclude that this rule, as modified, should also be applied to the lower 230 channels. Use of a common emission standard throughout the 800 MHz SMR band will facilitate use of common equipment and make it easier for licensees to combine upper 200 and lower 230 channels in their systems. As in the case of the upper 200 channels, application of the emission mask rule to the lower 230 channels will apply only to ''outer'' channels used by the licensee, *i.e.,* to channels that are creating out-of-band emissions that affect another licensee. Thus, the emission mask rules do not apply to ''interior'' channels in a spectrum block that do not create out-of-band emissions outside that block or on channels in the block that are used by incumbents.

5. Regulatory Classification of EA Licensees on the Lower 230 Channels

46. We adopt our proposal with respect to SMR applicants who obtain EA licensees on the lower 230 channels, but modify it with respect to non-SMR applicants for EA licenses. We anticipate that most applicants for EA licenses on these channels will be SMR applicants who seek to provide interconnected service, thus meeting the statutory definition of CMRS. Therefore, we will presumptively classify SMR winners of EA licenses as CMRS providers. However, we will allow SMR applicants and licensees to overcome this presumption by demonstrating that their service does not meet the CMRS definition. This is consistent with our approach to broadband PCS and other services. We reject Genesee's contention that we have illegitimately used CMRS classification as a basis for auctioning the lower 230 channels. In fact, the issue of regulatory classification under section 332 of the Act is irrelevant to the issue of auctionability, which turns on the factors enumberated in section 309(j) of the Act. We address the issue of auctionability elsewhere in this order and decline to revisit it here.

47. In the *Memorandum Opinion and Order* adopted today, we determine that non-SMRs as well as SMRs will be eligible to obtain EA licenses on the 150 General Category channels. While we expect most EA licenses to be sought by SMR providers, we agree with E.F. Johnson that where an EA license is obtained by a non-SMR operator, the CMRS presumption is inapplicable. Thus, in the event that EA licenses are awarded to Public Safety, Industrial/Land Transportation, or Business licensees, such licensees will be classified as PMRS providers. Although Business Radio licensees below 800 MHz may be classified as CMRS, Business Radio licensees above 800 MHz are precluded from providing for-

profit service, and therefore are classified as PMRS.

C. Relocation of Incumbents From the Upper 200 Channels

1. Comparable Facilities

48. We adopt our proposed definition of ''comparable'' facilities, with certain clarifications discussed below. In general, we define comparable facilities as facilities that will provide the same level of service as the incumbent's existing facilities. We also agree with commenters that being provided with comparable facilities requires that the change be transparent to the end user to the fullest extent possible. However, our definition does not require an EA licensee to upgrade the incumbent's facilities. As we proposed, EA licensees will not be required to replace existing analog equipment with digital equipment when there is an acceptable analog alternative that satisfies the comparable facilities definition. Thus, under these circumstances the cost obligation of the EA licensee will be the minimum cost the incumbent would incur if it sought to replace, but not upgrade, its system.

49. We agree with many of commenters' suggestions for further refining the factors that are used to define comparable facilities. We conclude that the determination of whether facilities are comparable should be made from the perspective of the end user. To this end, we identify four factors—*system, capacity, quality of service,* and *operating costs*—that are relevant to this determination. We emphasize that these factors are only relevant to determining what facilities the EA licensee must provide to meet the requirements for mandatory relocation; we reiterate that incumbents and EA licensees are free to negotiate any mutually agreeable alternative arrangement.

a. System

50. To meet the comparable facilities requirement, an EA licensee must provide the relocated incumbent with a comparable system. We believe the term ''system'' should be defined functionally from the end user's point of view, i.e., a system is comprised of base station facilities that operate on an integrated basis to provide service to a common end user, and all mobile units associated with those base stations. System comparability includes stations licensed on a secondary, non-protected basis. An incumbent that is licensed on a secondary basis at the time of notification must receive at least the equivalent type of license. We agree with SMR WON that this definition can include multiple-licensed facilities that share a common switch or are otherwise operated as a unitary system, provided that an end user has the ability to access all such facilities. However, our definition does not extend to facilities that are operationally separate. For example, if a subscriber on one system has the ability to roam on a neighboring system, we would not define the two facilities as part of a common ''system.'' In addition, our definition does not include managed systems that are comprised of individual licenses. We also agree with SMR WON and AMTA that a ''system'' may cover more than one EA if its existing geographic coverage extends beyond the EA borders. We reject Nextel and Pittencrief's suggestions that we define ''system'' more narrowly. In our view, a narrower definition would impair the flexibility of incumbents to continue meeting their customer's needs.

b. Capacity

51. To meet the comparable facilities requirement, an EA licensee must relocate the incumbent to facilities that provide equivalent channel capacity. We define channel capacity as the same number of channels with the same bandwidth that is currently available to the end user. For example, if an incumbent's system consists of five 50 kHz (two 25 kHz paired frequencies) channels, the replacement system must also have five 50 kHz channels. If a different channel configuration is used, it must have the same overall capacity as the original configuration. We agree with commenters that comparable channel capacity requires equivalent signaling capability, baud rate, and access time. In addition, the geographic coverage of the channels must be coextensive with that of the original system.

c. Quality of Service

52. Comparable facilities must provide the same quality of service as the facilities being replaced. We define quality of service to mean that the end user enjoys the same level of interference protection on the new system as on the old system. In addition, where voice service is provided, the voice quality on the new system must be equal to the current system. Finally, we consider reliability of service to be integral to defining quality of service. We measure reliability as the degree to which information is transferred accurately within the system. Reliability is a function of equipment failures (*e.g.* transmitters, feed lines, antennas, receivers, battery back-up power, etc.) and the availability of the frequency channel due to propagation characteristics (*e.g.* frequency, terrain, atmospheric conditions, radio-frequency noise, etc.) For digital data systems, this will be measured by the percent of time the bit error rate exceeds the desired value. For analog or digital voice transmissions, we will measure the percent of time that audio signal quality meets an established threshold. If analog voice system is replaced with a digital voice system the resulting frequency response, harmonic distortion, signal-to-noise ratio, and reliability will be considered.

d. Operating Costs

53. Another factor in determining whether facilities are comparable is operating costs. We define operating costs as costs that affect the delivery of services to the end user. If the EA licensee provides facilities that entail higher operating cost than the incumbent's previous system, and the cost increase is a direct result of the relocation, the EA licensee must compensate the incumbent for the difference. We anticipate that costs associated with the relocation process will fall into several categories. First, the incumbent must be compensated for any increased recurring costs associated with the replacement facilitates (*e.g.* additional rental payments, increased utility fees). Second, increased maintenance costs must be taken into consideration when determining whether operating costs are comparable. For example, maintenance costs associated with analog systems may be higher than the costs of digital equipment because manufacturers are producing mostly digital equipment and analog replacement parts can be difficult to find.

54. While we conclude that EA licensees should be responsible for increased operating costs caused by relocation, we note that identifying whether increased costs are attributable to relocation becomes more difficult over time. Therefore, we will not impose this obligation indefinitely, but will end the EA licensee's obligation to pay increased costs five years after relocation has occurred. We believe this appropriately balances the interests of EA licensees and relocated incumbents.

2. Cost-Sharing

a. Sharing Relocation Costs on a Pro Rata Basis

55. We adopt an approach that is similar to our PCS microwave relocation rules. We conclude that, absent an

agreement among EA licensees who are prepared to relocate the incumbent, all EA licensees who benefit from the relocation of the incumbent must share the relocation costs on a *pro rata* basis. Although several commenters believe that the Commission should adopt detailed rules for sharing relocation costs among multiple EA licensees, we do not believe that detailed rules are necessary since all EA licensees will be licensed at approximately the same time. However, we do not believe that all EA licensees will notify incumbents of their intention to relocate within 90 days of the release of the Public Notice announcing the commencement of the voluntary negotiation period because they may not be ready or capable of relocating an incumbent and, therefore will not participate in the relocation process. Those non-notifying EA licensees, however may subsequently determine that those channels relocated out of their EA by other EA licensees are necessary for their use. Therefore, EA licensees who relocate the incumbent will obtain a right to reimbursement from non-notifying EA licensees who want to benefit from the relocation. We believe that allowing all EA licensees who relocate the incumbent a right to reimbursement is necessary to avoid a ''free-rider'' problem by those EA licensees who did not provide notification, but subsequently benefit from the relocation. We also believe that reimbursement rights will ensure that the incumbent is relocated as a whole and not on a piece-meal basis.

56. The *pro rata* formula will be based on the number of channels being relocated out of each EA. Several commenters support this proposal, because the relocation process is likely to involve multiple EA licensees and one incumbent. The pro rata formula requires those EA licensees who participate in the relocation process to share the costs for relocating those channels that are located in a non-notifying licensee's EA. Therefore, the cost-sharing formula will determine the costs for relocating the incumbent's system out of each EA. We believe that determining the relocation costs for each EA will allow those EA licensees who participate in the relocation process to easily determine their cost obligation and their reimbursement share from later entrant EA licensees who did not participate. We believe that such a formula will negate the need for a complicated plan. The new formula is:

$$Ci = Tc \times \frac{Chi}{TCh}$$

Ci equals the amount of reimbursement
Tc equals the actual cost of relocating the incumbent
TCh equals the total number of channels that are being relocated
Chj equals the number of channels that each respective EA licensee will benefit from

57. We believe the formula provides an effective and straightforward means of determining a participating EA licensee's cost obligation and the reimbursement shares for later entrant EA licensees. This formula is essential to make cost-sharing administratively feasible and fair for those EA licensees who participate in the relocation process and those who choose not to.

58. The formula is similar to the formula adopted for sharing the relocation costs of microwave incumbents, but it does not take into account depreciation for the costs of reimbursing EA licensees who participated in the relocated process. Instead, non-notifying EA licensees who subsequently decide to use the channels or area of their EA that an incumbent was relocated out of must fully reimburse those participating EA licensees prior to testing. Similar to our decision in the microwave relocation proceeding, EA licensees who relocate channels that benefit other EA licensees and are fully outside of their market, should be entitled to full reimbursement of compensable costs for relocating that portion of the incumbent that are either fully outside their market area or licensed EA. However, because we realize that a non-notifying EA licensee may not decide to use those channels or serve the area of their EA that was once occupied by an incumbent, we conclude that ten years from the date of the Public Notice commencing the voluntary negotiation period, reimbursement rights will sunset.

59. The following is an example of how the formula will work: In October 1997, EA licensees A, B, and C each notify the incumbent in a timely manner that they are prepared to relocate the incumbent. EA licensee D does not provide notification to the incumbent. The incumbent decides to compel simultaneous negotiations among EA licensees A, B, and C. As a result, EA licensees A, B, and C fully relocate the incumbent. The total costs for relocating the incumbent is $100,000. There were 60 channels that EA licensees A, B, C, and D can use as a result of the relocation. The channels located in each EA are as follows: EA A has 25 channels; EA B has 15 channels; EA C has 10 channels; and EA D has 10 channels. For this example, we will calculate the formula for determining the costs share of EA licensee B. As a result, Chj=25, because that is the number of channels that EA licensee B will benefit from. The total number of channels that were relocated is 60 and, therefore TCh=60. In addition, Tc equals $100,000, because that is the total costs of relocating the incumbent. The calculation of licensee B's reimbursement payment is as follows:

$$\$25{,}000 = \$100{,}000 \times \frac{25}{60}$$

Thus, licensee B pays $25,000. Licensee A would pay $41,666.66, licensee C would pay $16,666.66 and licensee D would pay $16,666.66. Therefore, licensee D will be obligated to reimburse licensees A, B, and C $16,666.66 if licensee D subsequently decides to use the channels in EA D. This amount must be equally divided among EA licensees A, B, and C. All three licensees will trigger a right to reimbursement from licensee D and will have the right to collect their share of the costs prior to licensee D commencing with testing.

60. We decline to adopt the proposals of commenters that would allow EA licensees who relocate the incumbent to step into the shoes of the incumbent. We realize that not all EA licensees will provide notice, even though there are sufficient incentives to do so. However, we do not believe it would be appropriate to allow an EA licensee who is prepared to relocate the incumbent to succeed to all of the rights and obligations of that incumbent. In essence, succeeding to the rights and obligations of the incumbent would allow EA licensees to attain a de facto license for parts of an EA that they were not the high bidder for at auction. Therefore, we believe that all EA licensees who benefit initially or subsequently from the relocation of an incumbent should share the costs of the relocation on a *pro rata* basis. To accomplish this, EA licensees who relocate the incumbent will obtain a right to reimbursement from non-notifying EA licensees who subsequently decide to use the channels that were relocated. Therefore, we have designed a two-step process that will allow a participating EA licensee to obtain a reimbursement right and collect the initial costs for relocating channels outside of their EA.

b. Triggering a Reimbursement Right

61. Commenters, although supportive of the Commission's proposal to allow EA licensees who negotiate a relocation

agreement the right to reimbursement from EA licensees who benefitted, did not specifically address how such right should be created. We believe that a right to reimbursement can easily be triggered by the procedures we adopted in the *First Report and Order.*

62. In the *First Report and Order,* we developed a notification procedure that requires an EA licensee to file a copy of the relocation notice and proof of the incumbent's receipt of the notice to the Commission within ten days of receipt. Because notification affects an EA licensee's right to relocate an incumbent, we believe that such notification should also be the first step in triggering an EA licensee's reimbursement right. We believe the second step of triggering a reimbursement right is signing a relocation agreement with the incumbent. Thus, if an EA licensee timely notifies an incumbent of its intention to relocate, and subsequently negotiates and signs a relocation agreement with the incumbent, the EA licensee will have triggered its right to reimbursement from EA licensees who benefitted.

63. In addition, because notification is the first step in establishing a reimbursement right for an EA licensee, we believe that such notification should also establish an obligation for those EA licensees who benefited from the relocation. We believe that an EA licensee who is sincere about using the channels in its EA will provide notice to the incumbent of its intention to relocate the incumbent. We agree with AMTA that EA licensees who do not participate in the relocation process should be prohibited from invoking mandatory negotiations or any of the provisions of the Commission's mandatory relocation guidelines.

64. Therefore, if an EA licensee timely notifies an incumbent of its intention to relocate, but during the voluntary negotiation period decides not to participate in the relocation process, such EA licensee will be obligated to reimburse those EA licensees who have triggered a reimbursement right. EA licensees who do not provide notice to the incumbent, but subsequently decide to use the channels in the EA will be required to reimburse, outside of the Commission's mandatory relocation guidelines, those EA licensees who have established a reimbursement right. We believe that this procedure strikes a fair balance between EA licensees who relocate incumbents and those EA licensees who decide not to relocate incumbents.

c. Compensable Costs

65. We agree with those commenters who believe that premium payments should not be reimbursable and therefore adopt our proposal that reimbursable costs will be limited to the actual costs of relocating the incumbent. We believe that EA licensees who have an incentive to be first to market will have a need to accelerate the relocation process. We agree with those commenters that believe other EA licensees will not receive the same advantage and therefore should not be required to contribute to premium payments. Therefore, we conclude that reimbursement rights will only apply to actual relocation costs.

66. In the *Second Further Notice of Proposed Rulemaking,* we tentatively concluded that actual relocation costs will include, but not be limited to: SMR equipment; towers and/or modifications; back-up power equipment; engineering costs; installation; system testing; FCC filing costs; site acquisition and civil works; zoning costs; training; disposal of old equipment; test equipment; spare equipment; project management; and site lease negotiation. Commenters generally supported the list proposed, but were concerned that the list did not address other cost factors related to relocation. We agree with those commenters who argue that there are other factors related to the relocation process and therefore conclude that this list should be illustrative, and not exhaustive. However, because we want to encourage a fast relocation process free of disputes, we believe that the bulk of compensable costs should be tied as closely as possible to actual equipment costs. Based on this goal, we believe that subsequent EA licensees should only be required to reimburse EA relocators for incumbent transaction expenses that are directly attributable to the relocation, subject to a cap of two percent of the ''hard costs'' involved. Hard costs are defined as the actual costs associated with providing a replacement system, such as equipment and engineering expenses. This restriction on the reimbursement of transaction fees corresponds to the restriction we adopted with respect to PCS reimbursement of incumbent transaction expenses for cost-sharing during any time period—voluntary, mandatory, or involuntary. Therefore, we adopt the same restriction for purposes of this cost-sharing plan. However, EA licensees are not required to pay for transaction costs incurred by EA licensees during the voluntary or mandatory periods once the involuntary period is initiated, or for fees that cannot be legitimately tied to the provision of comparable facilities.

67. In addition, we believe that actual costs should also include costs directly related to a seamless transition. In the *First Report and Order,* we concluded that during the involuntary negotiation period, the EA licensee must conduct the relocation in such a fashion that there is a ''seamless'' transition from the incumbents ''old'' frequency to its ''new'' frequency. We agree with ITA and SMR Systems that it may be necessary to operate the old system and the new system simultaneously to ensure a seamless transition. We want to encourage EA licensees and incumbents to exercise flexibility when negotiating a relocation agreement, but we also want to ensure that the incumbent is made whole, and is relocated without a substantial disruption in service. We also recognize that alternative means may be agreed upon to avoid a substantial disruption in service. Therefore, we will require that any costs directly associated with a seamless transition will be considered actual costs and, therefore reimbursable.

d. Payment Issues

68. We partially agree with Genessee and conclude that reimbursement payments should be due when the frequencies of the incumbent have been cleared. We also agree with Fresno that an EA licensee may choose not to use the frequencies in a particular EA. Therefore, it is the EA licensee who must, within 90 days of the release of the Public Notice announcing the commencement of the voluntary negotiation period, decide whether they intend to participate in the mandatory relocation process.

69. We believe that an EA licensee who provides notification is sincere of its intention to use the frequencies in the EA and therefore, concluded supra, that once an EA licensee notifies an incumbent of its intention to relocate the incumbent, the EA licensee will be obligated to pay its share of reimbursement. However, EA licensees who have triggered an obligation should not be required to submit payment until the channels they have been licensed for are available for use. Therefore, we conclude that payments will not be due until the incumbent has been fully relocated and the frequencies are free and clear. We believe this procedure strikes a clear balance between those EA licensees who negotiate a relocation agreement and those EA licensees who want the use of the frequencies, but decide not to negotiate a relocation agreement.

70. Because non-notifying EA licensees will not receive the benefit of the Commission's relocation guidelines, they will be required to reimburse those EA licensees who have triggered a reimbursement right. Therefore, we conclude that non-notifying EA licensees who subsequently decide to use the channels, should be required to submit payment to those EA licensees who have triggered a reimbursement right prior to commencing testing of their system. We believe this strikes a fair balance between the EA licensee who has benefited a non-notifying EA licensee and the non-notifying EA licensees right to use those channels within its licensed EA. In addition, we believe that this will create an incentive for both parties to expedite negotiations among themselves.

3. Resolution of Disputes that Arise During Relocation

71. Commenters strongly support the Commission's proposal to use ADR procedures when disputes arise as to the amount of reimbursement required and the relocation negotiations (including disputes over comparability of facilities and the requirement to negotiate in good faith). We agree with those commenters who believe that the use of ADR procedures will help resolve disputes in a timely fashion, while conserving Commission resources. In addition, we believe that the rapid resolution of disputes will speed the development of wide-area systems, and therefore will ultimately benefit the public. Therefore, to the extent that disputes cannot be resolved among the parties, we strongly encourage parties to use expedited ADR procedures. ADR procedures provide several alternative methods such as binding arbitration, mediation, or other ADR techniques. Because we are encouraging parties to use ADR procedures, we do not need to designate an arbiter to resolve the disputes as some commenters suggest. As several commenters pointed out, the choice of arbiter should be a decision left to the parties.

72. We encourage parties to use ADR procedures prior to seeking Commission involvement and caution that entire resolution of disputes by the Commission will be time consuming and costly to the parties. In addition, we emphasize that parties who neglect their obligation to satisfy a reimbursement right will be subject to the full realm of Commission enforcement mechanisms.

4. Administration of the Cost-Sharing Plan

73. We believe that the cost-sharing plan we have adopted for 800 MHz SMR does not require us to designate an administrator. We believe that an administrator was necessary to administer the cost-sharing plan under the microwave relocation procedures because of the complexity of the plan. We do not believe that the cost-sharing plan we have adopted for 800 MHz SMR is as complex and therefore decline to designate a clearinghouse to administer the cost-sharing plan. However, we will not prohibit an industry supported, not-for-profit clearinghouse from being established for purposes of administering the cost-sharing plan under the 800 MHz relocation procedures.

D. BETRS Eligibility on the Upper 200 Channels

74. As we did in our *Paging Second Report and Order,* 62 FR 11616 (March 12, 1997), we do not believe it is necessary to continue separate primary licensing of BETRS facilities on 800 MHz SMR frequencies. Under the rules adopted in our *CMRS Flex Report and Order,* 61 FR 45336 (August 29, 1996), all CMRS providers, including SMRs, may provide fixed services of the type provided by BETRS licensees. In addition, entities seeking to offer BETRS on 800 MHz SMR frequencies will be able to obtain spectrum through geographic area licensing. We see no basis for distinguishing BETRS from other services that use 800 MHz SMR spectrum to provide commercial communications service to subscribers.

75. As we noted in our *Paging Second Report and Order,* we recognize that BETRS primarily serves rural, mountainous, and sparsely populated areas that might not otherwise receive basic telephone service. However, according to our records, there are few BETRS facilities licensed on 800 MHz SMR frequencies. According to our licensing records, as of November 13, 1996, there were only eleven BETRS authorizations in the 800 MHz service, and all of them were located in the State of Alaska. Furthermore, our records show no BETRS facilities licensed in Puerto Rico. Therefore, we disagree with PRTC that eliminating separate primary licensing of BETRS facilities on 800 MHz SMR frequencies will negatively affect phone penetration in Puerto Rico. More importantly, concerns about the delivery of service to rural and other high cost areas are currently being addressed in our ongoing rulemaking proceeding examining universal service issues. We also note that BETRS has other frequencies available to it under part 22. In light of the limited demand for these channels by BETRS licensees, and the alternatives available for providing telecommunications service in sparsely populated areas, we conclude that continued licensing of 800 MHz channels to BETRS on a co-primary basis is not necessary.

76. We will, however, allow BETRS licensees to obtain new sites and channels in the 800 MHz band on a secondary basis. If any EA licensee subsequently notifies the BETRS licensee that a secondary facility must be shut down because it may cause interference to the EA licensee's existing or planned facilities, the BETRS licensee must discontinue use of the particular channel at that site no later than six months after such notice.

E. Partitioning and Disaggregation for 800 MHz and 900 MHz Licensees

1. Partitioning

a. Eligibility

77. We adopt our tentative conclusion and further extend partitioning to all incumbent licensees and eligible SMR licensees on all SMR channel blocks. We agree with commenters that partitioning will provide SMR licensees with increased flexibility and result in more efficient spectrum management. In the broadband PCS proceeding, we eliminated the existing restriction that limited partitioning of broadband PCS licenses to only rural telcos. We concluded that allowing more entities to acquire partitioned broadband PCS licenses would: ''(1) Remove potential barriers to entry thereby increasing competition in the PCS marketplace; (2) encourage parties to use PCS spectrum more efficiently; and (3) speed service to unserved and underserved areas.'' We conclude that the very same important goals will be met by allowing more open partitioning in the SMR service. Eliminating the existing rural telco restriction on SMR partitioning will: (1) Allow new entities, such as small businesses, to acquire SMR licenses and thus increase competition and foster the development of new technologies and services; (2) encourage existing SMR licensees to use their spectrum more efficiently; and (3) ensure the faster delivery of SMR service to rural areas. We also believe that allowing more flexible partitioning will provide an alternative to the relocation of incumbent licensees.

78. Under our rules, SMR licensees are required to meet performance requirements based on substantial service, which may be fulfilled by providing population-based coverage. As some of the 900 MHz commenters noted, these requirements encourage SMR licensees to initially focus their attention on the more populated, urban

portions of their markets, in order to meet the construction requirements, while leaving the less-populated, rural areas unserved. With the present rural telco restriction in place, SMR licensees are not permitted to partition the more rural portions of the their markets to another entity, unless that entity is a qualified rural telco. In those cases where no rural telco is present in the market or where the rural telco does not desire to provide SMR service, there may be a delay in the delivery of service to the rural portions of the MTA. Allowing SMR licensees to partition portions of their markets to other entities more interested in providing service to those niche areas not only allows those other entities an opportunity to enter the SMR marketplace but also increases the odds that the less populated, rural portions of markets receive higher quality SMR service. Therefore, we are eliminating the existing rural telco restriction on both 800 MHz and 900 MHz SMR partitioning.

79. We do not find that retaining the rural telco restriction will result in higher quality service to rural areas. We find that allowing more open partitioning in the 900 MHz SMR service will mean that additional, highly qualified wireless operators, including incumbent SMR operators, will be permitted to provide 900 MHz SMR service which may result in better service and increased competition which may result in lower prices for service. We also do not find that allowing more open partitioning of 900 MHz SMR licenses is inconsistent with the mandate of section 309(j)(3)(B) of the Communications Act to ensure that licenses are disseminated among a wide variety of applicants including rural telcos. RTG argues that partitioning is the only preference that has been devised to ensure that rural telcos are afforded economic opportunities to participate in the provision of new and innovative services. We disagree. Rural telcos are able to take advantage of the special provisions for small businesses adopted for the 900 MHz SMR auction. Furthermore, sections 309(j)(3) (A), (B), and (D) of the Communications Act direct the Commission to further the rapid deployment of new technologies for the benefit of the public including those residing in rural areas, to promote economic opportunity and competition, and to ensure the efficient use of spectrum. While encouraging rural telco participation in 900 MHz SMR service offerings is an important element in meeting these goals, Congress did not dictate that this should be the sole method of ensuring the rapid deployment of service in rural areas. Allowing more open partitioning will further the goals of section 309(j)(3) by allowing 900 MHz SMR licensees to partition their licenses to multiple entities rather than to a limited number of rural telcos. In addition, we find that, because they possess the existing infrastructure and local marketing knowledge in rural areas, rural telcos will be able to compete with other parties to obtain partitioned 900 MHz SMR licenses.

80. We decline to adopt SMR WON's proposal to restrict non-incumbent 800 MHz SMR licensees from partitioning until they have relocated all incumbent licensees from their band. We agree with those 800 MHz commenters that believe that the auctions process obviates the need for restricting partitioning. While we acknowledge SMR WON's concerns that partitioning could be used as a method for avoiding responsibility for relocation of incumbents, we believe that such a restriction would unfairly discourage partitioning without any corresponding public interest benefit. We note that partitionees will be permitted to acquire partitioned license areas from EA licensees but will not be permitted to operate on channels that were previously cleared by other EA licensees until they have satisfied the relocation reimbursement requirements under our rules. EA licensees and partitionees are free to negotiate among themselves as to who will be responsible for paying the reimbursement costs, and we will require that parties seeking approval for a partitioning arrangement in the 800 MHz SMR service certify which party will be responsible for such reimbursement. We believe that such a certification is a more flexible approach to ensuring that partitioning is not used as a means to circumvent our reimbursement requirements.

b. Available License Area

81. In the broadband PCS and WCS proceedings, we allowed partitioning along any service area defined by the partitioner and partitionee. We found that, by providing such flexibility to licensees for determining partitioned broadband PCS license areas, we would permit the market to decide the most suitable services areas. We find that the same rationale holds true in the SMR service. Restricting the partitioning of SMR licenses to geopolitical boundaries, as originally proposed in the *Second Further Notice of Proposed Rulemaking* and by AMTA, may inhibit partitioning and may not allow licensees to respond to market demands for service. We find that allowing unrestricted partitioning of SMR licenses is preferable, as long as the parties submit information in their partial assignment applications that describes the partitioned license area.

82. We will require that applications seeking approval to partition an SMR license will be required to submit, as separate attachments to the partial assignment application, a description of the partitioned service area and, where applicable, a calculation of the population of the partitioned service area and licensed market. The partitioned service area must be defined by coordinate points at every 3 degrees along the partitioned service area agreed to by both parties, unless either (1) an FCC-recognized service area is utilized (*i.e.*, Major Trading Area, Basic Trading Area, Metropolitan Statistical Area, Rural Service or Economic Area) or (2) county lines are followed. Applicants need only define that portion of the partitioned service area that is not encompassed by an FCC-recognized service area or county line. For example, if the partitioned service area consisted of five counties and three additional townships, the applicant must only define that portion of the partitioned service area comprised of the additional townships. These geographical coordinates must be specified in degrees, minutes and seconds to the nearest second of latitude and longitude, and must be based upon the 1927 North American Datum (NAD27). Applicants may also supply geographical coordinates based on 1983 North American Datum (NAD83) in addition to those required based on NAD27. This coordinate data should be supplied as an attachment to the partial assignment application, and maps need not be supplied. In cases where an FCC recognized service area or county lines are being utilized, applicants need only list the specific area(s) (through use of FCC designations) or counties that make up the newly partitioned area. For example, if a licensee desires to partition its license only for the service area needed by a rural telco, it will simply provide coordinate data points at each 3 degree data point extending from the center of the service area (*i.e*, at the 3 degree, 6 degree, 9 degree, 12 degree, etc. azimuth points with respect to true north).

83. We note that this rule will also apply to incumbent 800 MHz SMR licensees seeking partial assignments of license. Incumbent licensees are currently licensed on a site-by-site basis and currently must seek a partial assignment of license under our existing rules if they desire to assign a portion of their licensed transmitter sites to

another entity. Under our new rules, incumbent 800 MHz SMR licensees must follow the same procedures as all other licensees and must include the necessary description of the ''partitioned license area.'' For incumbent 800 MHz SMR licensees, the ''partitioned license area'' will mean that area encompassed by the protected service contours of all of the transmitter sites being assigned.

2. Disaggregation

a. Eligibility

84. We conclude that all SMR licensees should be allowed to disaggregate portions of their spectrum to any party that is qualified for the spectrum's underlying channel block. We find that disaggregation will provide SMR licensees greater flexibility to manage their spectrum more efficiently and, in the 800 MHz band, will facilitate the coexistence of geographic area licensees and incumbents by allowing geographic licensees to subdivide their spectrum holdings and assign or transfer parts of their spectrum to other eligible entities or incumbents. We further find that disaggregation will increase competition by encouraging a broader range of SMR participants; foster a broader range of services offered by those participants as they seek niche markets and services; expedite the provision of SMR service to areas that may not otherwise receive CMRS service; and, allow the marketplace to determine who and by whom the spectrum will be used. Moreover, allowing SMR disaggregation will help establish regulatory symmetry with similar services, such as PCS, as mandated by the 1993 Budget Act. Once again, we find that allowing disaggregation will provide a less disruptive alternative for the relocation of incumbent licensees.

85. As we did with partitioning, we decline to adopt SMR WON's proposal to restrict non-incumbent 800 MHz SMR licensees' ability to disaggregate. We agree with commenters that conclude that the market should determine when and how much spectrum to disaggregate.

b. Amount of Spectrum to Disaggregate

86. We agree with commenters that we should not limit the amount of SMR spectrum that can be disaggregated. We find that the marketplace should decide the amount of SMR spectrum to be disaggregated and that there is no need to set a minimum disaggregation amount. As we did for broadband PCS and WCS, we seek to provide flexibility to the parties to decide the amount of spectrum they need. This will permit more efficient use of spectrum and deployment of a wider range of service offerings. Requiring a minimum disaggregation amount for SMR may interfere with parties intend use of spectrum and may foreclose some parties from using disaggregation as a means of obtaining SMR spectrum to provide their unique service offerings. We note that parties acquiring disaggregated SMR spectrum will continue to be subject to all of our technical and operating requirements.

1. Construction, Coverage and Channel Usage Requirements

87. We agree that SMR licensees should not be able to use partitioning and disaggregation as a means of circumventing our performance requirements and that some version of these requirements should apply to parties obtaining licenses through these means. By adopting such requirements we seek to ensure that spectrum is used to the same degree that it would have been used had the partitioning or disaggregation transaction not taken place.

88. Therefore, we will adopt flexible coverage and channel usage requirements for partitioning and disaggregation in the 800 MHz and 900 MHz SMR services that are consistent with the underlying requirements in those services. We find that granting the parties flexibility to devise a scheme for meeting these requirements will increase the viability and value of partitioned licenses and disaggregated spectrum and will facilitate partitioning and disaggregation for the SMR service.

89. With respect to incumbent licensees, we believe that it would be inappropriate to subject entities that obtain partitioned licenses or disaggregated spectrum from incumbent SMR licensees to additional performance requirements when no such requirements currently exist for these licensees. However, to prevent incumbent licensees from using partitioning or disaggregation as a means of circumventing our one-year construction requirement, we will hold partitionees and disaggregatees to the original construction deadline(s) for each of the partitioned facilities they acquire. These deadlines may vary depending on when the facility was originally licensed. In any case, a partitionee or disaggregatee that obtains a portion of an incumbent SMR licensees' facilities or spectrum with only a few months remaining before the expiration of the construction deadline, will be required to have these facilities constructed and providing ''service to subscribers'' by each individual construction deadline. Failure to meet the individual construction deadline for a specific facility will result in automatic termination of that facility's authorization. We believe that such a requirement is a fair balance between allowing incumbent SMR licensees the opportunity to utilize the helpful spectrum management tools of partitioning and disaggregation while ensuring continued compliance with our performance requirements.

90. *Geographic Area Licensees—Partitioning.* Because the coverage requirements differ for licensees in the 800 MHz and 900 MHz bands, we will adopt coverage requirements that are consistent with the licensees' underlying requirements. In the 900 MHz band and in the lower 230 channels of the 800 MHz band, licensees are required to provide ''substantial service'' to their markets within five years of the grant of their initial licensees. As such, we will permit parties seeking to partition licenses in those bands to meet one of the following performance requirements. Under the first option, the partitioner and partitionee can each agree to meet the ''substantial service'' requirement for their respective portions of the market. If a partitionee fails to meet the ''substantial service'' requirement for its portion of the market, the license for the partitioned area will automatically cancel without further Commission action. Under the second option, if the original geographic area licensee certifies that it has already met or will meet the ''substantial service'' requirement for the entire market by providing coverage to at least one-third of the population of the entire (pre-partitioned) market within three years of the grant of its license and at least two-thirds of the market population within five years, then the partitionee not be subject to performance requirements except for those necessary to obtain renewal.

91. In the upper 200 channels of the 800 MHz band, licensees must meet specific coverage benchmarks by providing coverage to at least one-third of the population of their market within three years of the grant of their initial license and coverage to at least two-thirds of the population within five years. For licensees in the upper 200 channels of the 800 MHz band, we will adopt flexible coverage requirements similar to those we adopted in the broadband PCS proceeding. Under the first option, we will require that the partitionee certify that it will meet the same coverage requirement as the original licensee for its partitioned

market. If the partitionee fails to meet its coverage requirement, the license for the partitioned area will automatically cancel without further Commission action. Under the second option, the original licensee certifies that it has already met or will meet its three-year coverage requirement and that it will meet the five-year construction requirement for the entire geographic area market. In that case, the partitionee will not be subject to performance requirements except for those necessary to obtain renewal.

92. *Geographic Area Licensees—Disaggregation.* Licensees in the upper 200 channels of the 800 MHz band are required to meet a channel usage requirement. Consistent with that rule, we will require that disaggregatees in the upper 200 channels of the 800 MHz band meet a channel usage requirement for the spectrum they acquire. However, consistent with our approach for partitioning and to provide flexibility to the parties to facilitate disaggregation in the upper 200 channels, we will permit the parties to negotiate among themselves the responsibility for meeting the channel usage requirement. Each party may agree to separately meet its channel usage requirement for its portion of the disaggregated spectrum or the original licensee may certify that is has or will meet the channel usage requirement for the entire spectrum block. Similar to our approach for partitioning, one party's failure to meet its agreed-to channel usage requirement shall result in that party's license automatically reverting to the Commission and shall not affect the other party's license.

93. There are no channel usage requirements in the 900 MHz SMR band or in the lower 230 channels of the 800 MHz band. We believe it would be inconsistent with our existing construction requirements to impose separate performance requirements on both the disaggregator and disaggregatee in those bands. However, we wish to ensure that parties do not use disaggregation to circumvent our underlying performance requirements. Therefore, we will adopt an approach similar to the one adopted for partitioning: we will retain the underlying ''substantial service'' requirement for the spectrum as a whole but allow either party to meet the requirements on its disaggregated portion. Therefore, a licensee in either the 900 MHz band or the lower 230 channels of the 800 MHz band that disaggregates a portion of its spectrum may elect to retain responsibility for meeting the ''substantial service'' requirement, or it may negotiate a transfer of this obligation to the disaggregatee. In either case, the rules ensure that the spectrum will be developed to at least the same degree that was required prior to disaggregation.

94. To ensure compliance with our rules, we will require that parties seeking Commission approval of disaggregation agreement in the 900 MHz band or the lower 230 channels of the 800 MHz band include a certification as to which party will be responsible for meeting the applicable ''substantial service'' requirements. Parties may also propose to share the responsibility for meeting the requirement. As part of our public interest review under section 310(d), we will review each transaction to ensure that the party designated as responsible for meeting the performance requirements is bona fide and has the ability to meet these requirements. In the event that only one party agrees to take responsibility for meeting the performance requirement and later fails to do so, that party's license will be subject to forfeiture, but the other party's license will not be affected. Should both parties agree to share the responsibility for meeting the performance requirements and either party later fail to do so, both parties' licenses will be subject to forfeiture.

95. We note also that disaggregatees that already hold an SMR license or other CMRS license in the same geographic market will be subject to the same performance requirements as disaggregatees who do not hold other licenses for disaggregated spectrum. In addition, as we noted above, we will require that parties to partitioning and disaggregation agreements involving 800 MHz licensees certify in their applications which party will be responsible for relocating incumbent licensees located in the partitioned license area or the disaggregated spectrum block. The parties are free to negotiate among themselves which party will be responsible for incumbent relocation.

2. Matters Related to Designated Entity Licensees

96. Geographic area licensees in both the 800 MHz and 900 MHz bands that qualify as a ''small business'' (otherwise referred to generally as ''designated entity'' licensees) may receive a bidding credit to reduce the amount of their winning auction bid. Entities with average gross revenues of not more than $3 million for the preceding three years may receive a 35 percent bidding credit. Entities with average gross revenues of not more than $15 million for the preceding three years may receive a 25 percent bidding credit. While 900 MHz licensees may repay their winning auction bid pursuant to installment payments, pursuant to our *Memorandum Opinion and Order* released today, installment payments for 800 MHz licensees in the upper 200 channels have been eliminated and we decline to adopt such a provision for the lower 230 channels. There are two levels of installment payments available to small business EA licensees in the upper 200 channels while only one level of installment payments is available to small business EA licensees in the lower 230 channels. Therefore, we must only concern ourselves with the question of installment payments with respect to 900 MHz licensees.

97. Whenever an geographic area 800 MHz or 900 MHz SMR licensee, that received a bidding credit at auction, transfers its entire license to an entity that would not have qualified for such a bidding credit or would have qualified for a lower bidding credit, the geographic area licensee is required to repay some or all of its bidding credit. If the transfer occurs in the first two years, 100 percent of the bidding credit must be repaid; if it occurs in year three, 75 percent; in year four, 50 percent; and in year five, 25 percent. After the fifth year, no unjust enrichment penalty is imposed.

98. Similarly, if a 900 MHz geographic area licensee, that is paying its winning bid through installment payments, transfers its license to entire an entity that would not have qualified for such installment payments or, in the case of the upper 200 channels, for a less favorable installment payment plan, the geographic area licensee must make full payment of the remaining unpaid principal and interest accrued through the date of assignment or transfer. A similar rule has been adopted for the lower 230 channels, however, only one level of installment payments in available to EA licensees in the lower 230 channels.

99. We conclude that the above-outlined unjust enrichment requirements shall apply if licensee, that received one of these special small business benefits, partitions or disaggregates to an entity that would not qualify for the benefit. We will follow the approach adopted in both the broadband PCS and WCS proceedings and apply all such unjust enrichment requirements on a *pro rata* basis using population to calculate the relative value of the partitioned area and amount of spectrum disaggregated to calculate the relative value of the disaggregated spectrum. We disagree

with PCIA that these measures will slow the assignment process or encourage the filing of frivolous petitions to deny. We find that such measures will provide an objective method for calculating the relative values of partitioned areas and disaggregated spectrum. We note that population will be calculated based upon the latest census data. Parties may use the latest census data when it is available.

100. With respect to installment payments, we will follow the procedures established in the broadband PCS proceeding and require that a 900 MHz SMR geographic area licensee, making installment payments, and seeking to partition or disaggregate to an entity that does not meet the applicable installment payment eligibility standards, make a payment of principal and interest calculated on a proportional basis as set forth above. If a geographic area licensee making installment payments, partitions or disaggregates to an entity that would qualify for less favorable installment payments, we will require the licensee to reimburse the government for the difference between the installment payment paid by the licensee and the installment payments for which the partitionee or disaggregatee is eligible calculated on a proportional basis as set forth above.

101. We will separate the payment obligations using the same procedures adopted for broadband PCS. When a 900 MHz SMR geographic area licensee with installment payments partitions or disaggregates to a party that would not qualify for installment payments under our rules or to an entity that does not desire to pay for its share of the license with installment payments, we will require, as a condition of grant of the partial assignment application, that the partitionee/disaggregatee pay its entire *pro rata* amount within 30 days of Public Notice conditionally granting the partial assignment application. The partitioner or disaggregator will receive new financing documents (promissory note and security agreement) with a revised payment obligation, based on the remaining amount of time on the original installment payment schedule. A default on an obligation will only affect that portion of the market area held by the defaulting party.

102. Where both parties to the 900 MHz SMR partitioning or disaggregation arrangement qualify for installment payments under our rules, we will again follow the procedures established in the broadband PCS proceeding and permit the partitionee/disaggregatee to make installment payments on its portion of the remaining government obligation. Partitionees/disaggregatees are free, however, to make a lump sum payment of all or some of their *pro rata* portion of the remaining government obligation within 30 days of the Public Notice conditionally granting the partial assignment application. Should a partitionee/disaggregatee choose to make installment payments, we will require, as a condition to approval of the partial assignment application, that both parties execute financing documents (promissory note and security agreement) agreeing to pay the U.S. Treasury their *pro rata* portion of the balance due (including accrued and unpaid interest on the date the partial assignment application is filed) based upon the installment payment terms for which they would qualify. Each party will receive a license for its portion of the market area and each party's financing documents will provide that a default on its obligation would only affect their portion of the market area. These payments to the U.S. Treasury are required notwithstanding any additional terms and conditions agreed to between or among the parties.

3. Related Matters

103. We asked commenters in the *Second Further Notice of Proposed Rulemaking* to discuss the conditions by which partitioning and disaggregation should be allowed for 800 MHz licensees. In addition, AMTA raised related matters in its Petition. We adopt the following rules with respect to the above-outlined matters similar to those we have adopted for the broadband PCS service.

a. Combined Partitioning and Disaggregation

104. In the broadband PCS proceeding, we found that allowing entities to propose combined partitioning and disaggregation transactions would provide added flexibility and would facilitate such arrangements. We believe the same rationale would apply to partitioning and disaggregation in the SMR service. Therefore, we will allow licensees to propose combined partitioning and disaggregation transactions. We believe that the goals of providing competitive serve offering, encouraging new market entrants, and ensuring quality service to the public will be advanced by allowing such combined transactions. We further conclude that in the event that there is a conflict in the application of the partitioning and disaggregation rules, the partitioning rules should prevail. For the purpose of applying our unjust enrichment requirements and/or for calculating obligations under installment payment plans, when a combined 900 MHz SMR partitioning and disaggregation is proposed, we will use a combination of both population of the partitioned area and amount of spectrum disaggregated to make these *pro rata* calculations.

b. License Term and Renewal Expectancy

105. In the broadband PCS proceeding, we concluded that entities acquiring a license through partitioning and disaggregation should hold their license for the remainder of the original licensee's license term. We found that this approach was consistent with the approach we had adopted for the Multipoint Distribution Service and was the easiest to administer. We found that allowing licensees to ''re-start'' the license term from the date of the grant of the partial assignment of license application could invite parties to circumvent our license term rules and unnecessarily delay service to the affected areas.

106. We find the same to be true with respect to the SMR service. Limiting partitionees and disaggregatees in the SMR service to the remainder of the original licensee's license term (whether it be five years for incumbent licensees or ten years for geographic area licensees) will ensure that there will be the maximum incentive for parties to pursue available spectrum as quickly as practicable, thus expediting delivery of service to the public.

107. We will also adopt renewal expectancy provisions for SMR partitionees and disaggregatees that obtain their licenses from geographic area licensees similar to those adopted in the broadband PCS proceeding. Partitionees and disaggregatees obtaining license areas or spectrum from geographic area licensees may earn a renewal expectancy on the same basis as other geographic area licensees.

c. Licensing

108. In order to provide added flexibility, we will not adopt the procedures set forth in the *Second Further Notice of Proposed Rulemaking* and, instead, adopt procedures similar to those proposed by AMTA and those devised for broadband PCS partitioning and disaggregation. We will require that parties seeking approval for an SMR partitioning or disaggregation transaction follow the existing partial assignment procedures for the SMR service. Such applications will be placed on Public Notice and will be subject to petitions to deny. The licensee will be required to file an FCC Form 490 that is signed by both the

licensee and the qualifying entity. The qualifying entity will also be required to file an FCC Form 430 unless a current FCC Form 430 is already on file with the Commission. An FCC Form 600 must be filed by the qualifying entity to receive authorization to operate in the market area being partitioned or for the disaggregate spectrum and to modify the existing license of the qualifying entity to include the new/additional market area being partitioned or the spectrum being disaggregated. Any requests for a partitioned license or disaggregated spectrum must contain the FCC Forms 490, 430, and 600 and be filed as one package under cover of the FCC Form 490. We note that the 45 MHz CMRS spectrum cap contained in § 20.6 of the rules applies to partitioned license areas and disaggregated spectrum in the SMR service. In the context of partitioning, we will determine compliance with the spectrum cap based on the post-partitioning populations of each licensees' partitioned market. This means that neither the partitioner nor the partitionee may count the population in the other's party's portion of the market in determining its own compliance with the spectrum cap. Furthermore, by signing FCC Forms 490 and 600, the parties will certify that grant of the partial assignment application would not cause either party to be in violation of the spectrum aggregation limit contained in § 20.6 of the rules.

F. Competitive Bidding Issues of Lower 80 and General Category Channels

1. Auction of Lower 80 and General Category Channels

109. In previous proceedings, we concluded generally that we should use ''competitive bidding procedures to select from among mutually exclusive CMRS applications where we have the authority to do so and where we find such processing to be in the public interest.'' Upon consideration of the record in this proceeding, we conclude that auctioning the Lower 80 channels and the General Category channels meets the criteria set forth in section 309(j) of the Communications Act and will further the public interest. Nextel, AMTA, and SMR Won generally support competitive bidding for these channels.

110. Southern and ITA argue that the Commission lacks the authority to auction this spectrum on the ground that under section 309(j) the Commission is obligated to use existing means (*i.e.* engineering solutions, negotiations, threshold qualifications) to avoid mutual exclusivity in application and license proceedings. We note as an initial matter that the Communications Act only requires the Commission to use other such existing means when it is in the public interest. After careful analysis of this spectrum, we conclude that the likelihood of mutually exclusive applications in the 800 MHz SMR band is considerable and that not all potential conflicts will be eliminated through negotiations or other existing means. We therefore conclude that the public interest will be served by using competitive bidding to license these channels.

111. Some commenters contend that the General Category and Lower 80 are not auctionable because the channels are heavily licensed leaving few or no channels or space available for new licensing. Further, these commenters contend that those channels that are open will be used for mandatory relocation of incumbents from the upper 10 MHz channels. These commenters also contend that there is little to be gained by adopting geographic licensing because geographic areas that already have any value are licensed and there will be no increase in spectrum efficiency. Further, commenters argue that because there is little open space and no mandatory relocation proposal from the Lower 80 or General Category channels, EA licensees will not be able to expand and these licensees could be further frustrated by relocatees from the upper 200 channels.

112. We reject those arguments for several reasons. We do not believe the purported dearth of channels in some areas or the potential risk of relocatees from the upper 200 channels render the competitive bidding process inapplicable. In this Order, we include provisions for licensees to aggregate licenses within a geographic area, which will enable them to expand the geographic coverage of their systems and potentially enhance the commercial viability of these licenses, as well as use this spectrum efficiently. As noted above, there is a high likelihood that mutually exclusive applications will be filed for these channels. The resolution of these applications by comparative hearings or other means will unnecessarily delay the processing of these applications, contrary to the public interest and to the Congressional objectives under section 309(j)(3). Under the licensing scheme for these channels, *i.e.*, on a geographic area basis (as with the upper 200 channels, EAs will be used for the lower 80 channels), there will be competitive opportunities to provide SMR service in this frequency band and the application process for these channels will be open to any qualified applicant. Furthermore, the use of competitive bidding to select among these applicants will ensure that the qualified applicants who place the highest value on the available spectrum will prevail in the selection process. Additionally, as we concluded in the *First Report and Order*, by using the same service area definition for the lower 80 and General Category channels as we used for the upper 200 channels, we will realize greater administrative efficiency in the licensing of these channels.

113. A few commenters contend that they cannot afford to participate in the auction. Some commenters believe that the auction procedure heavily favors large entities over smaller ones, that these larger entities will hurt competition and delay provision of services while the auction takes place. As noted below, to ensure small business participation in the Lower 80 and General Category channel auctions, the Commission has adopted bidding credits. Furthermore, contrary to claims that auctions will delay the deployment of services, we believe that the use of competitive bidding will enhance competition and serve to streamline the administrative process, thereby allowing licenses to provide service more quickly than alternative licensing procedures.

114. Several commenters argue that the government should be concerned with the safety and welfare of citizens even when such concerns prevent it from raising revenues. Some commenters believe that this spectrum should be reserved for public safety entities and that PMRS licensees need access to additional spectrum. Motorola believes that PMRS providers play an important role in public safety and private industry and that PMRS's concerns should be taken into account. We addressed these concerns fully in the *Second Further Notice of Proposed Rulemaking.* We stated that existing licensees will not be required to relocate their public safety radio systems and geographic licensees will be required to provide protection to all co-channel systems that are constructed and operating within their service area. In addition, an advisory committee has been established to address the concerns of public safety users. Therefore, the Commission's rules will allow both the efficient use of the spectrum and the preservation of public safety.

2. Competitive Bidding Design

a. Bidding Methodology

115. Based on the record in this proceeding and our successful experience conducting simultaneous

multiple round auctions for other services, we believe a simultaneous multiple round auction design is the preferred competitive bidding design for these channels. Commenters generally support the use of this methodology, on the grounds that there is interdependency among the licenses. No commenter advocated the use of sequential multiple round auctions. We also note, as discussed below, that we will adopt regional groupings for the Lower 80 and General Category EA licenses. The aggregation of licenses into these regional groupings creates stronger interdependencies between the licenses, further warranting the use of this auction methodology.

b. License Grouping

116. To expedite the process of auctioning the Lower 80 and General Category EA licenses, we will auction these licenses using the five regional groups that were used for the regional narrowband PCS auction: Northeast, South, Midwest, Central, and West. We believe that by grouping the licenses and auctioning them regionally, we reduce the burden on small businesses which choose to participate in the auction process. Each entity will need to participate only in those regional auctions in which it is interested in winning licenses. Additionally, by holding regional auctions and thereby limiting the number of licenses available, we will decrease the administrative burden of the auction on the participants, and further enable the auction to conclude at an earlier time. Finally, we believe that this grouping will make it easier for incumbents to secure spectrum that complements the licenses they currently hold while allowing them to expand their systems.

c. Bidding Procedures

i. Bid Increments

117. We will adopt our minimum bid increment proposal, but delegate authority to the Bureau to vary the minimum bid increment. While we believe our proposal is appropriate, our experience with other auctions indicates that flexibility is necessary to set appropriate bidding levels to account for the pace of the auction, the needs of the bidders, and the value of the spectrum. Commenters generally support a minimum bid increment based upon a percentage of the bid from the previous round. E.F. Johnson, on the other hand, argues that minimum bid increments should be reduced or eliminated to facilitate small business participation in the auction. There is no evidence that a minimum bid increment will deter small business participation in the auction. Rather, as we previously noted, an appropriate minimum bid increment is important to the functioning of the auction as it speeds the process of the auction and helps to ensure that it comes to closure within a reasonable period of time. Moreover, as noted below, we have adopted provisions to encourage small business participation. We will follow the practice that we have used for other auctions and, consistent with § 1.2104 of the Commission's Rules, announce by Public Notice prior to the auction the general guidelines for bid increments.

ii. Stopping Rules

118. In view of our decision to aggregate licenses on a regional basis, we believe that a simultaneous stopping rule is appropriate for both the Lower 80 and the General Category licenses. Thus, bidding will remain open on all licenses in an auction until bidding stops on every license. Based on the success of our prior broadband PCS and 900 MHz SMR auctions, Nextel agrees that there should be a simultaneous stopping rule. AMTA and Nextel also claim that this rule is appropriate because of the interdependencies between the markets. SMR Won supports the market-by-market stopping rule, suggesting that it will deter speculators and reduce artificial inflation of auction prices. We conclude that bidding should remain open on all licenses in an auction until bidding stops on every license. We believe that allowing simultaneous closing for all licenses will afford bidders the flexibility to pursue back-up strategies without the risk that bidders will refrain from bidding until the final rounds. In any event, we will retain the discretion to change the stopping rules during the course of the auction, and delegate authority to the Bureau to exercise that discretion.

iii. Activity Rules

119. In accordance with § 1.2104 of the Commission's Rules and the guidelines we adopted in the *Competitive Bidding Second Report and Order,* we will employ the Milgrom-Wilson activity rule for both the Lower 80 and General Category auctions. As we noted in the *Competitive Bidding Second Report and Order,* the Milgrom-Wilson activity rule is the preferred activity rule where a simultaneous stopping rule is used. We believe that the Milgrom-Wilson approach best achieves the Commission's goal of affording bidders flexibility to pursue backup strategies, while at the same time ensuring that simultaneous auctions are concluded within a reasonable period of time. Specifically, 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. For purposes of this auction, we will adopt the minimum required activity levels at each stage that recently were adopted for the D, E, and F Broadband PCS auction.

120. As in previous auctions, we reserve the discretion to set and, by announcement before or during the auction, vary the level of the requisite minimum activity levels (and associated eligibility calculations) for each auction stage. We believe that 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. We delegate to the Bureau the authority to set or vary the minimum activity levels if circumstances warrant a modification. The Bureau will announce any such modification by Public Notice. For the purposes of this auction, we also will use the general transition guidelines that were used for the D, E, and F Broadband PCS auctions. The auction will start in Stage One and move to Stage Two when the auction activity level is below ten percent for three consecutive rounds in Stage One. 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. Under no circumstances can the auction revert to an earlier stage. However, the Bureau will retain the discretion to determine and announce during the course of an auction when, and if, to move from one auction stage to the next.

121. 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, we will provide bidders with five activity rule waivers that may be used in any round during the course of the auction. The Bureau will retain the discretion to issue additional waivers during the course of an auction for circumstances beyond a bidder's control, and also retain 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.

iv. Duration of Bidding Rounds

122. We will retain the discretion to vary the duration of bidding rounds and

the intervals at which bids are accepted. In simultaneous multiple round auctions, bidders may need a significant amount of time to evaluate back-up strategies. AMTA requests that we allow only one round of an auction per day because many of its members who will participate in the auction do not have sufficient staff to monitor the auction if there is more than one round per day. Genesee requests that for the first five rounds of the auction only one round of bids per day be allowed. Genesee does not provide any rationale for its proposal. We do not believe these proposed limitations are necessary. We note that we have adopted regional license groupings that are intended to minimize for small entity participants these burdens in participating and monitoring the auctions. Therefore, we delegate authority to the Bureau to vary the bidding rounds or the interval at which bids are accepted in order to move the auction toward closure more quickly or as circumstances warrant. The Bureau will announce any changes to the duration of and intervals between bidding rounds, whether by Public Notice prior to the auction or by announcement during the auction.

d. Rules Prohibiting Collusion

123. We adopt the rules prohibiting collusive conduct for use in the Lower 80 and General Category auctions. These requirements, as set forth in §§ 1.2105 and 1.2107 of our Rules, operate along with existing antitrust laws as a safeguard to prevent collusion in the competitive bidding process. In addition, where specific instances of collusion in the competitive bidding process are alleged during the petition to deny process, we may conduct an investigation or refer such complaints to the U.S. Department of Justice for investigation. Bidders who are found to have violated the antitrust laws or the Commission's rules in connection with their participation in the auction process may be subject to a variety of sanctions, including the forfeiture of their down payment or their full bid amount, revocation of their licenses, and possible prohibition from participation in the auctions. Genesee supports our proposal on the grounds that these same rules were effective in the 900 MHz SMR auctions. Coral Gables, in contrast, requests that public safety radio service providers under part 90, or those proposing to provide such services, should be exempt from the collusion rules when they are negotiating with other public safety service providers. We reject Coral Gable's position. First, the specific needs of public safety entities are the subject of, and will be addressed in, a separate Commission proceeding. In addition, we believe that continued negotiation past the short-form filing date by any segment of bidders may impact the valuation of the licenses and jeopardize the integrity of the auction process. We note that prior to the short-form filing date, public safety radio service providers, like other auction participants, are free to negotiate with each other to the extent permitted by the antitrust laws.

e. Procedural and Payment Issues

i. Pre-Auction Application Procedures

124. We will generally use the applications and payment procedures set forth in part 1 of our rules, with certain modifications for the 800 MHz SMR service. 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 the method of competitive bidding to be used, applicable bid submission procedures, stopping rules, activity rules, the short-form filing deadline, and the upfront payment amounts.

125. Prior to the auction, the Wireless Telecommunications Bureau will also provide information about incumbent licensees for applicants planning to participate in the auction. We encourage all potential bidders to examine these records carefully and do their own independent investigation regarding existing licensees' operations in each license area on which they intend to bid in order to maximize their success in the auction.

126. Section 309(j)(5) provides that no party may participate in an auction ''unless such bidder submits such information and assurances as the Commission may require to demonstrate that such bidder's application is acceptable for filing.'' We adopt our proposal to require all applicants for 800 MHz SMR licenses to submit FCC Form 175 in order to participate in the auction. As we indicated in the *Competitive Bidding Second Report and Order,* if we receive only one application that is acceptable for filing for a particular license, and thus there is no mutual exclusivity, we will issue a Public Notice canceling the auction for that license and establish a date for the filing of a long-form application.

ii. Amendments and Modifications

127. We will apply the provisions set forth in part 1 of our rules governing amendments to and modifications of short-form application to the 800 MHz SMR service. The only commenter on this issue, Genesee, supports the Commission's proposal. Upon reviewing the short-form applications, we will issue a Public Notice listing all defective applications. Applicants with minor defects in their applications will be given an opportunity to cure them and resubmit a corrected version.

iii. Upfront Payments

128. We will adopt our upfront payment proposal, particularly because the majority of commenters support it. Fresno states that the upfront payment should be high enough to discourage frivolous bidders but flexible enough to reflect the lower value of the channels. As we previously noted, a substantial upfront payment requirement is necessary to ensure that only serious qualified bidders participate in auctions, thereby ensuring that sufficient funds are available to satisfy any bid withdrawal or default payments that may be incurred. We thus reject Coral Gables' claim that bidders that provide public safety radio services under part 90 of the Commission's Rules should not be required to make an upfront payment or, alternatively, that they should have a reduced upfront payment. We believe that making these exceptions to the upfront payment requirement would jeopardize the integrity of the auction process. As Fresno suggests, we recognize the standard upfront payment formula may yield too high a payment as compared to the value of these licenses. Accordingly, we delegate authority to the Bureau to vary the minimum upfront payment when it determines the general formula of $0.02 per MHz-pop is an unreasonably high upfront payment. The Bureau will announce any such modification by Public Notice.

iv. Down Payment and Full Payment

129. We conclude that we should require all winning bidders to supplement their upfront payments with down payments sufficient to bring their total deposits up to 20 percent of the winning bid(s). Genesee, the sole commenter to address this issue, supports our proposal. If the upfront payment already tendered by a winning bidder, after deducting any bid withdrawal and default payments due, amounts to 20 percent of its winning bids, no additional deposit will be required. If the upfront payment amount on deposit is greater than 20 percent of the winning bid amount after deducting any bid withdrawal and default payments due, the additional monies will be refunded.

130. We will require winning bidders to submit the required down payment to our lock-box bank within ten business days following release of a Public Notice announcing the close of bidding. All auction winners will be required to make full payment of the balance of their winning bids within ten business days following Public Notice that the Commission is prepared to award the license. The Commission generally will grant uncontested licenses within ten business days after receiving full payment.

131. We believe that small businesses should also be subject to a 20 percent down payment requirement. We believe that such a requirement is consistent with ensuring that winning bidders have the financial capability of building out their systems and will provide us a strong assurance against default. 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. We also believe that a 20 percent down payment should cover the required payments in the unlikely event of default. In view of our decision to defer the issue of installment payments to the part 1 proceeding, we will also defer our decision as to when small businesses must make their down payment to the part 1 proceeding.

v. Bid Withdrawal, Default, and Disqualification

132. To prevent insincere bidding we will apply our general bid withdrawal, default, and disqualification rules, as set forth in § 1.2104(g) of the Commission's Rules, to the Lower 80 and General Category auctions. Genesee, the sole commenter to address these issues, supports this proposal. Any bidder that withdraws a high bid before the Commission declares bidding closed will be required to reimburse the Commission in the amount of the difference between its high bid and the amount of the winning bid the next time the license is offered by the Commission if this subsequent winning bid is lower than the withdrawn bid. 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 on the amount bid on such licenses. When it becomes possible to calculate and assess the payment, any excess deposit will be refunded.

133. In the event an auction winner defaults on its initial down payment, the Commission must exercise our discretion to decide whether to hold a new auction or offer the licenses to the second highest bidder. In exercising our discretion, the Commission will evaluate the particular facts and circumstances of the specific case. In the unlikely event that there is more than one bid withdrawal on the same licenses, we will hold each withdrawing bidder responsible for the difference between its withdrawn bid and the amount of the winning bid the next time the license is offered by the Commission.

vi. Long-Form Applications and Petitions to Deny

134. In the *Second Further Notice of Proposed Rulemaking* we proposed to adopt the general procedures for filing long-form applications to the 800 MHz SMR auctions. In addition, we proposed that the petition to deny procedures that were adopted in the *CMRS Third Report and Order* should apply to the processing of applications for the 800 MHz SMR service. Genesee, the sole commenter on this issue, supports our proposal. Therefore, we adopt our proposals regarding petitions to deny. A party filing a petition to deny against an 800 MHz SMR license application will be required to demonstrate standing and meet all other applicable filing requirements. The restrictions in § 90.162 were established to prevent the filing of speculative applications and pleadings (or threats of the same) designed to extract money from 800 MHz license applicants. Thus, we will limit the consideration that a winning bidder or an individual or entity filing a petition to deny is permitted to receive for agreeing to withdraw an application or a petition to deny to the legitimate and prudent expenses of the withdrawing applicant or petitioner. We note also that we recently amended § 90.162 to reflect the fact that discussions regarding withdrawal of short-form applications are subject to § 1.2105(c) of our Rules.

vii. Transfer Disclosure Requirements

135. In section 309(j) of the Communications Act, Congress directed the Commission to ''require such transfer disclosures and anti-trafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits.'' Therefore, we imposed a transfer disclosure requirement on licenses obtained through the competitive bidding process, whether by designated entity or not. We tentatively concluded in the *Second Further Notice of Proposed Rulemaking* that the transfer disclosure requirements should apply to all 800 MHz SMR licenses obtained through the competitive bidding process. Genesee, again the sole commenter on this issue, supports the Commission's tentative conclusion. We will adopt the transfer disclosure requirements contained in § 1.2111(a) of our rules to auctions for the Lower 80 and General Category. We will give particular scrutiny to auction winners who have not yet begun commercial service and who seek approval for a transfer of control or assignment of their licenses within three years after the initial license grant, so that we may determine if any unforeseen problems relating to unjust enrichment outside the designated entity context have arisen. These particular transfer disclosure requirements are in addition to the unjust enrichment provisions discussed *infra*.

3. Treatment of Designated Entities

a. Overview and Objectives

136. In authorizing the Commission to use competitive bidding, Congress mandated that the Commission ''ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services.'' The statute required the Commission to ''consider the use of tax certificates, bidding preferences and other procedures'' in order to achieve this congressional goal. In addition, section 309(j)(3)(B) provided that in establishing eligibility criteria and bidding methodologies the Commission shall promote ''economic opportunity and competition * * * by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.'' Section 309(j)(4)(A) provides that to promote these objectives, the Commission shall consider alternative payment schedules, including installment payments.

137. We have employed a wide range of special provisions and eligibility criteria designed to meet the statutory objectives of providing opportunities to designated entities in other spectrum-based services. The measures considered for each service were established after closely examining the specific characteristics of the service and determining whether any particular barriers to accessing capital stood in the way of designated entity opportunities. For example, in narrowband PCS we

provided installment payments for small businesses and bidding credits for minority-owned and women-owned businesses. In 900 MHz SMR, we adopted bidding credits and installment payment plans for small businesses.

138. In the *Second Further Notice of Proposed Rulemaking*, we sought comment on the type of designated entity provisions that should be incorporated into our competitive bidding procedures for the Lower 80 and General Category channels. We requested comment on the possibility that, in addition to small business provisions, separate provisions for women- and minority-owned entities should be adopted for the Lower 80 and General Category channels. We requested commenters to discuss whether the capital requirements of the 800 MHz SMR service pose a barrier to entry by minorities and women and whether overcoming such a barrier, if it exists, would constitute a compelling governmental interest. In particular, we sought comment on the actual costs associated with the acquisition, construction, and operation of an 800 MHz SMR system with a service area based on a pre-defined geographic area as well as the proportion of existing 800 MHz SMR businesses that are owned by women and minorities. We also urged the parties to submit evidence about patterns or actual cases of discrimination in the 800 MHz SMR industry or in related communications services.

b. Eligibility for Designated Entity Provisions

139. At this time, we have not developed a record sufficient to sustain race-based measures in the Lower 80 and General Category licenses based on the standard established by the *Adarand* decision. In addition, we believe that the record is insufficient to support any gender-based provisions under the intermediate scrutiny standard established in the *VMI* decision. Fresno urges the Commission to design a regulatory scheme that will provide opportunities for businesses owned by women and minorities to comply with the congressional mandate set out in section 309(j). Fresno, however, does not provide any evidence of past discrimination. Conversely, Nextel states that there is no evidence that minorities and women have been historically discriminated against in the SMR industry. Based upon the record in this proceeding, we will adopt bidding credits solely for applicants qualifying as small businesses. We believe these provisions will provide small businesses with a meaningful opportunity to obtain licenses for the Lower 80 and General Category channels. Moreover, many women- and minority-owned entities are small businesses and will therefore qualify for these provisions. As such, these provisions will meet Congress' goal of promoting wide dissemination of licenses in this spectrum. We have determined that no special provisions for rural telephone companies are warranted but we note that rural telephone companies may take advantage of the geographic partitioning and disaggregation provisions and, to the extent that they fall within the definition of small businesses, they can take advantage of the designated entity provisions too.

i. Small Businesses Definition

140. Based upon the record in this proceeding, we conclude that special provisions for small businesses are appropriate for 800 MHz SMR services. We will adopt a two-tiered definition of small business. We will define a small business as an entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years that do not exceed $15 million; we will define a very small business as an entity that, together with affiliates and controlling principals, has average gross revenues for the preceding three years of that do not exceed $3 million. Bidding credits will be determined, as discussed *infra*, based upon this two-tiered approach.

141. In determining whether an applicant qualifies as a small business at any level, we will consider the gross revenues of the small business applicant and its affiliates. Specifically, for purposes of determining small business status, we will follow the procedure recently adopted for auctions involving other services and will attribute the gross revenues of affiliates of the applicant. We thus choose not to impose specific equity requirements on the controlling principals that meet our small business definition, as suggested by SMR WON and Genesee. We will still require, however, that in order for an applicant to qualify as a small business, qualifying small business principals must maintain ''control'' of the applicant. The term ''control'' would include both *de facto* and *de jure* control of the applicant. For this purpose, we will borrow from certain 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 licensees; and (3) the entity plays an integral role in all major management decisions. While we are not imposing specific equity requirements on the small business principals, the absence of significant equity could raise questions about whether the applicant qualifies as a *bona fide* small business.

ii. Bidding Credits

142. We believe that bidding credits are appropriate as a special provision for designated entities in the Lower 80 and General Category licenses. While bidding credits do not guarantee the success of small businesses, we believe that they at least provide such bidders with an opportunity to successfully compete against larger, well-financed bidders. We also conclude that it is appropriate to adopt tiered bidding credits for 800 MHz SMR auction participants based on the size of the small businesses. Such an approach, we believe, furthers our mandate under section 309(j) of the Communications Act to disseminate licenses to a variety of applicants. Consistent with the tiered small business definition that we adopt today, we will give small businesses that, together with affiliates and controlling principals, have average gross revenues for the preceding three years that do not exceed $3 million, a 35 percent bidding credit. We will give small businesses that, together with affiliates and controlling principals, have average gross revenues for the preceding three years that do not exceed $15 million, a 25 percent bidding credit. Consistent with our approach in the upper 200 channels, we believe that these tiered bidding credits take into account the difficulties smaller businesses have in accessing capital and their differing business strategies.

iii. Installment Payments

143. We will defer the decision regarding whether to adopt installment payments in the lower 80 and General Category channels to our part 1 proceeding. We do not disagree with the contention of Genesee and AMTA that small businesses benefit from the ability to pay for their licenses in installments. Nonetheless, in the part 1 proceeding, we sought comment on whether there are better alternatives to help small

businesses, such as offering higher bidding credits in lieu of installment payments for qualified winning bidders.

144. Finally, we do not see a reason to adopt an alternative payment plan for public safety auction winners, as suggested by Coral Gables. Coral Gables argues that there is a greater public interest value to use these channels for public safety purposes and that special installment payment provisions should be made in the auction rules for public safety auction winners. We decline to provide this benefit for several reasons. First, Coral Gables will not be forced to relocate to other channels and will not be required to participate in the auction to retain the spectrum for which it is currently licensed. Second, we are granting Coral Gables' request to allow disaggregation of channels by geographic area license winners which should enable public safety entities to secure more frequencies from auction winners. Also, as noted above, the Commission is engaged in a separate proceeding dedicated to the issue of spectrum allocation for public safety entities.

iv. Reduced Upfront Payment

145. In view of the favorable bidding credits adopted herein, we do not see a need to adopt reduced upfront payments in order to ensure small business participation in the auction, as advocated by Genesee. Rather, we believe that the standard upfront payment is appropriate for all participants and will help guard against defaults. In addition, reduced upfront payments impose heavy administrative burdens on the Commission and are more confusing to auction participants. We do note that the standard upfront payment amount of $.02/MHz-pop will be discounted on a uniform basis by the Bureau to account for incumbency on this spectrum. The Bureau will announce by Public Notice the amount of this discount.

v. Set-Aside Spectrum

146. We will not adopt an entrepreneurs' block for the Lower 80 and General Category channels for several reasons. First, contrary to the contention of some commenters that an entrepreneurs' block is required to ensure small businesses will be able to obtain licenses, we believe that small businesses will have significant opportunity to compete for licenses given the bidding credits we adopt herein. Second, as noted by at least two commenters, the establishment of an entrepreneurs' block could unfairly exclude some incumbent operators from participation in the auction because some incumbents on these channels are larger companies. Finally, we agree with the argument of one commenter that adoption of an entrepreneurs' block for these channels would contravene the goal of regulatory parity since there is no set-aside in the cellular service and only one-third of the broadband PCS spectrum was set aside for small businesses.

vi. Unjust Enrichment Provisions

147. To ensure that large businesses do not become the unintended beneficiaries of measures meant for smaller firms, we adopt unjust enrichment provisions similar to those adopted for narrowband PCS and 900 MHz SMR services. No comments were received on this issue. Licensees seeking to transfer their licenses to entities which do not qualify as small businesses, as a condition to approval of the transfer, must remit to the government a payment equal to a portion of the total value of the benefit conferred by the government. The amount of this payment will be reduced over time as follows: a transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit; in year three of the license term the payment will be 75 percent; in year four the payment will be 50 percent and in year five the payment will be 25 percent, after which there will be no payment. These assessments will have to be paid to the U.S. Treasury as a condition of approval of the assignment or transfer. Thus, a small business that received bidding credits seeking transfer or assignment of a license to an entity that does not qualify as a small business will be required to reimburse the government for the amount of the bidding credit before the transfer will be permitted.

148. Also, if an investor subsequently purchases an interest in a small business licensee and, as a result, the gross revenues of the business exceed the applicable financial caps, the unjust enrichment provision will apply. We will apply these payment requirements for the entire license term to ensure that small businesses will look first to other small businesses when deciding to transfer their licenses. While small business licensees must abide by these unjust enrichment provisions when transferring their licenses to entities that would not qualify under our small business definitions, we will not impose a holding period or other transfer restrictions on small businesses.

III. Conclusion

149. We believe that the service and auction rules we adopted herein in this *Second Report and Order* are necessary to continue our implementation of a new licensing scheme for the 800 MHz and 900 MHz SMR services. We further believe that the rules will facilitate the rapid implementation of wide-area licensing in the SMR service, thus advancing the public interest by fostering economic growth of competitive new services via efficient spectrum use. The rules also will allow the public to recover a portion of the value of the public spectrum and promote expeditious access to 800 MHz SMR services by consumers, and rapid deployment of 800 MHz SMR by existing licensees and potential new entrants. We also believe that the technical rules proposed and adopted herein strike the proper balance between the rights of incumbent licensees in the 800 MHz SMR spectrum and new EA licensees.

IV. Procedural Matters

A. Regulatory Flexibility Act: (Second Report and Order and Memorandum Opinion and Order on Reconsideration)

150. As required by the Regulatory Flexibility Act, 5 U.S.C. 603 (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Second Further Notice of Proposed Rulemaking* in PR Docket No. 93–144. The Commission sought written public comment on the proposals in the *Second Further Notice of Proposed Rulemaking,* including the IRFA. This Final Regulatory Flexibility Analysis to accompany final rules in both the *Second Report and Order* and the accompanying *Memorandum Opinion and Order on Reconsideration* conforms to the RFA, amended by the Contract With America Advancement Act of 1996.

151. *Need for and Purpose of this Action:* In this *Second Report and Order,* the Commission establishes a flexible regulatory scheme for the 800 MHz Specialized Mobile Radio (SMR) service to promote efficient licensing and enhance the service's competitive potential in the commercial mobile radio marketplace. The rules adopted in the *Second Report and Order* also implement Congress's goal of regulatory symmetry in the regulation of competing commercial mobile radio services as described in sections 3(n) and 332 of the Communications Act of 1934, as amended, 47 U.S.C. 153(n), 332 (Communications Act), as amended by Title VI of the Omnibus Budget Reconciliation Act of 1993 (Budget Act).

The Commission also adopts rules regarding competitive bidding for the remaining 800 MHz SMR spectrum based on section 309(j) of the Communications Act, 47 U.S.C. 309(j), which delegates authority to the Commission to use auctions to select among mutually exclusive initial applications in certain services, including 800 MHz SMR.

152. *Summary of Issues Raised in Response to the Initial Regulatory Flexibility Analysis:* No comments were submitted in response to the IRFA. However, there were several comments concerning the potential impact of some of the Commission's proposals on small entities, especially on certain incumbent 800 MHz SMR licensees.

153. The Commission adopted geographic area licensing for the lower 230 800 MHz SMR channels in order to facilitate the evolution of larger 800 MHz SMR systems covering wider areas and offering commercial services to rival other wireless telephony services. Some licensees that were not SMR licensees opposed this plan arguing that it was unsuitable to the needs of smaller, private systems, which do not seek to cover large geographic areas in the manner of commercial service providers.

154. The Commission adopted a portion of a proposal set forth by a number of incumbent 800 MHz SMR licensees (''Industry Proposal'') and allotted three contiguous 50-channel blocks from the former General Category block of channels. Some commenters argued that allotting such large contiguous blocks would not suit the needs of smaller SMR systems, which typically trunk smaller numbers of non-contiguous channels. These commenters argued that large blocks of contiguous channels could be prohibitively expensive to bid for at auction, thereby limiting the opportunities for smaller operators to take advantage of geographic area licensing.

155. The Commission adopted a proposal to allow incumbent licensees in the lower 230 channels to make system modifications within their interference contours without prior Commission approval, so long as they do not expand the 18 dBμV/m interference contour of their systems. Proponents of the Industry Proposal argued for an alternative plan to limit incumbent expansion rights on the lower 230 channels. The Industry Proposal called for the Commission to permit incumbent licensees in the lower 230 channels to negotiate expansion rights within each EA through a settlement process. The proposed settlement process would occur on a channel-by-channel basis prior to the auction of the lower 230 channels, but after incumbents on the upper 200 channels had an opportunity to relocate or retune to the lower 230 channels. For each channel, incumbents licensed on the channel within the EA would negotiate among themselves to allocate rights to the channel within the EA. If all incumbents on the single channel negotiated an agreement for use of that channel within the EA (*e.g.*, by forming a partnership, joint venture, or consortium), they would then receive an EA license for that channel. If only one incumbent operated on the channel within an EA, it would receive an EA license for that channel automatically. If incumbents on a channel were unable to reach a settlement, the channel would be included in the auction of the lower 230 channels. The Industry Proposal called for non-settling channels in the lower 80 channels to be auctioned in five-channel blocks and the 150 General Category channels to be auctioned in three 50-channel blocks.

156. Commenters argued, *inter alia,* that the Industry Proposal would provide significant opportunities for small businesses. Although commenters acknowledged that auctions are a fast and generally efficient means of licensing new spectrum, they argued that small businesses will ''have no chance of succeeding in gaining the spectrum they need for future growth if they must compete against larger entities with deeper pockets.'' The commenters contended that, in the case of non-SMR licensees, the provision of communications services is not their primary business and they will not be in the position to compete with commercial operators at auction.

157. The Commission adopted rules allowing all 800 MHz SMR licensees to partition their market areas and to disaggregate their spectrum. Commenters generally supported these new rules arguing that partitioning and disaggregation will result in more participation in the marketplace by small entities and allow coalitions of smaller entities to bid at auction.

158. The Commission adopted a proposal to auction the Lower 80 channels and the General Category channels. Some commenters argued that there is little space in the Lower 80 and General Categories and that there was no mandatory relocation proposal for incumbents in these channels. These commenters argue that the combination of these factors will further frustrate incumbent licensees in these channels when incumbents from the Upper 200 channels are relocated. Several other commenters argue that they are not financially capable of participating in the auction of the Lower 80 channels and General Category. These commenters believe that the auction process favors large entities and that the large entities an effectively stifle competition in the auction process including the delaying the conclusion of the auction.

159. The Commission adopted its proposal for a minimum bid increment of the greater of $.01 per MHz-pop, or 5% percent of the high bid from the previous round. E.F. Johnson argued that minimum bid increments should be reduced or eliminated to facilitate small business participation in the auction.

160. The Commission adopted a two-tiered small business definition. In order to be eligible for designated entity provisions, an applicant must qualify as a ''small business,'' where an entity must have had average gross revenues of not more than $15 million for the preceding three years or as ''very small business,'' where a company must have had average gross revenues of not more than $3 million for the preceding three years.

161. The Commission adopted bidding credit amounts that were tailored to the Commission's small business definition. Specifically, small businesses with average gross revenues of not more than $15 million for the preceding three years will receive a 10 percent bidding credit and those entities with average gross revenues of not more than $3 million for the preceding three years will receive a 15 percent bidding credit. Some commenters expressed concern that the proposed bidding credits were too low. Coral Gables argued that the bidding credits for public safety entities should be set at a different level than non-public safety entities.

162. The Commission did not adopt an entrepreneurs' block for the Lower 80 and General Category channels. Some commenters argued that by establishing an entrepreneurs' block, some incumbents could be unfairly excluded from participation in the auction because some incumbents in these channels are larger companies. Nextel argued that the adoption of an entrepreneurs' block would contravene the goal of regulatory parity since there is no set-aside in the cellular service and only one-third of the broadband PCS spectrum was set aside for small businesses.

163. *Description and Number of Small Entities Involved:* The rules adopted will apply to current 800 MHz SMR operators and new entrants into the 800 MHz SMR market. Under these rules, Economic Area (EA) licenses 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 800 MHz SMR licenses, the Commission, as noted, has adopted a two-tier definition of small businesses. A very small business will be defined for these purposes as 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. A small business will be defined as 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 approved these definitions for 800 MHz SMR services.

164. The Commission anticipates that a total of 3,325 EA licenses will be auctioned in the lower 230 channel blocks of the 800 MHz SMR service. This figure is derived by multiplying the total number of EAs (175) by the number of channel blocks (19) in the lower 230 channels. The lower 80 channels were divided into 16 blocks of 5 channels each and the General Category channels were divided into 3 blocks of 50 channels each. This results in 19 channels blocks available for auction in each of the 175 EAs. Auctions of 800 MHz SMR licenses have not yet been held, and there is no basis to determine the number of lower 230 channel licenses that will be awarded to small entities. However, the Commission assumes, for purposes of the evaluations and conclusions in this Final Regulatory Flexibility Analysis, that all the auctioned 3,325 geographic area 800 MHz SMR licenses in the lower 230 channels will be awarded to small entities, as that term is defined by the SBA.

165. *Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements:* Geographic area 800 MHz SMR 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 800 MHz SMR licenses 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.

166. 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.'' The Commission adopted safeguards designed to ensure that the requirements of this section are satisfied, including a transfer disclosure requirement for 800 MHz SMR 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.

167. With respect to small businesses, we have 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.

168. The *Second Report and Order* also adopts rules for 800 MHz SMR partitioning and disaggregation rules. These rules contain information requirements that will be used to determine whether the licensee is a qualifying entity to obtain a partitioned license or disaggregated spectrum. This information will be a one-time filing by any applicant requesting such a license. The information will be submitted on the FCC Form 490 (or 430 and/or 600 filed as one package under cover of the Form 490) which are currently in use and have already received OMB clearance. The Commission estimates that the average burden on the applicant is three hours for the information necessary to complete these forms. The Commission estimates that 75 percent of the respondents (which may include small businesses) will contract out the burden of responding. The Commission estimates that it will take approximately 30 minutes to coordinate information with those contractors. The remaining 25 percent of respondents (which may include small businesses) are estimated to employ in-house staff to provide the information. Applicants (including small businesses) filing the package under cover of FCC Form 490 electronically will incur a $2.30 per minute on-line charge. On-line time would amount to no more than 30 minutes. The Commission estimates that 75 percent of the applicants may file electronically. The Commission estimates that applicants contracting out the information would use an attorney or engineer (average of $200 per hour) to prepare the information.

169. *Steps Taken to Minimize Any Significant Economic Burdens on Small Entities:* Section 309(j)(3)(B) of the Communications Act 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) 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 800 MHz licenses in the lower 230 channels, 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 800 MHz SMR rules for the lower 230 channels for competitive bidding by small businesses. The Commission believes that small businesses applying for these licenses should be entitled to bidding credits.

170. In order to ensure the more meaningful participation of small business entities in the 800 MHz auctions, the Commission has adopted a two-tier definition of small businesses. This approach will give qualifying small businesses bidding flexibility. A small business will be defined as an entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years that do not exceed $3 million. A very small business will be defined as an entity that, together with affiliates and controlling principals, has average gross revenues for the three preceding years that do not exceed $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 will establish 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 that do not exceed $3 million, will receive a 35 percent bidding credit. Small businesses that, together with affiliates and controlling principals, have average gross revenues for the three preceding years that do not exceed $15 million, will receive a bidding credit of 25 percent.

171. The Commission is also extending geographic partitioning and disaggregation to all entities eligible to be 800 MHz and 900 MHz SMR licensees. The Commission believes that this provision will allow SMR 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 SMR services, and will facilitate market entry by small entities that have the ability to provide service only to a limited population.

172. *Significant Alternatives Considered and Rejected:* The Commission considered a number of alternative channelization plans for licensing the 150 General Category 800 MHz SMR channels. The three alternatives were: (a) a 120-channel block, a 20-channel block and a 10-channel block; (b) six 25-channel blocks; or (c) fifteen 10-channel blocks.

173. Some commenters argued that allotting large contiguous blocks would not suit the needs of smaller SMR systems, which typically trunk smaller numbers of non-contiguous channels. These commenters argued that large blocks of contiguous channels could be prohibitively expensive to bid for at auction, thereby limiting the opportunities for smaller operators to take advantage of geographic area licensing.

174. In order to accommodate licensees who wanted contiguous as well as those that wanted large blocks of spectrum, the Commission adopted the Industry Proposal and alloted three contiguous 50-channel blocks. As for the concerns of smaller entities that such blocks may be too large, the Commission found that such entities will have the opportunity to acquire smaller amounts of spectrum compatible with their existing technology through the newly-created disaggregation rules.

175. The Commission adopted a proposal to allow incumbent licensees in the lower 230 channels to make system modifications within their interference contours without prior Commission approval, so long as they do not expand the 18 dBμV/m interference contour of their systems. As noted above, the Industry Proposal called for the Commission to permit incumbent licensees in the lower 230 channels to negotiate expansion rights within each EA through a settlement process. The Commission rejected this approach finding that it would not serve the public interest. The Commission found that the Industry Proposal would foreclose new entrants from obtaining spectrum on any of the lower 230 channels that are subject to a settlement. In any market where all of the channels in an EA were allocated by such settlements, the result would be that no opportunities for geographic licensing would be available to new entrants. The Commission also found that the Industry Proposal would preclude competition in the licensing process and restrict the number of potential applicants who can obtain licenses. Thus, it could yield a higher concentration of licenses than would result if non-incumbents were allowed to compete for the spectrum at the same time. The Commission also found that the Industry Proposal would also be inconsistent with the approach it has adopted in other services where it has converted from site-by-site licensing to geographic area licensing.

176. The Commission adopted bidding credits qualified small business entities in the lower 230 channel auctions. Coral Cables sought to have eligibility for, and percentage of, bidding credits set at different levels for public safety entities. The Commission found that its rules were reasonable and met the concerns of commenters and that the bidding credits took into account the fact that different small businesses will pursue different strategies.

177. The Commission declined to adopt rules to allow licensees who qualify as small businesses in a geographic area 800 MHz SMR license auction for the lower 230 channels to pay their winning bid amount in installments over the term of the license. The Commission found that a better alternative to help small businesses, as well as ensure new services to the public is to offer a higher level of bidding credit.

178. Finally, the Commission declined to set aside a special block of 800 MHz SMR channels for entrepreneurs. The Commission found that small businesses will have significant opportunity to compete for licenses given the special bidding credit provisions it had adopted.

179. *Report to Congress:* 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). A copy of this Final Regulatory Flexibility Analysis will also be published in the **Federal Register**.

B. Authority

180. Authority for issuance of this Second Report and Order is contained in the Communications Act, sections 4(i), 7, 303(c), 303(f), 303(g), 303(r), and 332, 47 U.S.C. 154(i), 157, 303(c), 303(f), 303(g), 303(r), 332, as amended.

C. Ordering Clauses

181. Accordingly, IT IS ORDERED that, pursuant to authority of sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), and 309(j), Part 90 of the Commission's Rules, 47 CFR part 90 IS AMENDED as set forth below.

182. IT IS FURTHER ORDERED that the rule changes made herein WILL BECOME EFFECTIVE September 29, 1997. This action is taken pursuant to sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), and 309(j).

183. IT IS FURTHER ORDERED that the Regulatory Flexibility Analysis, as required by section 604 of the Regulatory Flexibility Act is ADOPTED.

184. IT IS FURTHER ORDERED that all waiting lists for the lower 230 channels of 800 MHz SMR spectrum ARE ELIMINATED and all applications currently on waiting lists for such frequencies ARE DISMISSED, effective *July 10, 1997*.

D. Further Information

185. For further information concerning this proceeding, contact Shaun A. Maher or Michael Hamra, Policy and Rules Branch, Commercial Wireless Division, Wireless Telecommunications Bureau at (202) 418–0620 or Alice Elder, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau at (202) 418–0660.

List of Subjects in 47 CFR Part 90

Radio, Specialized mobile radio services.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

Rule Changes

Part 90 of chapter I of title 47 of the Code of Federal Regulations is amended as follows:

PART 90—PRIVATE LAND MOBILE RADIO SERVICES

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

Authority: 47 U.S.C. 154, 303, and 332, unless otherwise noted.

2. Section 90.210 is amended by revising footnote 3 in the table in the introductory paragraph to read as follows:

§ 90.210 Emission masks.

* * * * *

APPLICABLE EMISSION MASKS

* * * * *

[3] Equipment used in this band licensed to EA or non-EA systems shall comply with the emission mask provisions of § 90.691.

* * * * *

3. Section 90.615 is revised to read as follows:

§ 90.615 Spectrum blocks available in the General Category for 800 MHz SMR General Category.

TABLE 1.—806–821/851–866 MHZ BAND CHANNELS (150 CHANNELS)

Spectrum block	Channel Nos.
D	1 through 50.
E	51 through 100.
F	101 through 150.

4. Section 90.617 is amended by revising paragraph (d) and Table 4A to read as follows:

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

* * * * *

(d) The channels listed in Tables 4A and 4B are available only to eligibles in the SMR category which consists of Specialized Mobile Radio (SMR) stations and eligible end users. The frequencies listed in Table 4A are available to SMR eligibles desiring to be authorized for EA-based service areas in accordance with § 90.681. SMR licensees licensed on Channels 401–600 on or before March 3, 1996, may continue to utilize these frequencies within their existing service areas, subject to the mandatory relocation provisions of § 90.699. This paragraph deals with the assignment of frequencies only in areas farther than 110 km (68.4 miles) from the U.S./Mexico border and farther than 140 km (87) miles from the U.S./Canada border. See § 90.619 for the assignment of SMR frequencies in these border areas. For stations located within 113 km (70 miles) of Chicago, channels 401–600 will be assigned in blocks as outlined in Table 4C.

TABLE 4A.—SMR CATEGORY 806–821/851–866 MHZ BAND CHANNELS (280 CHANNELS)

Spectrum block	Channel Nos.
A	401 through 420.
B	421 through 480.
C	481 through 600.
G	201–241–281–321–361.
H	202–242–282–322–362.
I	203–243–283–323–363.
J	204–244–284–324–364.
K	205–245–285–325–365.
L	206–246–286–326–366.
M	207–247–287–327–367.
N	208–248–288–328–368.
O	221–261–301–341–381.
P	222–262–302–342–382.
Q	223–263–303–343–383.
R	224–264–304–344–384.
S	225–265–305–345–385.
T	226–266–306–346–386.
U	227–267–307–347–387.
V	228–268–308–348–388.

* * * * *

5. Section 90.619 is amended by revising paragraphs (a)(5) and Table 4A, (b)(8) Table 12, (b)(9) Table 16, (b)(10) Table 20, and (b)(11) Table 24 to read as follows:

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

(a) * * *

(5) Tables 4A and 4B list the channels that are available for assignment for the SMR Category (consisting of Specialized Mobile Radio systems as defined in § 90.7).

These channels are not available for inter-category sharing.

TABLE 4A.—UNITED STATES-MEXICO BORDER AREA, SMR AND GENERAL CATEGORIES 806–821/851–866 MHZ BAND (95 Channels)

Spectrum block	Offset channel Nos.
EA-Based SMR Category (83 Channels)	
A	398–399–400.
B	429–431–433–435–437–439–469–471–473–475–477–479.
C	509–511–513–515–517–519–549–551–553–555–557–559–589–591–593–595–597–599.
G	229–272–349.
H	230–273–350.
I	231–274–351.
J	232–278–352.
K	233–279–353.
L	234–280–354.
M	235–309–358.
N	236–310–359.

TABLE 4A.—UNITED STATES-MEXICO BORDER AREA, SMR AND GENERAL CATEGORIES 806–821/851–866 MHZ BAND (95 Channels)—Continued

Spectrum block	Offset channel Nos.
O	237–311–360.
P	238–312–389.
Q	239–313–390.
R	240–314–391.
S	269–318–392.
T	270–319–393.
U	271–320–394.
V	228–268–308–348–388.
General Category (12 Channels)	
D	275–315–355–395.
E	276–316–356–396.
F	277–317–357–397

(b) * * *
(8) * * *

TABLE 12.—SMR AND GENERAL CATEGORIES—95 CHANNELS
(Regions 1, 4, 5, 6)

	Spectrum block Channel Nos.
EA-Based SMR Category (90 Channels)	
A	None.
B	463 through 480.
C	493 through 510, 523 through 540, 553 through 570, 583 through 600.
G through V	None.
General Category (5 Channels)	
D	30.
E	60 and 90.
F	120 and 150.

(9) * * *

TABLE 16.—SMR AND GENERAL CATEGORIES—60 CHANNELS
(Region 2)

Spectrum block	Channel Nos.
SMR Category (55 Channels)	
A	None.
B	None.
C	518 through 528, 536 through 546, 554 through 564, 572 through 582, 590 through 600.
G through V	None.
General Category (5 Channels)	
D 18 and 36..	
E	54–72–90.

TABLE 16.—SMR AND GENERAL CATEGORIES—60 CHANNELS—Continued
(Region 2)

Spectrum block	Channel Nos.
F	None.

(10) * * *

TABLE 20.—SMR AND GENERAL CATEGORIES (135 CHANNELS)
(Region 3)

Spectrum block	Channel Nos.
SMR Category (120 Channels)	
A	417 through 420.
B	421 through 440, 457 through 480.
C	497 through 520, 537 through 560, 577 through 600.
G through V	None.
General Category (15 Channels)	
D	38–39–40–158–159.
E	78–79–80–160–198.
F	118–119–120–199–200.

(11) * * *

TABLE 24.—(REGIONS 7, 8) SMR AND GENERAL CATEGORIES—190 CHANNELS

Spectrum block	Channel Nos.
SMR Category (172 Channels)	
A	389 through 400.
B	425 through 440, 465 through 480.
C	505 through 520, 545 through 560, 585 through 600.
G	155–229–269–309–349.
H	156–230–270–310–350.
I	157–231–271–311–351.
J	158–232–272–312–352.
K	159–233–273–313–353.
L	160–234–274–314–354.
M	195–235–275–315–355.
N	196–236–276–316–356.
O	197–237–277–317–357.
P	198–238–278–318–358.
Q	199–239–279–319–359.

TABLE 24.—(REGIONS 7, 8) SMR AND GENERAL CATEGORIES—190 CHANNELS—Continued

Spectrum block	Channel Nos.
R	200–240–280–320–360.
S	225–265–305–345–385.
T	226–266–306–346–386.
U	227–267–307–347–387.
V	228–268–308–348–388.
General Category (18 Channels)	
D	35 through 40.
E	75 through 80.
F	115 through 120.

* * * * *

6. Section 90.621 is amended by revising paragraphs (b) introductory text, (b)(1) and (b)(3) introductory text to read as follows:

§ 90.621 Selection and assignment of frequencies.

* * * * *

(b) Stations authorized on frequencies listed in this subpart, except for those stations authorized pursuant to paragraph (g) of this section and EA-based and MTA-based SMR systems, will be afforded protection solely on the basis of fixed distance separation criteria. For Channel Blocks A, through V, as set forth in § 90.917(d), the separation between co-channel systems will be a minimum of 113 km (70 mi) with one exception. For incumbent licensees in Channel Blocks D through V, that have received the consent of all affected parties to utilize an 18 dBμV/m signal strength interference contour (see § 90.693), the separation between co-channel systems will be a minimum of 173 km (107 mi). The following exceptions to these separations shall apply:

(1) Except as indicated in paragraph (b)(4) of this section, no station in Channel Blocks A through V shall be less than 169 km (105 mi) distant from a co-channel station that has been granted channel exclusivity and authorized 1 kW ERP on any of the following mountaintop sites: Santiago Peak, Sierra Peak, Mount Lukens, Mount Wilson (California). Except as indicated in paragraph (b)(4) of this section, no incumbent licensee in Channel Blocks D through V that have received the consent of all affected parties to utilize an 18 dBμV/m signal strength interference contour shall be less than 229 km (142 mi) distant from a co-channel station that has been

granted channel exclusivity and authorized 1 kW ERP on any of the following mountaintop sites: Santiago Peak, Sierra Peak, Mount Lukens, Mount Wilson (California).

* * * * *

(3) Except as indicated in paragraph (b)(4) of this section, stations in Channel Blocks A through V that have been granted channel exclusivity and are located in the State of Washington at the locations listed below shall be separated from co-channel stations by a minimum of 169 km (105 mi). Except as indicated in paragraph (b)(4) of this section, incumbent licensees in Channel Blocks D through V that have received the consent of all affected parties to utilize an 18 dBμV/m signal strength interference contour, have been granted channel exclusivity and are located in the State of Washington at the locations listed below shall be separated from co-channel stations by a minimum of 229 km (142 mi). Locations within one mile of the geographical coordinates listed in the table below will be considered to be at that site.

* * * * * * *

7. Subpart S is amended by revising the undesignated center heading following § 90.671 to read as follows:

POLICIES GOVERNING THE LICENSING AND USE OF EA-BASED SMR SYSTEMS IN THE 806–821/851–866 BAND

8. Section 90.681 is revised to read as follows:

§ 90.681 EA-based SMR service areas.

EA licenses in Spectrum Blocks A through V band listed in Table 4A of § 90.617(d) are available in 175 Economic Areas (EAs) as defined in § 90.7.

9. Section 90.683(a) introductory text is revised to read as follows:

§ 90.683 EA-Based SMR system operations.

(a) EA-based licensees authorized in the 806–821/851–866 MHz band pursuant to § 90.681 may construct and operate base stations using any of the base station frequencies identified in their spectrum block anywhere within their authorized EA, provided that:

* * * * *

10. Section 90.685 is revised to read as follows:

§ 90.685 Authorization, construction and implementation of EA licenses.

(a) EA licenses in the 806–821/851–866 MHz band will be issued for a term not to exceed ten years. Additionally, EA licensees generally will be afforded a renewal expectancy only for those stations put into service after August 10, 1996.

(b) EA licensees in the 806–821/851–866 MHz band must, within three years of the grant of their initial license, construct and place into operation a sufficient number of base stations to provide coverage to at least one-third of the population of its EA-based service area. Further, each EA licensee must provide coverage to at least two-thirds of the population of the EA-based service area within five years of the grant of their initial license. Alternatively, EA licensees in Channel blocks D through V in the 806–821/851–866 MHz band must provide substantial service to their markets within five years of the grant of their initial license. Substantial service shall be defined as: ''Service which is sound, favorable, and substantially above a level of mediocre service.''

(c) *Channel Use Requirement.* In addition to the population coverage requirements described in this section, we will require EA licensees in Channel blocks A, B and C in the 816–821/861–866 MHz band to construct 50 percent of the total channels included in their spectrum block in at least one location in their respective EA-based service area within three years of initial license grant and to retain such channel usage for the remainder of the construction period.

(d) An EA licensee's failure to meet the population coverage requirements of paragraphs (b) and (c) of this section, will result in forfeiture of the entire EA license. Forfeiture of the EA license, however, would not result in the loss of any constructed facilities authorized to the licensee prior to the date of the commencement of the auction for the EA licenses.

11. Section 90.687 is revised to read as follows:

§ 90.687 Special provisions regarding assignments and transfers of authorizations for incumbent SMR licensees in the 806–821/851–866 MHz band.

An SMR licensee initially authorized on any of the channels listed in Table 4A of § 90.617 may transfer or assign its channel(s) to another entity subject to the provisions of §§ 90.153 and 90.609(b). If the proposed transferee or assignee is the EA licensee for the spectrum block to which the channel is allocated, such transfer or assignment presumptively will be deemed to be in the public interest. However, such presumption will be rebuttable.

12. Section 90.689(a) is revised to read as follows:

§ 90.689 Field strength limits.

(a) For purposes of implementing §§ 90.689 through 90.699, predicted 36 and 40 dBμV/m contours shall be calculated using Figure 10 of § 73.699 of this chapter with a correction factor of −9 dB, and predicted 18 and 22 dBμV/m contours shall be calculated using Figure 10a of § 73.699 of this chapter with a correction factor of −9 dB.

* * * * *

13. Section 90.693 is revised to read as follows:

§ 90.693 Grandfathering provisions for incumbent licensees.

(a) *General Provisions.* These provisions apply to ''incumbent licensees'', all 800 MHz SMR licensees who obtained licenses or filed applications on or before December 15, 1995.

(b) *Spectrum Blocks A through V.* An incumbent licensee's service area shall be defined by its originally-licensed 40 dBμV/m field strength contour and its interference contour shall be defined as its originally-licensed 22 dBμV/m field strength contour. Incumbent licensees are permitted to add, remove or modify transmitter sites within their original 22 dBμV/m field strength contour without prior notification to the Commission so long as their original 22 dBμV/m field strength contour is not expanded and the station complies with the Commission's short-spacing criteria in §§ 90.621(b)(4) through 90.621(b)(6). The incumbent licensee must, however, notify the Commission within 30 days of the completion of any changes in technical parameters or additional stations constructed through a minor modification of their license. Such notification must be made by submitting an FCC Form 600 and must include the appropriate filing fee, if any. These minor modification applications are not subject to public notice and petition to deny requirements or mutually exclusive applications.

(c) *Special Provisions for Spectrum Blocks D through V.* Incumbent licensees that have received the consent of all affected parties to utilize an 18 dBμV/m signal strength interference contour shall have their service area defined by their originally-licensed 36 dBμV/m field strength contour and its interference contour shall be defined as their originally-licensed 18 dBμV/m field strength contour. Incumbent licensees are permitted to add, remove or modify transmitter sites within their original 18 dBμV/m field strength contour without prior notification to the Commission so long as their original 18 dBμV/m field strength contour is not expanded and the station complies with the Commission's short-spacing criteria in §§ 90.621(b)(4) through 90.621(b)(6). The incumbent licensee must, however,

notify the Commission within 30 days of the completion of any changes in technical parameters or additional stations constructed through a minor modification of their license. Such notification must be made by submitting an FCC Form 600 and must include the appropriate filing fee, if any. These minor modification applications are not subject to public notice and petition to deny requirements or mutually exclusive applications.

(d) *Consolidated License. (1) Spectrum Blocks A through V.* Incumbent licensees operating at multiple sites may, after grant of EA licenses has been completed, exchange multiple site licenses for a single license, authorizing operations throughout the contiguous and overlapping 40 dBμV/m field strength contours of the multiple sites. Incumbents exercising this license exchange option must submit specific information for each of their external base sites after the close of the 800 MHz SMR auction.

(2) *Special Provisions for Spectrum Blocks D through V.* Incumbent licensees that have received the consent of all affected parties to utilize an 18 dBμV/m signal strength interference contour operating at multiple sites may, after grant of EA licenses has been completed, exchange multiple site licenses for a single license. This single site license will authorize operations throughout the contiguous and overlapping 36 dBμV/m field strength contours of the multiple sites. Incumbents exercising this license exchange option must submit specific information for each of their external base sites after the close of the 800 SMR auction.

14. Section 90.699 is revised to read as follows:

§ 90.699 Transition of the upper 200 channels in the 800 MHz band to EA licensing.

In order to facilitate provision of service throughout an EA, an EA licensee may relocate incumbent licensees in its EA by providing ''comparable facilities'' on other frequencies in the 800 MHz band. Such relocation is subject to the following provisions:

(a) EA licensees may negotiate with incumbent licensees as defined in § 90.693 operating on frequencies in Spectrum Blocks A, B, and C for the purpose of agreeing to terms under which the incumbents would relocate their operations to other frequencies in the 800 MHz band, or alternatively, would accept a sharing arrangement with the EA licensee that may result in an otherwise impermissible level of interference to the incumbent licensee's operations. EA licensees may also negotiate agreements for relocation of the incumbents' facilities within Spectrum Blocks A, B or C in which all interested parties agree to the relocation of the incumbent's facilities elsewhere within these bands. ''All interested parties'' includes the incumbent licensee, the EA licensee requesting and paying for the relocation, and any EA licensee of the spectrum to which the incumbent's facilities are to be relocated.

(b) The relocation mechanism consists of two phases that must be completed before an EA licensee may proceed to request the involuntary relocation of an incumbent licensee.

(1) *Voluntary Negotiations.* There is a one year voluntary period during which an EA licensee and an incumbent may negotiate any mutually agreeable relocation agreement. The Commission will announce the commencement of the first phase voluntary period by Public Notice. EA licensees must notify incumbents operating on frequencies included in their spectrum block of their intention to relocate such incumbents within 90 days of the release of the Public Notice that commences the voluntary negotiation period. Failure on the part of the EA licensee to notify the incumbent licensee during this 90 period of its intention to relocate the incumbent will result in the forfeiture of the EA licensee's right to request involuntary relocation of the incumbent at any time in the future.

(2) *Mandatory Negotiations.* If no agreement is reached by the end of the voluntary period, a one-year mandatory negotiation period will begin during which both the EA licensee and the incumbent must negotiate in ''good faith.'' Failure on the part of the EA licensee to negotiate in good faith during this mandatory period will result in the forfeiture of the EA licensee's right to request involuntary relocation of the incumbent at any time in the future.

(c) *Involuntary Relocation Procedures.* If no agreement is reached during either the voluntary or mandatory negotiating periods, the EA licensee may request involuntary relocation of the incumbent's system. In such a situation, the EA licensee must:

(1) Guarantee payment of relocation costs, including all engineering, equipment, site and FCC fees, as well as any legitimate and prudent transaction expenses incurred by the incumbent licensee that are directly attributable to an involuntary relocation, subject to a cap of two percent of the hard costs involved. Hard costs are defined as the actual costs associated with providing a replacement system, such as equipment and engineering expenses. EA licensees are not required to pay incumbent licensees for internal resources devoted to the relocation process. EA licensees are not required to pay for transaction costs incurred by incumbent licensees during the voluntary or mandatory periods once the involuntary period is initiated, or for fees that cannot be legitimately tied to the provision of comparable facilities;

(2) Complete all activities necessary for implementing the replacement facilities, including engineering and cost analysis of the relocation procedure and, if radio facilities are used, identifying and obtaining, on the incumbents' behalf, new frequencies and frequency coordination; and

(3) Build the replacement system and test it for comparability with the existing 800 MHz system.

(d) *Comparable Facilities.* The replacement system provided to an incumbent during an involuntary relocation must be at least equivalent to the existing 800 MHz system with respect to the following four factors:

(1) *System.* System is defined functionally from the end user's point of view (*i.e.*, a system is comprised of base station facilities that operate on an integrated basis to provide service to a common end user, and all mobile units associated with those base stations). A system may include multiple-licensed facilities that share a common switch or are otherwise operated as a unitary system, provided that the end user has the ability to access all such facilities. A system may cover more than one EA if its existing geographic coverage extends beyond the EA borders.

(2) *Capacity.* To meet the comparable facilities requirement, an EA licensee must relocate the incumbent to facilities that provide equivalent channel capacity. We define channel capacity as the same number of channels with the same bandwidth that is currently available to the end user. For example, if an incumbent's system consists of five 50 kHz (two 25 kHz paired frequencies) channels, the replacement system must also have five 50 kHz channels. If a different channel configuration is used, it must have the same overall capacity as the original configuration. Comparable channel capacity requires equivalent signaling capability, baud rate, and access time. In addition, the geographic coverage of the channels must be coextensive with that of the original system.

(3) *Quality of Service.* Comparable facilities must provide the same quality

of service as the facilities being replaced. Quality of service is defined to mean that the end user enjoys the same level of interference protection on the new system as on the old system. In addition, where voice service is provided, the voice quality on the new system must be equal to the current system. Finally, reliability of service is considered to be integral to defining quality of service. Reliability is the degree to which information is transferred accurately within the system. Reliability is a function of equipment failures (*e.g.*, transmitters, feed lines, antennas, receivers, battery back-up power, etc.) and the availability of the frequency channel due to propagation characteristics (*e.g.*, frequency, terrain, atmospheric conditions, radio-frequency noise, etc.) For digital data systems, this will be measured by the percent of time the bit error rate exceeds the desired value. For analog or digital voice transmissions, this will be measured by the percent of time that audio signal quality meets an established threshold. If analog voice system is replaced with a digital voice system the resulting frequency response, harmonic distortion, signal-to-noise ratio, and reliability will be considered.

(4) *Operating Costs.* Operating costs are those costs that affect the delivery of services to the end user. If the EA licensee provides facilities that entail higher operating cost than the incumbent's previous system, and the cost increase is a direct result of the relocation, the EA licensee must compensate the incumbent for the difference. Costs associated with the relocation process can fall into several categories. First, the incumbent must be compensated for any increased recurring costs associated with the replacement facilitates (*e.g.*, additional rental payments, increased utility fees). Second, increased maintenance costs must be taken into consideration when determining whether operating costs are comparable. For example, maintenance costs associated with analog systems may be higher than the costs of digital equipment because manufacturers are producing mostly digital equipment and analog replacement parts can be difficult to find. An EA licensee's obligation to pay increased operating costs will end five years after relocation has occurred.

(e) If an EA licensee cannot provide comparable facilities to an incumbent licensee as defined in this section, the incumbent licensee may continue to operate its system on a primary basis in accordance with the provisions of this rule part.

(f) *Cost-Sharing Plan for 800 MHz SMR EA licensees.* EA licensees are required to relocate the existing 800 MHz SMR licensee in these bands if interference to the existing incumbent operations would occur. All EA licensees who benefit from the spectrum clearing by other EA licensees must contribute, on a *pro rata* basis to such relocation costs. EA licensees may satisfy this requirement by entering into private cost-sharing agreements or agreeing to terms other than those specified in this section. However, EA licensees are required to reimburse other EA licensees that incur relocation costs and are not parties to the alternative agreement as defined in this section.

(1) *Pro Rata Formula.* EA licensees who benefit from the relocation of the incumbent must share the relocation costs on a *pro rata* basis. For purposes of determining whether an EA licensee benefits from the relocation of an incumbent, benefitted will be defined as any EA licensee that:

(i) Notifies incumbents operating on frequencies included in their spectrum block of their intention to relocate such incumbents within 90 days of the release of the Public Notice that commences the voluntary negotiation period; or

(ii) Fails to notify incumbents operating on frequencies included in their spectrum block of their intention to relocate such incumbents within 90 days of the release of the Public Notice that commences the voluntary negotiation period, but subsequently decides to use the frequencies included in their spectrum block. EA licensees who do not participate in the relocation process will be prohibited from invoking mandatory negotiations or any of the provisions of the Commission's mandatory relocation guidelines. EA licensees who do not provide notice to the incumbent, but subsequently decide to use the frequencies in their EA will be required to reimburse, outside of the Commission's mandatory relocation guidelines, those EA licensees who have established a reimbursement right pursuant to paragraph (f)(3) of this section.

(2) *Triggering a Reimbursement Obligation.* An EA licensees reimbursement obligation is triggered by:

(i) Notification (*i.e.*, files a copy of the relocation notice and proof of the incumbent's receipt of the notice to the Commission within ten days of receipt), to the incumbent within 90 days of the release of the Public Notice commencing the voluntary negotiation period of its intention to relocate the incumbent; or

(ii) An EA licensee who does not provide notification within 90 days of the release of the Public Notice commencing the voluntary negotiation period, but subsequently decides to use the channels that were relocated by other EA licensees.

(3) *Triggering a Reimbursement Right.* In order for the EA licensee to trigger a reimbursement right, the EA licensee must notify (*i.e.*, files a copy of the relocation notice and proof of the incumbent's receipt of the notice to the Commission within ten days of receipt), the incumbent of its intention to relocate the incumbent within 90 days of the release of the Public Notice commencing the voluntary negotiation period, and subsequently negotiate and sign a relocation agreement with the incumbent. An EA licensee who relocates a channel outside of its licensed EA (*i.e.*, one that is in another frequency block or outside of its market area), is entitled to *pro rata* reimbursement from non-notifying EA licensees who subsequently exercise their right to the channels based on the following formula:

$$Ci = Tc \times \frac{Chj}{TCh}$$

Ci equals the amount of reimbursement

Tc equals the actual cost of relocating the incumbent

TCh equals the total number of channels that are being relocated

Chj equals the number of channels that each respective EA licensee will benefit from

(4) *Payment Issues.* EA licensees who benefit from the relocation of the incumbent will be required to submit their *pro rata* share of the relocation expense to EA licensees who have triggered a reimbursement right and have incurred relocation costs as follows:

(i) For an EA licensee who, within 90 days of the release of the Public Notice announcing the commencement of the voluntary negotiation period, provides notice of its intention to relocate the incumbent, but does not participate or incur relocation costs in the relocation process, will be required to reimburse those EA licensees who have triggered a reimbursement right and have incurred relocation costs during the relocation process, its *pro rata* share when the channels of the incumbent have been cleared (*i.e.*, the incumbent has been fully relocated and the channels are free and clear).

(ii) For an EA licensee who does not, within 90 days of the release of the Public Notice announcing the commencement of the voluntary negotiation period, provide notice to the incumbent of its intention to relocate and does not incur relocation costs during the relocation process, but subsequently decides to use the channels in its EA, will be required to submit its *pro rata* share payment to those EA licensees who have triggered a reimbursement right and have incurred relocation costs during the relocation process prior to commencing testing of its system.

(5) *Sunset of Reimbursement Rights.* EA licensees who do not trigger a reimbursement obligation as set forth in paragraph (f)(2) of this section, shall not be required to reimburse EA licensees who have triggered a reimbursement right as set forth in paragraph (f)(3) of this section ten (10) years after the voluntary negotiation period begins for EA licensees (*i.e.*, ten (10) years after the Commission releases the Public Notice commencing the voluntary negotiation period).

(6) *Resolution of Disputes that Arise During Relocation*. Disputes arising out of the costs of relocation, such as disputes over the amount of reimbursement required, will be encouraged to use expedited ADR procedures. ADR procedures provide several alternative methods such as binding arbitration, mediation, or other ADR techniques.

(7) *Administration of the Cost-Sharing Plan*. We will allow for an industry supported, not-for-profit clearinghouse to be established for purposes of administering the cost-sharing plan adopted for the 800 MHz SMR relocation procedures.

14. Section 90.813 is revised to read as follows:

§ 90.813 Partitioned licenses and disaggregated spectrum.

(a) *Eligibility*. Parties seeking approval for partitioning and disaggregation shall request an authorization for partial assignment of a license pursuant to § 90.153(c).

(b) *Technical Standards.* (1) *Partitioning.* In the case of partitioning, requests for authorization for partial assignment of a license must include, as attachments, a description of the partitioned service area and a calculation of the population of the partitioned service area and the licensed geographic service area. The partitioned service area shall be defined by coordinate points at every 3 degrees along the partitioned service area unless an FCC recognized service area is utilized (*i.e.*, Major Trading Area, Basic Trading Area, Metropolitan Service Area, Rural Service Area or Economic Area) or county lines are followed. The geographic coordinates must be specified in degrees, minutes, and seconds to the nearest second of latitude and longitude and must be based upon the 1927 North American Datum (NAD27). Applicants may supply geographical coordinates based on 1983 North American Datum (NAD83) in addition to those required (NAD27). In the case where an FCC recognized service area or county lines are utilized, applicants need only list the specific area(s) (through use of FCC designations or county names) that constitute the partitioned area.

(2) *Disaggregation*. Spectrum may be disaggregated in any amount.

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

(c) *Unjust Enrichment.* (1) *Installment Payments.* Licensees that qualified under § 90.812 to pay the net auction price for their licenses in installment payments that partition their licenses or disaggregate their spectrum to entities not meeting the eligibility standards for installment payments, will be subject to the provisions concerning unjust enrichment as set forth in § 90.812(b).

(2) *Bidding Credits.* Licensees that qualified under § 90.810 to use a bidding credit at auction that partition their licenses or disaggregate their spectrum to entities not meeting the eligibility standards for such a bidding credit, will be subject to the provisions concerning unjust enrichment as set forth in § 90.810(b).

(3) *Apportioning Unjust Enrichment Payments.* Unjust enrichment payments for partitioned license areas shall be calculated based upon the ratio of the population of the partitioned license area to the overall population of the license area and by utilizing the most recent census data. Unjust enrichment payments for disaggregated spectrum shall be calculated based upon the ratio of the amount of spectrum disaggregated to the amount of spectrum held by the licensee.

(d) *Installment Payments.* (1) *Apportioning the Balance on Installment Payment Plans.* When a winning bidder elects to pay for its license through an installment payment plan pursuant to § 90.812, and partitions its licensed area or disaggregates spectrum to another party, the outstanding balance owed by the licensee on its installment payment plan (including accrued and unpaid interest) shall be apportioned between the licensee and partitionee or disaggregatee. Both parties will be responsible for paying their proportionate share of the outstanding balance to the U.S. Treasury. In the case of partitioning, the balance shall be apportioned based upon the ratio of the population of the partitioned area to the population of the entire original license area calculated based upon the most recent census data. In the case of disaggregation, the balance shall be apportioned based upon the ratio of the amount of spectrum disaggregated to the amount of spectrum allocated to the licensed area.

(2) *Parties Not Qualified For Installment Payment Plans.* (i) When a winning bidder elects to pay for its license through an installment payment plan pursuant to § 90.812, and partitions its license or disaggregates spectrum to another party that would not qualify for an installment payment plan or elects not to pay for its share of the license through installment payments, the outstanding balance owed by the licensee (including accrued and unpaid interest) shall be apportioned according to paragraph (d)(1) of this section.

(ii) The partitionee or disaggregatee shall, as a condition of the approval of the partial assignment application, pay its entire *pro rata* amount within 30 days of Public Notice conditionally granting the partial assignment application. Failure to meet this condition will result in a rescission of the grant of the partial assignment application.

(iii) The licensee shall be permitted to continue to pay its *pro rata* share of the outstanding balance and shall receive new financing documents (promissory note, security agreement) with a revised payment obligation, based on the remaining amount of time on the original installment payment schedule. These financing documents will replace the licensee's existing financing documents which shall be marked ''superseded'' and returned to the licensee upon receipt of the new financing documents. The original interest rate, established pursuant to § 1.2110(e)(3)(i) of this chapter at the time of the grant of the initial license in the market, shall continue to be applied to the licensee's portion of the remaining government obligation. We will require, as a further condition to approval of the partial assignment application, that the licensee execute and return to the U.S. Treasury the new financing documents within 30 days of the Public Notice conditionally granting the partial assignment application. Failure to meet this condition will result

in the automatic cancellation of the grant of the partial assignment application.

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

(3) *Parties Qualified For Installment Payment Plans.* (i) Where both parties to a partitioning or disaggregation agreement qualify for installment payments, the partitionee or disaggregatee will be permitted to make installment payments on its portion of the remaining government obligation, as calculated according to paragraph (d)(1) of this section.

(ii) Each party will be required, as a condition to approval of the partial assignment application, to execute separate financing documents (promissory note, security agreement) agreeing to pay their *pro rata* portion of the balance due (including accrued and unpaid interest) based upon the installment payment terms for which they qualify under the rules. The financing documents must be returned to the U.S. Treasury within thirty (30) days of the Public Notice conditionally granting the partial assignment application. Failure by either party to meet this condition will result in the automatic cancellation of the grant of the partial assignment application. The interest rate, established pursuant to § 1.2110(e)(3)(i) of this chapter at the time of the grant of the initial license in the market, shall continue to be applied to both parties' portion of the balance due. Each party will receive a license for their portion of the partitioned market or disaggregated spectrum.

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

(iv) Partitionees and disaggregatees that qualify for installment payment plans may elect to pay some of their *pro rata* portion of the balance due in a lump sum payment to the U.S. Treasury and to pay the remaining portion of the balance due pursuant to an installment payment plan.

(e) *License Term.* The license term for a partitioned license area and for disaggregated spectrum shall be the remainder of the original licensee's license term as provided for in § 90.665(a).

(f) *Construction Requirements.* (1) *Requirements for Partitioning.* Parties seeking authority to partition must meet one of the following construction requirements:

(i) The partitionee may certify that it will satisfy the applicable construction requirements set forth in § 90.665 for the partitioned license area; or

(ii) The original licensee may certify that it has or will meet the construction requirements set forth in § 90.665 for the entire market. In that case, the partitionee must only meet the requirements for renewal of its license for the partitioned license area.

(iii) Applications requesting partial assignments of license for partitioning must include a certification by each geographic area 800 MHz SMR licenses in the lower 230 channels will be awarded to small entities, as that term is defined by the SBA.

(iv) Partitionees must submit supporting documents showing compliance with the respective construction requirements within the appropriate time frames set forth in § 90.665.

(v) Failure by any partitionee to meet its respective performance requirements will result in the automatic cancellation of the partitioned or disaggregated license without further Commission action.

(2) *Requirements for Disaggregation.* Parties seeking authority to disaggregate must submit with their partial assignment application a certification signed by both parties stating which of the parties will be responsible for meeting the construction requirements for the market as set forth in § 90.665. Parties may agree to share responsibility for meeting the construction requirements. Parties that accept responsibility for meeting the construction requirements and later fail to do so will be subject to license forfeiture without further Commission action.

15. Section 90.901 is revised to read as follows:

§ 90.901 800 MHz SMR spectrum subject to competitive bidding.

Mutually exclusive initial applications for Spectrum Blocks A through V in the 800 MHz band are subject to competitive bidding procedures. The general competitive bidding procedures provided in 47 CFR part 1, subpart Q will apply unless otherwise indicated in this subpart.

16. Section 90.902 is revised to read as follows:

§ 90.902 Competitive bidding design for 800 MHz SMR licensing.

The Commission will employ a simultaneous multiple round auction design when selecting from among mutually exclusive initial applications for EA licenses for Spectrum Blocks A through V in the 800 MHz band, unless otherwise specified by the Wireless Telecommunications Bureau before the auction.

17. Section 90.903 is amended by revising paragraphs (a) and (b) and adding paragraph (f) to read as follows:

§ 90.903 Competitive bidding mechanisms.

(a) *Sequencing.* The Wireless Telecommunications Bureau will establish and may vary the sequence in which 800 MHz SMR licenses for Spectrum Blocks A through V will be auctioned.

(b) *Grouping.* (1) *Spectrum Blocks A through C.* All EA licenses for Spectrum Blocks A through C will be auctioned simultaneously, unless the Wireless Telecommunications Bureau announces, by Public Notice prior to the auction, an alternative competitive bidding design.

(2) *Spectrum Blocks D through V.* All EA licenses for Spectrum Blocks D through V will be auctioned by the following Regions:

(i) Region 1 (Northeast): The Northeast Region consists of the following MTAs: Boston-Providence, Buffalo-Rochester, New York, Philadelphia, and Pittsburgh.

(ii) Region 2 (South): The South Region consists of the following MTAs: Atlanta, Charlotte-Greensboro-Greenville-Raleigh, Jacksonville, Knoxville, Louisville-Lexington-Evansville, Nashville, Miami-Fort Lauderdale, Richmond-Norfolk, Tampa-St. Petersburg-Orlando, and Washington-Baltimore; and, Puerto Rico and United States Virgin Islands.

(iii) Region 3 (Midwest): The Midwest Region consists of the following MTAs: Chicago, Cincinnati-Dayton, Cleveland, Columbus, Des Moines-Quad Cities, Detroit, Indianapolis, Milwaukee, Minneapolis-St. Paul, and Omaha.

(iv) Region 4 (Central): The Central Region consists of the following MTAs: Birmingham, Dallas-Fort Worth, Denver, El Paso-Albuquerque, Houston, Kansas City, Little Rock, Memphis-Jackson, New Orleans-Baton Rouge, Oklahoma City, San Antonio, St. Louis, Tulsa, and Wichita.

(v) Region 5 (West): The West Region consists of the following MTAs: Honolulu, Los Angeles-San Diego, Phoenix, Portland, Salt Lake City, San Francisco-Oakland-San Jose, Seattle (including Alaska), and Spokane-Billings; and, American Samoa, Guam, and the Northern Mariana Islands.

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(f) *Duration of Bidding Rounds.* The Wireless Telecommunications Bureau retains the discretion to vary the duration of bidding rounds or the intervals at which bids are accepted.

18. Section 90.904 is revised to read as follows:

§ 90.904 Aggregation of EA licenses.

The Commission will license each Spectrum Block A through V in the 800 MHz band separately. Applicants may aggregate across spectrum blocks within the limitations specified in § 20.6 of this chapter.

19. Section 90.906 is revised to read as follows:

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

All applicants to participate in competitive bidding for 800 MHz SMR licenses in Spectrum Blocks A through V must submit applications on FCC Forms 175 and 175-S pursuant to the provisions of § 1.2105 of this chapter. The Wireless Telecommunications Bureau will issue a Public Notice announcing the availability of these 800 MHz SMR licenses and, in the event that mutually exclusive applications are filed, the date of the auction for those licenses. This Public Notice also will specify the date on or before which applicants intending to participate in a 800 MHz SMR auction must file their applications in order to be eligible for that auction, and it will contain information necessary for completion of the application as well as other important information such as the materials which must accompany the Forms, any filing fee that must accompany the application or any upfront payment that will need to be submitted, and the location where the application must be filed. In addition to identifying its status as a small business or rural telephone company, each applicant must indicate whether it is a minority-owned entity and/or a women-owned entity, as defined in § 90.912(e).

20. Section 90.907 is revised to read as follows:

§ 90.907 Submission of upfront payments and down payments.

(a) *Upfront Payments.* Bidders in a 800 MHz SMR auction for Spectrum Blocks A through V will be required to submit an upfront payment prior to the start of the auction. The amount of the upfront payment for each 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) *Down Payments.* Winning bidders in a 800 MHz SMR auction for Spectrum Blocks A through V must submit a down payment to the Commission in an amount sufficient to bring their total deposits up to 20 percent of their winning bids within ten (10) business days after the auction closes. Winning bidders will be required to make full payment of the balance of their winning bids ten (10) business days after Public Notice announcing that the Commission is prepared to award the license.

21. Section 90.909 is amended by revising the section heading to read as follows:

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

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22. Section 90.910 is revised to read as follows:

§ 90.910 Bidding credits.

(a) A winning bidder that qualifies as a very small business or a consortium of very small businesses, as defined in §§ 90.912(b)(2) and (b)(5), may use a bidding credit of 35 percent to lower the cost of its winning bid on Spectrum Blocks A through V. A winning bidder that qualifies as a small business or a consortium of small businesses, as defined in §§ 90.912(b)(1) or (b)(4), may use a bidding credit of 25 percent to lower the cost of its winning bid on Spectrum Blocks A through V.

(b) *Unjust Enrichment.* (1) If a small business or very small business (as defined in §§ 90.912(b)(1) and 90.912(b)(2), respectively) that utilizes a bidding credit under this section seeks to assign or transfer control of an authorization to an entity that is not a small business or very small business, or seeks to make any other change in ownership that would result in the licensee losing eligibility as a small business or very small business, the small business or very small business must seek Commission approval and reimburse the government for the difference between the amount of the bidding credit obtained by the licensee and the bidding credit for which the assignee, transferee, or licensee is eligible under this section as a condition of the approval of such assignment, transfer, or other ownership change.

(2) If a very small business (as defined in § 90.912(b)(2)) that utilizes a bidding credit under this section seeks to assign or transfer control of 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 Commission approval and reimburse the government for the difference between the amount of the bidding credit obtained by the licensee and the bidding credit for which the assignee, transferee, or licensee is eligible under this section as a condition of the approval of such assignment, transfer, or other ownership change.

(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 three of the license term the payment will be 75 percent; in year four the payment will be 50 percent; and in year five the payment will be 25 percent, after which there will be no assessment.

23. Section 90.911 is revised to read as follows:

§ 90.911 Partitioned licenses and disaggregated spectrum

(a) *Eligibility.* Parties seeking approval for partitioning and disaggregation shall request an authorization for partial assignment of a license pursuant to § 90.153(c).

(b) *Technical Standards.* (1) *Partitioning.* In the case of partitioning, requests for authorization for partial assignment of a license must include, as attachments, a description of the partitioned service area and a calculation of the population of the partitioned service area and the licensed geographic service area. The partitioned service area shall be defined by coordinate points at every 3 degrees along the partitioned service area unless an FCC recognized service area is utilized (*i.e.*, Major Trading Area, Basic Trading Area, Metropolitan Service Area, Rural Service Area or Economic Area) or county lines are followed. The geographic coordinates must be specified in degrees, minutes, and seconds to the nearest second of latitude and longitude and must be based upon the 1927 North American Datum (NAD27). Applicants may supply geographical coordinates based on 1983 North American Datum (NAD83) in addition to those required (NAD27). In the case where an FCC recognized service area or county lines are utilized, applicants need only list the specific area(s) (through use of FCC designations or county names) that constitute the partitioned area.

(2) *Disaggregation.* Spectrum may be disaggregated in any amount.

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

(c) *Unjust Enrichment.* (1) *Bidding Credits.* Licensees that qualified under § 90.910 to use a bidding credit at auction that partition their licenses or

disaggregate their spectrum to entities not meeting the eligibility standards for such a bidding credit, will be subject to the provisions concerning unjust enrichment as set forth in § 90.910(b).

(2) *Apportioning Unjust Enrichment Payments.* Unjust enrichment payments for partitioned license areas shall be calculated based upon the ratio of the population of the partitioned license area to the overall population of the license area and by utilizing the most recent census data. Unjust enrichment payments for disaggregated spectrum shall be calculated based upon the ratio of the amount of spectrum disaggregated to the amount of spectrum held by the licensee.

(d) *License Term.* The license term for a partitioned license area and for disaggregated spectrum shall be the remainder of the original licensee's license term as provided for in §§ 90.629(a), 90.665(a) or 90.685(a).

(e) *Construction and Channel Usage Requirements—Incumbent Licensees.* Parties seeking to acquire a partitioned license or disaggregated spectrum from an incumbent licensee will be required to construct and commence ''service to subscribers'' all facilities acquired through such transactions within the original construction deadline for each facility as set forth in §§ 90.629 and 90.683. Failure to meet the individual construction deadline will result in the automatic termination of the facility's authorization.

(f) *Construction and Channel Usage Requirements—EA Licensees.*

(1) *Licensees in Channel Blocks A, B and C.* (i) *Requirements for Partitioning.* (A) The partitionee may certify that it will satisfy the applicable construction requirements set forth in § 90.685(c) for the partitioned license area; or

(B) The original licensee may certify that it has or will meet the three and five year construction requirements set forth in § 90.685(c) for the entire market.

(C) Applications requesting partial assignments of license for partitioning must include a certification by each party as to which of the above options they select.

(D) Partitionees must submit supporting documents showing compliance with the respective construction requirements within the appropriate time frames set forth in § 90.685(c).

(E) Failure by any partitionee to meet its respective construction requirements will result in the automatic cancellation of the partitioned license without further Commission action.

(ii) *Requirements for Disaggregation.* Parties seeking authority to disaggregate spectrum from an EA licensee in Spectrum Blocks A, B and C must meet one of the following channel use requirements:

(A) The partitionee may certify that it will satisfy the channel usage requirements set forth in § 90.685(d) for the disaggregated spectrum; or

(B) The original licensee may certify that it has or will meet the channel usage requirements as set forth in § 90.685(d) for the entire spectrum block. In that case, the disaggregatee must only satisfy the requirements for ''substantial service,'' as set forth in § 90.685(c), for the disaggregated spectrum within five years of the license grant.

(C) Applications requesting partial assignments of license for disaggregation must include a certification by each party as to which of the above options they select.

(D) Disaggregatees must submit supporting documents showing compliance with the respective channel usage requirements within the appropriate time frames set forth in § 90.685(c).

(E) Failure by any disaggregatee to meet its respective channel usage requirements will result in the automatic cancellation of the disaggregated license without further Commission action.

(2) *Licensees in Channel Blocks D through V.* (i) *Requirements for Partitioning.* Parties seeking authority to partition an EA license must meet one of the following construction requirements:

(A) The partitionee may certify that it will satisfy the applicable construction requirements set forth in § 90.685(c) for the partitioned license area; or

(B) The original licensee may certify that it has or will meet the construction requirements set forth in § 90.685(c) for the entire market.

(C) Applications requesting partial assignments of license for partitioning must include a certification by each party as to which of the above options they select.

(D) Partitionees must submit supporting documents showing compliance with the respective construction requirements within the appropriate time frames set forth in § 90.685(c).

(E) Failure by any partitionee to meet its respective construction requirements will result in the automatic cancellation of the partitioned license without further Commission action.

(ii) *Requirements for Disaggregation.* Parties seeking authority to disaggregate must submit with their partial assignment application a certification signed by both parties stating which of the parties will be responsible for meeting the construction requirements for the market as set forth in § 90.685. Parties may agree to share responsibility for meeting the construction requirements. Parties that accept responsibility for meeting the construction requirements and later fail to do so will be subject to license forfeiture without further Commission action.

(g) *Certification Concerning Relocation of Incumbent Licensees.* Parties seeking approval of a partitioning or disaggregation agreement pursuant to this section must include a certification with their partial assignment of license application as to which party will be responsible for meeting the incumbent relocation requirements set forth at § 90.699.

24. Section 90.912 is revised to read as follows:

§ 90.912 Definitions.

(a) *Scope.* The definitions in this section apply to §§ 90.910 and 90.911, unless otherwise specified in those sections.

(b) *Small Business; Very Small Business; Consortium of Small Businesses; Consortium of Very Small Businesses.* (1) A *small business* is an entity that together with its affiliates and controlling principals, has average gross revenues that do not exceed $15 million for the three preceding years; or

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

(3) For purposes of determining whether an entity meets 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.

(4) A *consortium of small business* 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 paragraphs (b)(1) of this section. In a consortium of small businesses, each individual member must establish its eligibility as a small business, as defined in this section.

(5) A *consortium of very small business* 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 very small business in paragraph (b)(2) of this

section. In a consortium of small businesses, each individual member must establish its eligibility as a very small business, as defined in this section.

(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 (FCC Form 175). 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) of this section. 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) of this section. 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) of this section. A owns a controlling interest in Corporation X. A's sister-in-law, B, has a controlling interest in an SMR application. Because A and B have a presumptive kinship affiliation, A's interest in Corporation X is attributable to B, and thus to the applicant, unless B rebuts the presumption with the necessary showing.

(4) *Affiliation through stock ownership.* (i) An applicant is presumed to control or have the power to control a concern if he/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) of this section. If company B holds an option to purchase a controlling interest in company A, who holds a controlling interest in an SMR application, the situation is treated as though company B had exercised its rights and had become owner of a controlling interest in company A. The gross revenues of company B must be taken into account in determining the size of the applicant.

Example 2 for paragraph (d)(5) of this section. 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 an SMR application, and gives a third party, SmallCo, an option to purchase 50 of the 70 shares owned by BigCo, BigCo will be deemed to be an affiliate of company A, and thus the applicant, until SmallCo actually exercises its options to purchase such shares. In order to prevent BigCo from circumventing the intent of the

rule, which requires such options to be considered on a fully diluted basis, the option is not considered to have present effect in this case.

Example 3 for paragraph (d)(5) of this section. 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.

25. Section 90.913 is revised to read as follows:

§ 90.913 Eligibility for small business status.

(a) *Short-Form Applications: Certifications and Disclosure.* Each applicant for an EA license which qualifies as a small business or consortium of small businesses under §§ 90.912(b) or (c) shall append the following information as an exhibit to its short-form application (FCC Form 175):

(1) The identity of the applicant's affiliates and controlling principals, and, if a consortium of small businesses (or a consortium of very small businesses), the members of the joint venture; and

(2) The applicant's gross revenues, computed in accordance with § 90.912.

(b) *Long-Form Applications: Certifications and Disclosure.* In addition to the requirements in subpart V of this part, each applicant submitting a long-form application for license(s) for Spectrum Blocks A through V and qualifying as a small business shall, in an exhibit to its long-form application:

(1) Disclose separately and in the aggregate the gross revenues, computed in accordance with § 90.912, for each of the following: the applicant, the applicant's affiliates, the applicant's controlling principals, and, if a consortium of small businesses (or consortium of very 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, very small business, consortium of small businesses or consortium of very small businesses under §§ 90.910 and 90.912, including the establishment of *de facto* and *de jure* control; such agreements and instruments include articles of incorporation and bylaws, shareholder agreements, voting or other trust agreements, franchise agreements, and any other relevant agreements (including letters of intent), oral or written; and

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

(c) *Records Maintenance.* All winning bidders qualifying as small businesses or very small businesses, shall maintain at their principal place of business an updated file of ownership, revenue and asset information, including any document necessary to establish eligibility as a small business, very small business and/or consortium of small businesses (or consortium of very small businesses) under § 90.912. Licensees (and their successors in interest) shall maintain such files for the term of the license.

(d) *Audits.* (1) Applicants and licensees claiming eligibility as a small business, very small business or consortium of small businesses (or consortium of very small businesses under §§ 90.910 and 90.912 shall be subject to audits by the Commission, using in-house and contract resources. Selection for audit may be random, on information, or on the basis of other factors.

(2) Consent to such audits is part of the certification included in the short-form application (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 800 MHz SMR service and shall also include consent to the interview of principals, employees, customers and suppliers of the applicant or licensee.

(3) *Definitions.* The terms affiliate, small business, very small business consortium of small businesses, consortium of very small businesses,

and gross revenues used in this section are defined in § 90.912.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 90

[PR Docket No. 93–144; GN Docket No. 93–252; PP Docket No. 93–253; FCC 97–224]

Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In the *First Report and Order* and *Eighth Report and Order* in PR Docket No. 93–144, GN Docket No. 93–252, and PP Docket No. 93–253, the Commission adopted final service and competitive bidding rules for the upper 200 channels of the 800 MHz Specialized Mobile Radio (SMR) band. In the *Second Further Notice of Proposed Rulemaking,* the Commission sought comment on additional service and competitive bidding rules for the remaining 800 MHz SMR spectrum and the General Category channels. After carefully reviewing the comments and petitions the Commission received following the issuance of the *Further Notice of Proposed Rulemaking,* the Commission addresses the Petitions for Reconsideration in this order.

EFFECTIVE DATE: September 29, 1997.

FOR FURTHER INFORMATION CONTACT: Shaun Maher or Michael Hamra, Policy and Rules Branch, Commercial Wireless Division, Wireless Telecommunications Bureau at (202) 418–0620 or Alice Elder, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau at (202) 418–0660.

SUPPLEMENTARY INFORMATION: This *Memorandum Opinion and Order on Reconsideration* in PR Docket No. 93–144, GN Docket No. 93–252, and PP Docket No. 93–253, adopted June 23, 1997, and released July 10, 1997, is available for inspection and copying during normal business hours in the FCC Dockets Branch, Room 230, 1919 M Street, NW., Washington, DC. The complete text may be purchased from the Commission's copy contractor, International Transcription Service, Inc., 2100 M Street, NW., Suite 140, Washington, DC 20037 (telephone (202) 857–3800).

I. Background

1. In the 800 MHz Report and Order, 61 FR 6138 (February 16, 1996), the Commission restructured the licensing framework that governs the 800 MHz SMR service. For the upper 200 channels, the Commission replaced site- and frequency-specific licensing with a geography-based system similar to those used in other Commercial Mobile Radio Services (''CMRS''). The Commission designated the upper 200 channels of 800 MHz SMR spectrum for geographic licensing, and created 120-, 60- and 20-channel blocks within the U.S. Department of Commerce Bureau of Economic Analysis Economic Areas (''EAs''). The Commission concluded that mutually exclusive applications for these licenses would be awarded through competitive bidding. Additionally, the Commission granted EA licensees the right to relocate incumbent licensees out of the upper 200 channels to comparable facilities. The Commission reallocated the 150 contiguous 800 MHz General Category channels for exclusive SMR use.

2. The Commission also established competitive bidding rules for the upper 200 channels of 800 MHz SMR spectrum. Specifically, the order provided for the award of 525 EA licenses in the upper 200 channel block through a simultaneous multiple round auction. Incumbents and new entrants may bid for all EA licenses, subject to the CMRS spectrum cap in § 20.6 of the Commission's rules. The Commission also adopted a ''tiered'' approach to installment payments for small businesses in the upper 200 channel block, and allowed partitioning for rural telephone companies.

A. Geographic Licensing in the 800 MHz SMR Band

1. Geographic Licensing in Contiguous Spectrum Blocks

3. In the *CMRS Third Report and Order,* 59 FR 59945 (November 21, 1996), the Commission found that licensing 800 MHz SMR spectrum in contiguous blocks would make SMR systems more competitive with other CMRS systems by maximizing technical flexibility so that, for example, it would be possible for SMR licensees to deploy spread spectrum and other broadband technologies. In the *800 MHz Report and Order* the Commission concluded that the entire upper 200 channel block should be licensed on a contiguous basis throughout a geographic area because the SMR geographic license would then be equivalent in size to the smallest block of spectrum now authorized for broadband PCS.

4. Commenters argue that the Commission has not justified its decision to group the upper 200 channels of 800 MHz SMR spectrum into geographically licensed contiguous blocks or adequately explained how the need for contiguous spectrum justifies disruption of established SMR operators and that the Commission's rules impermissibly fail to mandate that contiguous blocks of spectrum be used to offer innovative or competitive services. They also argue that the Commission's decision should be reversed if it is based on reducing its administrative burden. It argues that scarcity of Commission resources cannot justify any changes in its rules and that geographic licensing will in fact increase the Commission's administrative burden. One commenter asserts that most incumbent licensees span all three EA frequency blocks. Thus, relocating most incumbents will require that at least four applications be filed, placed on public notice and processed by the Commission. It also claims that these burdens will be exacerbated by the burdens of site-specific licensing because the Commission has not eliminated current site-specific licenses.

5. *Discussion:* The Commission rejects the contention that it has failed to justify the need for licensing the upper 200 channels in contiguous blocks. In the *CMRS Third Report and Order,* the Commission determined that, where feasible, assigning contiguous spectrum is likely to enhance the competitive potential of CMRS geographic providers. In the *800 MHz Report and Orde*r the Commission determined that geographic licensing and contiguous spectrum are essential to the competitive viability of SMR service because they will permit use of spread spectrum and other broadband technologies and eliminate delays and transaction costs associated with site-by-site licensing.

6. The Commission disagrees with Commenters claim that geographic licensing will have a negative impact on existing SMR operators. The Commission's rules continue to protect incumbent operators from interference. In the upper 200 channels, the Commission requires EA licensees to comply with existing rules that require minimum separation from incumbents' facilities. Thus, an EA licensee must either locate its station at least 113 km (70 miles) from any incumbent's facility, or if it seeks to operate stations less than 113 km from an incumbent's facility, it must comply with the Commission's short-spacing rule, unless it negotiates a shorter distance with the incumbent. Additionally, incumbent SMRs on the