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Before the
Federal Communications Commission
Washington, D.C. 20554

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PR Docket No. 93-144

In the matter of

Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band	RM-8117, RM-8030, RM-8029

NOTICE OF PROPOSED RULE MAKING

Adopted: May 13, 1993; Released: June 9, 1993

Comment Date: July 19, 1993
Reply Comment Date: August 5, 1993

By the Commission:

I. INTRODUCTION

1. With this *Notice of Proposed Rule Making* (*Notice*), we examine ways to promote continued growth of the 800 MHz Specialized Mobile Radio (SMR) industry. We have observed a growing entrepreneurial interest in providing private land mobile service to wide geographic areas through the use of advanced technologies. Three pending petitions for rule making and numerous recent applications for waivers of Part 90 of our rules indicate that our current regulations may not be conducive to the development of innovative wide-area SMR operations. The petitioners, namely the National Association of Business and Educational Radio, Inc. (NABER), A&B Electronics, Inc. (A&B), and the American Mobile Telecommunications Association, Inc. (AMTA),[1] request that we modify our rules to facilitate the aggregation of substantial numbers of 800 MHz SMR channels at base station sites within a defined geographic area so that more efficient systems can be developed to offer a diverse array of mobile communications services to greater numbers of customers. We invite comment on methods of allowing wide-area and advanced system implementation while preserving the current success of 800 MHz SMR service.

II. BACKGROUND

2. Licensees in the Specialized Mobile Radio (SMR) Service operate private land mobile stations on a commercial basis.[2] The Commission initiated the SMR Service in the 806-821 MHz and 851-866 MHz bands in 1974 as part of a sweeping reallocation of spectrum to land mobile radio services.[3] As we developed rules to govern SMR operation, we envisioned that SMR systems would provide primarily dispatch service to eligible customers.[4] Therefore, while emphasizing our intent to maintain our flexibility to accommodate future technologies,[5] we generally designed Subpart S of Part 90 of our Rules to govern operations within limited local areas.[6]

3. Today, the 800 MHz SMR industry is no longer typified by small systems serving only local needs. In recent years we have observed a great deal of geographic market expansion through licensing, management agreements and corporate consolidation.[7] Licensees increasingly express interest in aggregating large channel blocks and using advanced technologies to increase system capacity and serve wide areas efficiently. Increasing numbers of SMR licensees have requested rule waivers to permit them to construct advanced, spectrally efficient systems that would increase system capacity and permit seamless end user "roaming" among many transmitter sites.[8]

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[1] *See* RM-8029 (asking Commission to facilitate licensing of wide area SMRs), filed March 13, 1992 by NABER [hereinafter "NABER Petition"]; RM-8030 (asking Commission to modify the "40 mile rule," 47 C.F.R. § 90.627(b)), filed May 26, 1992 by A&B Electronics; RM-8117 (proposing a wide area licensing program), filed October 26, 1992 by AMTA [hereinafter "the AMTA Blueprint"].

[2] The SMR Service is governed by Subpart S of Part 90 of the Commission's Rules, 47 C.F.R. §§ 90.601-90.657.

[3] *See* First Report and Order and Second Notice of Inquiry, Docket No. 18262, 35 F.R. 8644 (June 4, 1970); Second Report and Order, Docket No. 18262, 46 FCC 2d 752 (1974), *modified on recon.*, Memorandum Opinion and Order, Docket No. 18262, 51 FCC 2d 945 (1975), *aff'd*, National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976). SMR spectrum is also allocated at 900 MHz, but regulatory initiatives for those channels are the subject of another proceeding. *See* First Report and Order and Further Notice of Proposed Rule Making, FCC No. 93-34, PR Docket No. 89-553, 8 FCC Rcd 1469 (1993) [hereinafter *900 MHz Phase II*].

[4] *See* Memorandum Opinion and Order, Docket No. 18262, *supra* note 3, paras. 6, 43, 67 (1975); Second Report and Order, PR Docket No. 79-191, 90 FCC 2d 1281 (1982), para. 12 (1982), *modified*, Memorandum Opinion and Order, 95 FCC 2d 477 (1983).

[5] *See* Second Report and Order, Docket No. 18262, 46 FCC 2d at 755.

[6] *See* Memorandum Opinion and Order, Docket No. 18262, *supra* note 3, para. 43. *See also* Second Report and Order, PR Docket No. 79-191, *supra* note 4, para. 149 (SMR system operators failed to show general need for wide area capability).

[7] For example, after completing its merger with Dispatch Communications, NexTel Communications, Inc. (formerly Fleet Call, Inc.) expects to serve markets with a combined population of 95 million people in areas approximately equivalent to 70 metropolitan statistical areas (MSAs). Similarly, the April 1993 consolidation of CenCall Inc. of Denver (CenCall) and SMR Network Inc. of Portland, Ore. will enable CenCall to cover an area including four of the top 30 MSAs. *Major Players Announce Mergers*, Open Channels, Jan-Feb 1993, at 12, 14.

[8] The first of these waivers were granted to Fleet Call, Inc. (Fleet Call), Mobile Radio New England (MRNE) and Advanced Radio Communication Services of Florida, Inc. (Advanced). *See* Fleet Call, Inc., 6 FCC Rcd 1533 (1991); Letter from Richard J. Shiben, Chief, Land Mobile and Microwave Division, Private Radio Bureau, to George Hertz, President, Advanced MobileComm of New England, Inc. (April 13, 1992); 1992 grant of applications assigned file numbers 553493-553499 and associated Request for Rule Waiver filed by Advanced Radio Communication Services of Florida, Inc. on July 15, 1991.

4. Our rules have generally proven flexible enough to accommodate existing licensees that seek to convert their analog systems to wide-area systems employing advanced technologies. For example, NexTel Communications, Inc. (NexTel) is now developing wide-area systems in six areas of the country, almost entirely within the scope of our rules. In enabling NexTel and subsequent applicants to implement these systems, we did, however, recognize that wide-area licensees might be unable to construct and begin to operate their innovative networks within the one year construction period set by our rules, and we therefore granted extended periods of time to implement the proposed systems.[9]

5. Although our present rules do not foreclose the growth of advanced and wide-area SMR systems, we believe that some rules might be modified to ease what the petitioners characterize as a large-scale industry transition to new system technologies and configurations. In addition, wide-area SMR applications that comply with our existing regulatory framework are often so voluminous and complex that they have reduced the efficiency of license processing. We have already proposed to permit licensees to locate transmitters less than 70 miles from co-channel stations, depending on the actual operational parameters of proposed and existing co-channel facilities, in recognition of increasing interest in advanced system design and widely dispersed system configurations.[10] We also have proposed to amend the rule requiring that SMR licensees construct trunked system facilities within one year of the initial license grant,[11] because such licensees are often unable to construct complex advanced networks and place them into operation before one year expires.[12] In the instant proceeding, we intend to examine how other rules may inadvertently deter development of modern systems. For example, our rule prohibiting applying for more than five 800 MHz SMR channels at a time[13] prevents implementation of multi-site, low-power networks where spectrum use is too low to satisfy aggregate loading requirements.[14]

6. The various petitioners have suggested new approaches to accommodating 800 MHz wide-area SMR systems. For example, AMTA asks us to establish a program to authorize blocks of channels to particular licensees to be used for operations within areas no smaller than MSAs and RSAs.[15] NABER, on the other hand, proposes that we amend Sections 90.631(g) and (h) of our Rules, 47 C.F.R. §§ 90.631(g),(h), to simplify existing procedures for 800 MHz SMR operators to create wide-area systems within geographic areas of their own choosing.[16] Finally, A&B proposes that we permit licensees to acquire stations within 40 miles of the licensee's existing station if both stations were fully loaded at the end of the initial five year license term.[17]

III. PROPOSAL

7. We have examined these petitions, the comments and replies filed in response to the petitions, and the various applications for waiver of our rules. Based on this record, we conclude that modifying our rules could promote use of advanced radio technologies, expansion of SMR system capacity and development of wide-area 800 MHz SMR services. We propose in this proceeding to establish an "Expanded Mobile Service Provider" (EMSP) licensing approach to assigning 800 MHz SMR spectrum for wide-area use throughout wide service areas. Pursuant to this proposed licensing method, we would:

- Grant a new type of 800 MHz SMR wide-area license that would permit channels to be aggregated for operation of wide-area systems throughout each of the 47 Rand-McNally Major Trading Areas (MTAs), or, in the alternative, each of the 487 Rand-McNally Basic Trading Areas (BTAs) and Puerto Rico;
- Initially restrict eligibility for EMSP licenses to those entities who are licensees of 800 MHz SMR systems within the BTA/MTA on or before May 13, 1993, and seek to reuse throughout that area the SMR channels operating on stations that they have constructed and placed in operation as of the date that they apply for the EMSP license;
- Dispose of applications requesting licensing on the same channels within a BTA/MTA:

  1. a. by providing applicants within the area with a 60-day opportunity to resolve the conflict, and if they are unable to do so,

     b. by rank-ordering all applications within the area by lottery and granting applications accordingly; or

     2. through competitive bidding, if we are authorized to use such procedures to select among mutually exclusive applicants;

- Grant, on a first-come, first-served basis, EMSP licenses for a total not to exceed 42 channels, to any entity except those with an EMSP license for 42 or more unconstructed EMSP channels within the particular BTA/MTA;

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[9] *See* Fleet Call, Inc., 6 FCC Rcd at 1535-36; Memorandum Opinion and Order, Mobile Radio New England Request for Rule Waiver, FCC No. 92-550, 8 FCC Rcd 349 (1993), para. 8.

[10] *See* Notice of Proposed Rule Making, PR Docket No. 93-60, 8 FCC Rcd 2454 (1993).

[11] 47 C.F.R. § 90.631(e), (f).

[12] *See* Notice of Proposed Rule Making, PR Docket No. 92-210, 7 FCC Rcd 6587 (1992); Report and Order, PR Docket No. 92-210, adopted May 13, 1993, _____ FCC Rcd _____ (1993).

[13] *See* 47 C.F.R. § 90.621(a)(1)(iv).

[14] *See* letter of December 23, 1992 from Ralph A. Haller, Chief, Private Radio Bureau, to Mr. David E. Weisman (Weisman letter).

[15] *See* AMTA Blueprint at 5.

[16] *See* NABER Petition at 4-5. NABER also proposes that we permit Business Radio Service licensees to operate "satellite" stations on a primary basis in wide-area system configurations. Presumably such wide-area Business Radio Service systems would continue to be foreclosed from reselling excess system capacity on a for-profit basis, because our Rules prohibit for-profit resale above 800 MHz by non-SMR licensees.

[17] *See* RM-8030, filed May 26, 1992 by A&B Electronics, at 9-15.

- Permit EMSP licensees to reuse any SMR Category channels covered by the EMSP license throughout the BTA/MTA without regard to current restrictions on applying for more than five channels at a time or establishing minimum loading;
- Require EMSP licensees to certify that they will protect existing co-channel licensees and previously filed co-channel applications from harmful interference;
- Require an EMSP licensee to construct and operate a system that covers at least 80 percent of the population or 80 percent of the geographic area in its BTA/MTA;
- Require EMSP licensees to construct and begin operating their systems within five years of the date the license is granted;
- Permit an EMSP licensee to modify its system license by obtaining conditional authority to operate its individual base stations within the BTA/MTA upon completing a "self-coordination" procedure;
- Require an EMSP licensee that has not constructed and placed in operation sufficient 800 MHz SMR channels to meet our EMSP construction standards prior to applying for an EMSP license to post a performance bond or place funds in escrow to be withdrawn as needed for construction of the remaining facilities as a condition of receiving five years to implement its wide-area system;
- Prohibit EMSP licensees from assigning or transferring their licenses or applying for additional wide-area channels until they have satisfied our requirements for constructing and operating the EMSP channels, but allow them to lease capacity on their systems in the interim;
- Cancel the EMSP license for failure to comply with any of the proposed conditions of the license. Upon cancellation, the EMSP licensee would retain an individual SMR license for each base station within the BTA/MTA that has been constructed and placed in operation.

In the following section, we will provide further discussion of these proposals, requesting comment on the specific elements of the proposal and on a variety of other regulatory issues that will affect the future development of the 800 MHz SMR industry.

IV. DISCUSSION

8. Any rule making addressing the issues raised by this *Notice* must satisfy certain objectives. First, we must reduce the administrative burdens currently associated with filing and processing requests to implement 800 MHz wide-area SMR systems. Second, we must develop flexible policies that will permit 800 MHz SMR system operators in all areas of the country to develop wide-area systems while continuing to allow entities that do not wish to implement such systems to acquire spectrum and remain viable. Third, we must ensure that licensees of such wide-area systems make productive use of the spectrum by constructing and implementing their systems promptly. In addition, we must encourage more efficient use of spectrum, particularly in congested areas, and accommodate technologically advanced systems supporting enhanced services such as seamless wide-area roaming and high speed data transmission. Finally, we intend to preserve those factors that contribute to the current success of 800 MHz SMR operations.

A. Future Development of the 800 MHz SMR Industry

9. As we have indicated, a key objective of this proceeding is to ensure that the industry continues its currently successful direction. We accept AMTA's basic premise that a large segment of the 800 MHz SMR industry is evolving into a number of compatible, wide-area SMR networks employing advanced technologies.[18] SMR system operators are increasingly joining licensee consortiums to construct and link new systems using compatible, highly efficient system technologies.[19] These new networks will support not only interconnection to the public switched telephone network but also high speed data transmissions and end user "roaming" between transmitter sites. Our goal is to ease the current transition to wide-area networks for both small and large licensees, and to efficiently license systems offering advanced technologies now and in the future. We also intend to use this proceeding to identify and help satisfy the future needs of the rapidly evolving 800 MHz SMR marketplace.

10. Stand-alone (non-wide-area) 800 MHz SMR systems currently play a significant role in the SMR industry. The AMTA Blueprint and the recent proliferation of applications to implement wide-area systems, however, raise the issue of whether the stand-alone SMR operator will remain a permanent part of the SMR market. We invite discussion of the future role of stand-alone entrepreneurs. Will stand-alone systems continue to fulfill needs that would not be met by wide-area networks? Could any such needs be met by systems below 800 MHz? Should we preserve some 800 MHz spectrum for stand-alone systems? If so, how much spectrum should be reserved, and what mechanisms could we incorporate into a regulatory scheme to set aside spectrum without resulting inefficiencies?

B. Defining the Market

11. To date, applicants for waivers to create wide-area SMR systems have chosen the areas that they seek to serve, the boundaries of which are inferred from the composite service areas of their existing high-powered SMR base stations.[20] Defining a proposed wide-area system in this way is a natural product of our existing rules, which were not originally drafted in contemplation of such systems. Allowing the licensee to define its own area of operation without regard to any artificial boundaries and to freely incorporate any or all of its existing facilities may be advantageous. Since our current rules encompass licensee-defined wide-area operations, this approach would also be least disruptive to the current 800 MHz SMR market. Unfortunately, there are also numerous difficulties associated with licens-

[18] *See* AMTA Blueprint at 1-4 (discussing wide-area system initiatives).

[19] *See, e.g.,* Seth Malgieri, *SMR Groups Band to Create Digital Wireless Network,* RCR, March 22, 1993, at 1; *Roaming Consortium Adds New Members,* Open Channels, March 1993, at 13.

[20] NABER supports continuing this concept. Comments of NABER, regarding AMTA Blueprint, at 9.

ees defining their own markets, and these will become more apparent as we receive more applications for such systems.

12. Licensee-defined markets have apparently proven effective thus far because all SMR wide-area systems have been established through conversion of existing facilities that meet certain operational requirements.[21] Continuing to license 800 MHz SMR wide-area systems through reliance upon licensee-defined service areas, however, could eventually complicate processing and implementation of these systems. These complications would increase if we acted in this proceeding to relax the operational requirements that presently limit the size and scope of SMR wide-area systems. For example, if we enabled applicants to acquire more than five SMR Category channels at a time,[22] a licensee-defined service area approach would make it difficult to define the limits of a reasonable service area for an applicant that wishes to construct a wide-area system but has few or no existing sites. The same difficulty arises if we attempt to impose reasonable limitations upon the extent to which existing licensees may expand their systems. Applications for licensee-defined service areas are also burdensome to process because of likely overlap of service contours, making it difficult to define operating areas and determine actual channel availability. Commenters that favor continuing licensee-defined service areas should address the specifics of how licensees should define their systems, what, if any, limits should be placed on the extent of the geographic area specified, and how an existing licensee would be able to extend its coverage area. In discussing this issue, commenters should consider the feasibility of licensee-defined service areas if accompanied by a relaxation in certain of our SMR operational requirements to promote expansion of wide-area offerings. *See, e.g.,* 47 C.F.R. §§ 90.621(a)(1)(iv) and 90.627(b).

13. In the alternative, we could establish service areas for new wide-area systems, consistent with the AMTA Blueprint.[23] This method has been proposed for regional 900 MHz SMR licenses[24] and regional personal communications systems.[25] Commission-defined markets could greatly expedite the licensing process for wide-area systems by simplifying determinations of which license applications are mutually exclusive. In addition, defined service areas provide licensees with greater certainty regarding the environment for planning and implementing wide-area systems. One drawback of Commission-defined markets, however, is the potential that markets will be defined in a way that is not consistent with the licensee's perception of its customer base.

14. There are a number of existing options available for defining markets, such as the 734 Metropolitan Statistical Areas and Rural Service Areas (MSA/RSA), 487 "Basic Trading Areas" (BTAs), 47 "Major Trading Areas" (MTAs), the 7 Regional Bell Operating Company areas, or 194 telephone Local Access and Transport Areas (LATAs),[26] that divide the country into regions of various sizes taking into account actual business markets. AMTA proposed that the Commission define markets by reference to MSAs and RSAs, but indicated that it remains open to other paradigms.[27]

15. We believe that licensing 800 MHz wide-area systems based on either a BTA or MTA approach would better serve the public interest. The 47 MTAs define regions that are large enough to permit systems to re-use spectrum efficiently, to provide the economies of scale necessary to allow a licensee to provide complete state-of-the-art service, and to provide licensees the flexibility and coverage required to fulfill their customers' desires for complete coverage throughout their particular business areas. MTAs may, however, exceed the anticipated geographic boundaries of these evolving SMR service offerings. In addition, MTAs may not provide sufficient opportunity for small businesses and new entrepreneurs to take advantage of the licensing opportunities we propose to create. Accordingly, we also ask commenters to consider the merits of licensing 800 MHz wide-area systems based on the 487 Basic Trading Areas (BTAs). Like MTAs, BTAs represent economically-related geographic areas. BTAs are small enough, however, to perhaps better reflect the scope of a licensee's intended market. We will refer to licensees authorized to apply for use of 800 MHz SMR channels throughout the BTA/MTA regions as "expanded mobile service providers" (EMSPs). We request comment on our proposal. Specifically, we request comments on the advantages of Commission-defined versus licensee-defined service areas and whether the adoption of BTA service areas, MTA service areas, or some other alternative proposal would be the best approach for 800 MHz licensing. We also ask commenters to consider the impact on our administrative efficiency of awarding licenses in 487 BTAs as opposed to 47 MTAs. Given the current proliferation of filings for 800 MHz wide-area SMR systems, we also ask for comment on whether it is necessary or even desirable to amend our existing rules. Can wide-area development be successfully accommodated by preserving the status quo or does future growth of the industry call for some revision of our rules?

Establishing the EMSP License

16. To date, all applicants for wide-area 800 MHz SMR systems have applied for waiver of our one-year construction requirement. In order to implement these wide-area systems, these applicants must also demonstrate sufficient "aggregate loading"[28] to satisfy the 40 mile rule and the limit on submitting an application for more than five channels at one time. These rules pose different obstacles to applicants for wide-area systems, depending on whether they are existing licensees or new to the market, the extent to which their systems are loaded, and where the systems are located.

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[21] *See* Weisman letter, *supra* note 14.

[22] *See* 90.621(a)(1)(iv).

[23] AMTA supports the creation of Commission-defined markets. *See* AMTA Blueprint at 5.

[24] *See 900 MHz Phase II, supra* note 3, para. 16.

[25] Notice of Proposed Rule Making and Tentative Decision, General Docket No. 90-314, 7 FCC Rcd 5676, 5699-5701 (1992).

[26] *See* U.S. v. Western Electric, 569 F. Supp. 1057 (D.D.C. 1983), *subsequent history omitted,* for the boundaries of the RBOC regions and the LATAs. *See also* Rand McNally 1992 Commercial Atlas & Marketing Guide, 123rd Edition, pp. 36-39 (boundaries of the Major Trading Areas and Basic Trading Areas); 47 C.F.R. Part 22 (describing MSAs and RSAs); Notice of Proposed Rule Making and Tentative Decision, General Docket No. 90-314, 7 FCC Rcd 5676, 5699-5701 (1992); *900 MHz Phase II, supra* note 3, para. 16.

[27] *See* AMTA Blueprint at 5 & n.7.

[28] *See* Weisman letter, *supra* note 14.

17. We are proposing procedures that would facilitate licensing for licensees of loaded and unloaded systems, as well as newcomers seeking wide-area system authorizations. Our proposals would give existing licensees the first opportunity to reuse their channels with constructed and operating stations throughout their BTAs or MTAs, but we would also provide 800 MHz wide-area licensing opportunities for new applicants and those interested in bringing wide-area service to rural areas. All operations under an EMSP license would be exempted from the 40 mile rule, the five channel limit, and certain restrictions on station location and construction time. We solicit comment on the proposed EMSP license and the licensing procedures detailed below.

Benefits of EMSP License

18. An EMSP licensee would be able to construct its channels anywhere it chooses within its BTA/MTA, provided that it protects existing co-channel systems. Under our current rules, if an SMR licensee wishes to construct wide-area facilities, it must obtain a license for each proposed or modified base station site.[29] Petitioners for wide-area systems have requested greater flexibility to add or modify base stations without the need for individual station authorization from the Commission.[30] We have proposed such an approach to licensing nationwide and regional SMR systems in the 900 MHz band,[31] and we believe that a similar approach is feasible and advisable to promote efficient development of wide-area systems in 800 MHz spectrum. We propose to permit both existing wide-area 800 MHz SMR system licensees[32] and future EMSP licensees to add authorized channels on existing or new base stations within the BTA/MTA by extending availability of conditional licensing. *See generally* 47 C.F.R. § 90.159. We also propose to streamline the application process by requiring EMSP licensees to submit their own frequency coordination analyses for each base station facility and by implementing electronic application filing procedures.[33]

40 mile rule; 5-channel licensing limit

19. Pursuant to our current policies, licensees may convert "aggregately loaded"[34] SMR systems to wide-area networks[35] without obtaining waivers of 47 C.F.R. §§ 90.627(b) ("40 mile rule") or 90.621(a)(1)(iv) (limiting licensing of trunked channels to five channels at a time).[36] The 40 mile rule and the five channel limit were originally designed to prevent licensees from warehousing spectrum.[37] We propose to prevent this from occurring under the EMSP licensing plan by requiring that EMSPs meet strict construction and implementation requirements.[38] Additionally, after the initial phase of EMSP licensing,[39] we propose that an applicant be granted an EMSP license for a total number of channels that will not exceed 42 unconstructed channels.[40] Under our proposed rules, therefore, the operations of EMSPs would not be subject to the five channel limit and the 40 mile rule. We request that commenters express their positions on our proposals.

C. Licensing Mechanism

Initial Filing Window

20. AMTA proposes that we establish a one-time filing window for existing 800 MHz SMR licensees to apply for wide-area system licenses, with first-come, first-served wide-area licensing thereafter. Pursuant to the AMTA Blueprint, the Commission would delineate geographic areas no smaller than MSAs and RSAs and license wide-area operations throughout those areas. In areas with more than 42 unlicensed channels, AMTA proposes that we designate and license 42-channel blocks for operation throughout a wide-area by new or existing individual licensees or coalitions of licensees. AMTA also proposes that we randomly select the licensees of these channel blocks by conducting lotteries. AMTA proposes filing fees of $200.00 per channel, strict construction requirements, and restrictions on license assignment and transfer.

21. In areas with fewer than 42 unlicensed channels, AMTA proposes that we establish one-time 30-day filing windows and accept applications from licensees proposing to reuse throughout an MSA or RSA the 800 MHz SMR channels that the licensees already operate on constructed sites within the area.[41] In order to encourage use of advanced technologies, AMTA suggests that we require that applicants propose to implement their wide-area systems using technologies capable of providing twice the capacity of state-of-the-art analog systems. To promote orderly and efficient consolidation of existing systems' authorized channels for wide-area operation, AMTA proposes that we accept applications from groups of eligibles as well as individual licensees.[42] AMTA proposes that we first grant the application of the entity operating the most constructed discrete frequencies, then the request of the applicant operating the second-largest group of constructed frequencies, and so forth.[43] According to AMTA, this licensing mechanism would avoid the procedural problems that arise when several applicants request the same frequencies by deleting

[29] *See* Fleet Call, Inc., 6 FCC Rcd at 1535.

[30] Fleet Call requested such an approach. The Commission, however, determined that Fleet Call could fulfill its goals without the extensive relief requested. *See* Fleet Call, Inc., 6 FCC Rcd at 1534-1535.

[31] *See 900 MHz Phase II, supra* note 3, para 43.

[32] The "existing wide-area . . . licensees" are those licensees that have received or will obtain waivers of our rules to develop wide-area systems over a licensee-defined area.

[33] *See infra* para. 34.

[34] *See, e.g.,* Fleet Call, Inc., 6 FCC Rcd at 1535.

[35] *See supra* note 8 (discussing wide-area system requests that we have granted). *See also* Section 90.621(b) of our Rules (normal spacing requirements of co-channel SMR systems). 47 C.F.R. § 90.621(b).

[36] *See* 47 C.F.R. §§ 90.627(b), 90.621(a)(1)(iv).

[37] *See, e.g.,* Memorandum Opinion and Order, Docket No. 18262, 51 FCC 2d at 956-57 para. 38; Memorandum Opinion and Order, PR Docket No. 79-191, 95 FCC 2d 477, 483 para. 10 (1983).

[38] *See infra* Section D (discussing these requirements).

[39] *See infra* paras. 24 - 28.

[40] We have chosen 42 channels because, considering petitions and comments we have received, we believe that this is the smallest block of channels necessary for a licensee to construct an economically viable wide area system that is able to take full advantage of the spectrum efficiency benefits of vigorous channel reuse. *See* AMTA Blueprint at 10.

[41] AMTA Blueprint at 6. AMTA would have us require wide-area licensees to protect existing co-channel licensees, nonetheless, by satisfying a 40/22 dBu standard for co-channel distance separation. *Id.* at 7.

[42] *Id.* at 6-7.

[43] *Id.* at 7.

requests in pending applications for channels already authorized to a higher-ranked applicant. AMTA states that this approach would facilitate rapid and efficient licensing and enable expeditious development of wide-area 800 MHz SMR service.[44]

22. NABER proposes that we continue to accept wide-area license applications on a first-come, first-served basis. NABER suggests minor amendments to our rules that would increase the flexibility of licensees seeking to define and expand wide-area systems. Under NABER's proposal, we would amend Section 90.631(g) and (h) of our rules to permit a wide-area SMR licensee to reuse its authorized frequencies at other sites operated by that licensee. Although NABER would have us authorize wide-area systems even to licensees without aggregate loading, a licensee could not reuse its channels at an additional site within 40 miles of an existing, unloaded station operated by that licensee. NABER's Petition does not elaborate a way for applicants with no existing SMR licenses to obtain wide-area licenses, nor does it suggest procedures to resolve potentially numerous requests for the same channels in the same area.

23. We agree with NABER's observation that, although licensees are already constructing wide-area systems, existing licensing mechanisms have caused processing bottlenecks, substantially delaying service to the public.[45] Nevertheless, we propose to solve the delays with an orderly mechanism that would allow us to license new wide-area systems and facilitate consolidation of existing systems. We believe that our approach will alleviate uncertainty among small businesses, provide opportunities for new businesses to establish wide-area systems, and promote state-of-the-art service to areas outside major markets. We intend that our proposed rules be responsive to concerns that AMTA has identified, while building in the operational flexibility that NABER states is necessary.

24. We therefore propose initially to restrict EMSP license eligibility to applicants that are licensed on one or more SMR Category channels in the relevant BTA/MTA as of May 13, 1993. These applicants will be permitted to apply for an EMSP license to reuse throughout the BTA/MTA all such channels that operate on constructed base stations as of the date the EMSP application is filed. We believe that the public would benefit from a more viable and expeditiously provided EMSP service by permitting existing licensees first to convert their existing systems to wide-area operations before newcomers are authorized to operate on the existing licensee's channels in the relevant BTA/MTA. Numerous SMR systems already occupy all 800 MHz SMR channels in many parts of the country. This extensive infrastructure, which is already in place, will as a practical matter be the foundation for any quality EMSP offering. Furthermore, if applicants without constructed systems were eligible for initial MTA licensing, they would be required nonetheless to protect existing co-channel systems, and their MTA systems would therefore surround and provide no wide-area service to large central regions. Existing licensees, in contrast, could increase overall spectrum capacity by aggregating and reusing their authorized frequencies at their existing sites. We therefore believe that this initial license eligibility restriction would enable non-disruptive and efficient provision of service to the public, and thus *Ashbacker Radio Corp. v. FCC,* 326 U.S. 327 (1945), does not preclude us from setting these standards.[46] We solicit comment on the benefits and/or detriments of initially restricting eligibility for EMSP licenses to applicants seeking to reuse throughout a BTA/MTA the channels that they have already constructed and placed in operation. In addition, we ask commenters to consider the possibility that Congress may grant the Commission auction authority, or design competitive bidding procedures for licensing channels. If that authority is granted, and exercised to authorize wide-area SMR systems at 800 MHz, would different eligibility criteria be preferable?

25. During this first phase of EMSP licensing, we propose to allow applicants to reuse throughout the BTA/MTA only those 800 MHz SMR Category channels that are being operated on constructed base stations within the BTA/MTA on the date the application for an EMSP license is filed. Loading levels would not be relevant to eligibility for this initial 30-day filing window. Our proposal is consistent with AMTA's Blueprint, which emphasizes the need for a well-defined, orderly process to facilitate consolidation and spectrally efficient reconfiguration of existing 800 MHz SMR systems.[47] A licensee operating several noncontiguous systems in a BTA/MTA could apply for authorization to aggregate any number of its authorized SMR Category channels for reuse within the BTA/MTA. Nevertheless, we would require EMSP license applicants to certify that each base station constructed pursuant to their EMSP licenses would comply with the co-channel protection provisions of 47 C.F.R. § 90.621(b). Note that an authorized EMSP could continue to employ existing non-SMR Category

[44] *Id.* at 8.

[45] *See* NABER Petition at 3.

[46] *See* United States v. Storer Broadcasting Co., 351 U.S. 192 (1956) (hearing requirement in 47 U.S.C. § 309 does not limit the Commission's power to establish license eligibility criteria). The Commission exercised this authority in, for example, An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, 86 FCC 2d 469, 483 (1981) (restricting license eligibility for a block of cellular radio frequencies to wireline telephone carriers for a number of years), *modified,* 89 FCC 2d 48, 69-77 (1982) (further limiting wireline set aside period), *further modified in* Amendment of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings, 98 FCC 2d 175, 194-98 (1984) (reaffirming eligibility criteria, but redefining set aside periods for each market), *modified on other grounds,* 101 FCC 2d 577 (1985); Second Report and Order/Further Notice of Proposed Rule Making, Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, 7 FCC Rcd 3340, 3342-43 (1992) (limiting initial eligibility for Advanced Television frequencies to existing broadcasters), *recon.,* Memorandum Opinion and Order/Third Report and Order/Third Further Notice of Proposed Rule Making, MM Docket No. 87-268, FCC 92-438, released October 16, 1992, at paras. 3, 6, 8 n.9 (reaffirming eligibility restriction); Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, GN Docket No. 90-217, 6 FCC Rcd 3488 (1991), *recon. granted in part,* 7 FCC Rcd 1808 (1992) (establishing a dispositive "pioneer's preference" for developers of new or innovative communications services), *further recon. denied,* Memorandum Opinion and Order, FCC No. 93-116, 58 Fed. Reg. 14328 (1993).

[47] *See* AMTA Blueprint at 5-6.

channels at existing sites within its BTA/MTA, but such channels could not be freely reused throughout that area as are SMR Category channels.[48]

26. We propose to allow existing licensees to join a consortium of other licensees within a BTA/MTA to file an EMSP license application. An EMSP license granted to a coalition applicant would permit the coalition members to aggregate and reuse the constructed and operational channels of all coalition members throughout the BTA/MTA. We emphasize, however, that under our proposal each licensee could incorporate its constructed and operating channels into only one EMSP license application. Specifically, an 800 MHz SMR Category channel operating on a station that has been constructed and placed in operation within the BTA/MTA could be included in only one EMSP application. We would, however, permit an SMR licensee operating a number of channels with constructed and operational stations to split its channels among two or more EMSP applications, provided again that each of the licensee's discrete channels is incorporated into only one EMSP license application.[49] We tentatively decide to preclude managers of constructed and operating systems from applying for an EMSP license during this initial filing period, except as part of a consortium with full agreement of the member licensees, but we request comment on whether persons or entities with exclusive agreements to manage constructed and operating systems should be eligible at this point for EMSP licenses.

27. After we close the initial filing window in each BTA/MTA, we propose to grant all qualified applications for EMSP licenses in that area that are not mutually exclusive with other applications. An application would be considered "mutually exclusive" with other applications if the application contained any of the same channels that the other applicants requested within the BTA/MTA. We would provide mutually exclusive applicants with an opportunity to negotiate with one another for sixty days after their applications are designated for lottery to resolve any conflicting requests for channels and amend or withdraw their applications to eliminate any mutual exclusivity. We would not permit any consideration to pass among negotiating entities in exchange for agreement to withdraw or amend their pending EMSP applications, and we would not award cumulative chances in a lottery to those entering into post-filing settlements.[50] We ask commenters to address the adequacy of these safeguards and discuss other methods of regulating the process to avoid abuses and ensure that all EMSP license applicants harbor bona fide intentions to construct and operate a wide-area 800 MHz SMR system.

28. If mutually exclusive applicants fail to resolve conflicts through full market settlements, we propose to rank order randomly all mutually exclusive applications within the BTA/MTA and to grant EMSP licenses in accordance with that rank order. We would require each applicant to indicate, in an attachment to its EMSP license application, the minimum number of EMSP channels it would accept. Thus, after we grant a request to license channels that are also requested by a lower-ranked applicant, we would examine the latter application to determine whether the applicant agreed to accept the number of its requested EMSP channels that remain available for licensing after all previous licenses have been granted. If so, then the applicant would receive, through partial grant of its application, an EMSP license for those remaining channels. Otherwise, we would dismiss the application.

29. AMTA proposes that we select among mutually exclusive applicants by granting wide-area system licenses to the applicants with the most discrete channels in a market, in descending order of preference.[51] We tentatively conclude, however, that granting a dispositive preference to those applying for the largest number of discrete channels in a market would not serve the public interest. We believe that, in general, applicants with a broad range of discrete channels may bring wide-area service to the public as promptly and surely as applicants with the most channels. Indeed, a licensee that arranges low-powered transmitters with low antenna heights in a closely spaced configuration can produce greater system capacity than traditional systems often maintain using two to six times as many channels. We nevertheless request comment on this issue. We also invite commenters to discuss other alternatives to our lottery proposal that are both feasible and legally supportable. In particular, we invite commenters to consider the possibility that Congress may grant the Commission authority to design competitive bidding procedures for licensing channels. Should that authority, if granted, be exercised to authorize grants of EMSP licenses to existing SMR licensees seeking to expand into BTAs/MTAs? Should grants by competitive bidding be limited to newly acquired channels? We request comment on what specific rule changes would be necessary and advisable to implement competitive bidding procedures for EMSP system licenses?

Subsequent Applications

30. After this initial round of licensing, we propose to accept applications for all SMR Category channels not assigned to EMSP licensees in the initial round on a first-come, first-served basis within each BTA/MTA. We would accept applications from all entities, except those EMSP licensees that are licensed for 42 or more EMSP channels and that have not met the 80 percent coverage requirements of proposed Section 90.677(d), discussed below in Section D. We would permit each applicant to apply for wide-area use of not more than 42 channels. The channels that applicants seek to use must be available for licensing at some location within the BTA/MTA. All EMSP license applicants must certify that they will protect existing licensees and previously-filed co-channel applications,[52] con-

[48] *See* discussion of EMSP use of non-SMR Category channels, *infra* para. 32.

[49] We propose to appropriate AMTA's suggestion that we require applicants to submit, with each EMSP license application, information including a list of participating licensed discrete channels, the licensee names, transmitter site coordinates and call signs of each channel at each base station site. *See* AMTA Blueprint at 6. We propose to require applicants to file their license applications and supplements electronically, pursuant to a computer format that would be set forth in a Public Notice, contingent on our ability to accept such information in an electronic format. This electronic filing process would simplify data base management and expedite application processing. *See Order*, FCC No. 93-174, 58 Fed. Reg. 21405 (1993) (modifying rules so that we may accept electronically "signed" filings).

[50] While the licensing mechanism we propose contemplates formation of pre-filing settlement groups, we will not award cumulative chances to the surviving application.

[51] *See* AMTA Blueprint at 7-8.

[52] In light of these proposed changes to our regulatory scheme

sistent with 47 C.F.R. § 90.621(b). In addition, we would again require applicants to indicate the minimum number of EMSP channels that they would accept, and would limit an applicant to including a given constructed and operating channel in no more than one EMSP license application. Furthermore, to reduce the potential for manipulation of the selection process, we would preclude any EMSP applicants with no licenses for 800 MHz SMR Category channels in the BTA/MTA from participating in more than one EMSP license application. Specifically, we would not permit any person or entity with a direct or indirect interest[53] in one EMSP applicant to invest directly or passively, hold or exercise any control over, or otherwise participate in another applicant for an EMSP license in the same BTA/MTA.[54] We would consider these subsequent applications to be mutually exclusive only if they were filed on the same day and requested use of any of the same channels within the same BTA/MTA. Once again, we would provide a 60-day opportunity for mutually exclusive applicants to negotiate among themselves, and, if that manner of resolution failed, we would randomly select and grant one application at a time, following the procedures described above in paragraph 28.

31. We ordinarily assign the same call sign to all channels at a given base station site, rather than assigning a separate call sign to each channel in a designated area. In this proceeding, however, we propose to grant a system license for an indeterminate number of base station sites, because we are authorizing flexible system configuration. Assigning an individual call sign to each EMSP license would be consistent with anticipated operations and would provide us with sufficient information to track spectrum use. Addition of base stations to the EMSP license would thus be treated as a license modification. We therefore propose to assign an individual call sign to each EMSP license, covering all stations in the BTA/MTA.[55] We request comment on this call sign proposal. Because we are proposing to assign a single call sign to every EMSP license, the filing fee for each EMSP application would be $35.[56] We request that commenters discuss this proposal.

Expanding EMSP Systems

32. Several comments on the Petitions before us raise questions regarding wide-area system reuse of channels that are not allocated to the SMR Category.[57] We propose to permit EMSPs that have incorporated non-SMR Category channels into their existing systems to continue to use those channels at base station sites that were already authorized for such operations. Out-of-category channels could not, however, be part of an EMSP license, either initially or through modification of the EMSP license. We propose that traditional SMR systems, however, could continue to expand in accordance with our current rules and policies.[58] We ask for comment, nevertheless, on whether intercategory sharing opportunities for traditional SMRs should be limited to General Category frequencies because depletion of SMR Category frequencies by EMSP licensees may cause unacceptable increases in demand for out-of-category assignments. We also ask if we should permit General Category channels to be incorporated into EMSP licenses since SMRs are also eligible to operate on frequencies in the General Category.

D. Implementing EMSP Systems

1. Modifying an EMSP License

33. Under existing rules, applicants for SMR Category channels specify particular coordinates, and SMR base stations are individually licensed in accordance with fixed co-channel mileage separations on a first-come, first-served basis. *See* 47 C.F.R. § 90.621(b). Our proposal, however, authorizes p: wide-area licensees to use their channels anywhere within a BTA/MTA. This is similar to the proposal to allow 900 MHz SMR licensees to develop regional SMR systems.[59] In that proceeding we proposed to allow such licensees great flexibility in constructing and modifying stations in most instances, without prior authorization from the Commission.[60] Because there are more licensees in the 800 MHz band than in the 900 MHz band, however, there is a much greater risk of co-channel interference, and it is unlikely that we would be able to offer 800 MHz EMSPs the same degree of flexibility we proposed for 900 MHz regional licensees. We do believe, however, that 800 MHz EMSPs require more flexibility to construct and modify facilities than they currently have under our Rules.

34. EMSP licensees will be required to file an application to modify their licenses whenever an individual facility is added or modified. Currently the Commission performs all coordination for SMR applications requesting SMR Category channels. We anticipate, however, that an extremely large number of applications will be filed to license the individual stations that comprise an EMSP system and that it may not be possible for the Commission to

for 800 MHz SMR systems, we are also proposing to discontinue waiting lists; therefore, EMSP licensees would not be required to protect waiting list applications, which would be returned without further action. *See infra* para. 34.

[53] Such an "interest" would include, but would not be limited to, the interests of stockholders, partners, owners, trustees, beneficiaries and directors. We request commenters to address whether we should restrict a person or entity with an exclusive agreement to manage a proposed EMSP system from involvement with another applicant.

[54] We propose, however, to permit these persons or entities to hold a *de minimus* interest in a publicly-held entity. *Cf.* Report and Order, PR Docket No. 89-552, 6 FCC Rcd at 2365 & n.128.

[55] We would, however, later permit EMSP licensees to request conditional permits to operate at particular base station sites.

[56] Applicants who receive EMSP licenses would be required to submit additional $35 fees later, when they file for conditional licensing of EMSP channels at new base station facilities, because those new authorizations would require us to modify their EMSP licenses.

[57] *See, e.g.,* comments of Utilities Telecommunications Council regarding the NABER Petition, at 5-7; reply comments of Industrial Telecommunications Association, Inc., regarding the AMTA Blueprint, at 7.

[58] An EMSP licensee operating a traditional SMR system in the same geographic area as its EMSP system base stations may not attribute the EMSP system mobiles to the mobile counts for the traditional SMR system. We will closely scrutinize requests of SMR licensees for additional channels to determine whether mobiles operating on a commonly owned EMSP system are being used to inflate SMR mobile counts. It would be appropriate for frequency coordinators processing intercategory sharing requests, pursuant to §§ 90.621(g)(2) and 90.621(g)(3), to also seek confirmation that the applicant's mobile count does not include mobiles operating on a proximate, commonly-owned EMSP system.

[59] *See 900 MHz Phase II, supra* note 3, para. 17.

[60] *See id.,* para. 44.

coordinate all of these applications in a timely manner. To avoid overwhelming the Commission's limited resources, we propose to require electronic filing of these applications for license modification.[61] We also propose that EMSPs "self-coordinate" their applications. Under this policy of self-coordination, an EMSP will have to submit a list of all co-channel stations and previously filed co-channel applications in the area, including call signs and coordinates, and, if the stations do not meet the co-channel spacing requirements of Section 90.621(b), the power and antenna heights of the stations considered. Applications filed by EMSP license applicants should also clearly indicate how the proposed facility provides protection to all co-channel stations and previously filed co-channel applications in the area. This will greatly ease the burden on the Commission's resources and, because it is likely that an EMSP license applicant will perform these studies regardless of who coordinates the application, we do not believe that it will impose a substantial burden on EMSPs.[62] We request comment on this proposal. In addition, we believe that as EMSP licensing is implemented, waiting lists will no longer be necessary in the licensing of 800 MHz SMR systems. We therefore propose to eliminate waiting lists for 800 MHz SMR applications and return all applications that are pending on waiting lists.[63] We request comment on this proposal.

2. Co-channel Interference

35. There are two aspects to co-channel interference and the degree of flexibility a licensee should be given to add or modify base stations. The first consideration is protection of existing co-channel facilities. We anticipate that many existing co-channel facilities will not become part of an EMSP license. EMSPs will be required to protect such facilities.[64] We propose, however, that EMSPs be able to obtain conditional licenses to operate new or modified stations using their authorized wide-area channels provided the new or modified stations comply with the co-channel spacing requirements of Section 90.621(b) of our rules, 47 C.F.R. § 90.621(b).[65] In such situations the EMSP will be able to operate a new or modified facility for 180 days under a temporary permit evidenced by a temporary license certificate (FCC Form 572) after submitting a formal application for station license. Licensees will not, however, be permitted to operate under conditional authority in certain instances where greater regulatory oversight is generally required.[66] In such cases the licensee will have to submit an application and receive authority from the Commission *prior* to operation of the facility.

36. The other consideration is co-channel interference between adjacent EMSPs. To limit co-channel interference between adjacent regions we propose that the signal strength at the boundary of a licensee's region not exceed 22 dBu.[67] If we adopt this standard, the existing stations of an EMSP that are in operation when the wide-area application is filed and that result in a signal strength in excess of 22 dBu at the BTA/MTA boundary will not be required to reduce power. The co-channel wide-area operator in the adjacent BTA/MTA will not, however, be required to protect such an existing facility in accordance with Section 90.621(b). Rather, the licensee in the adjacent BTA/MTA would only be required to meet the 22 dBu field strength limit at the common border. We also propose, however, that an EMSP be able to exceed the 22 dBu field strength upon the written consent of its co-channel neighbor. We request comment on this proposal in general, and especially regarding whether the 22 dBu signal strength at the boundary is sufficient to allow a licensee to serve the entire BTA/MTA. We also request comment on any alternative approaches to guarding against co-channel interference. One alternative may be to have no co-channel interference standards between adjacent EMSPs. In this case the regional licensees would bear all responsibility for coordinating with their co-channel neighbors and resolving any co-channel interference problems. Another alternative would be to license the individual stations on a first-come/first-served basis and require the adjacent co-channel wide-area licensees to protect their neighbors' stations in accordance with the requirements of Section 90.621(b). We also ask for comment on this proposal.

3. Efficient use of the spectrum

37. Because spectrum is a scarce resource, it is in the public interest that it be used efficiently.[68] Under our existing SMR rules we measure the efficiency of spectrum use in terms of number of mobiles operating on a particu-

[61] We would issue a Public Notice setting forth a computer format for these electronic filings. *See Order*, FCC No. 93-174, 58 Fed. Reg. 21405 (1993) (modifying rules so that we may accept electronically "signed" filings).

[62] Our proposed rules also require this supporting data to be electronically filed in accordance with a computer format that would be specified in a Public Notice.

[63] *See* 47 C.F.R. § 90.611(d). This proceeding contemplates a change in our licensing procedures so substantial as to render the waiting list concept of limited use in the context of any new licensing framework we may adopt. The Commission's broad discretion to change its regulatory approach in response to changing circumstances is well settled. *See* Telocator Network of America v. FCC, 691 F.2d 525, 540 (D.C. Cir. 1982). If waiting lists are eliminated, all applications pending on waiting lists would be returned without further action only after the final rules in this proceeding become effective. *See* Storer Broadcasting Co. v. FCC, 351 U.S. 192 (1956) (the Commission has authority to make rules that are prospective in nature, leading to dismissal of applications without a hearing); Bowen v. Georgetown University Hospital, 488 U.S. 204, 220 (1988) (Scalia, J., concurring) (where a rule "merely affect[s] past transactions" rather than "chang[ing] what was the law in the past," it may be upheld if reasonable).

[64] Wide area licensees will not, of course, be required to protect existing facilities authorized on a secondary basis. Such sites must not cause interference to facilities authorized on a primary basis and are not protected from interference from facilities authorized on a primary basis. *See* 47 C.F.R. § 90.07 (defining secondary operations).

[65] In a separate proceeding we are considering amendments to co-channel protection criteria for licensed facilities operating above 800 MHz. Any changes adopted in that proceeding will apply to facilities licensed as a result of this proceeding. *See* Notice of Proposed Rule Making, PR Docket 93-60, adopted March 11, 1993, 58 Fed Reg 19396 (1993).

[66] *See* proposed rule 47 C.F.R. § 90.673(d) in Appendix A. *See also* 47 C.F.R. §§ 90.177, 1.1307, 1.1312, 17.7, and 90.621.

[67] Signal strength at the boundaries would be calculated using the Commission's R6602 F(50,10) curves with a 9 dBu correction factor for mobile use. Each application to construct or modify a facility that is part of the wide area system will be required to include an engineering study demonstrating compliance with this limit.

[68] *See* 47 U.S.C. § 332(a)(2).

lar channel.[69] For the more traditional, single-site SMR system this yields an unambiguous measurement of channel use. Attempting to apply this same standard to wide-area systems, however, does not yield a relevant measure of spectrum use. Currently, applicants applying for a wide-area authorization are permitted to measure channel usage by counting the number of mobiles using the entire system with respect to the number of discrete frequencies used in the system.[70] We question whether counting mobiles per discrete frequency is an appropriate method for determining system capacity. Substantial differences in the calculation of system usage can exist among wide-area systems that employ the same number of discrete channels but apply different technologies, have different patterns of frequency reuse, or use the channels over different sized areas. Additionally, considering the wide variety of services that we anticipate SMR systems will offer in the future, including extensive interconnection with the public switched telephone network, transmission of data, and various personal communications services, our traditional "mobile per channel" measurement of spectrum use may no longer yield a relevant estimate of a system's usage. No commenter has, as yet, proposed a viable alternative measurement of spectrum use. Accordingly, we propose that EMSPs not be required to meet any particular mobile loading standard. We request comment, however, on whether some other method of measuring spectrum use, such as minimum air time per channel, is appropriate.

38. AMTA proposes that we grant wide-area licenses only to applicants certifying that they will use technology that provides at least twice the capacity of analog technology.[71] Some commenters to AMTA's proposal have suggested even more stringent standards.[72] We do not believe that such a requirement is necessary or appropriate. In creating EMSP licenses we are primarily trying to facilitate the SMR industry's transition to wide-area systems. Implementation of such systems does not necessarily require the use of advanced technologies and thus we do not intend to force licensees to use such potentially costly technologies, especially in areas where they may not be needed or cost effective. Instead, we believe that EMSPs will implement a wide variety of advanced technologies voluntarily when they perceive sufficient customer demand for the enhanced services that would result. Accordingly, we do not propose to mandate that EMSPs use advanced technology. We request comment, however, on whether such a requirement might be appropriate and, if so, whether it should be limited to only frequency-congested BTA/MTAs or to certain frequency-congested areas within BTA/MTAs. Additionally, if such a requirement is appropriate, is there a definitive measurement for the increase in capacity or is this too subjective a concept to serve as a meaningful condition of the EMSP license, especially considering that we have stated that mobile loading is not generally relevant to the proposed EMSP systems?

4. Construction Requirements

39. Finally, we examine the construction requirements for wide-area systems. Unlike either the 220-222 MHz and 900 MHz bands, there are already many systems operating in the 800 MHz band. In most major markets, 800 MHz SMR systems are congested and in need of additional capacity. Rather than follow the pattern of the construction requirements for 220-222 and 900 MHz systems,[73] the construction requirements adopted for 800 MHz systems must consider that this is a mature market and many 800 MHz wide-area systems will be produced by converting existing systems into more efficient systems that provide increased capacity. We propose that an 800 MHz EMSP system be required to ultimately cover either 80 percent of the land area or serve 80 percent of the population within its BTA/MTA.[74] We consider a licensee to provide service if it provides a signal strength of 40 dBu or greater to that area. We propose that licensees have up to five years after the license grant to meet this requirement.[75] If the EMSP system does not meet the coverage requirement five years from the date of EMSP license grant we propose that the licensee lose the exclusive right to use its channels throughout the BTA/MTA. Such a licensee would be permitted to continue to operate any stations already constructed and in operation, and these facilities would be protected in accordance with Section 90.621(b) of our rules, but the licensee would not be permitted to continue constructing or modifying stations on these channels throughout the BTA/MTA. Additionally, a licensee that loses its EMSP license would not be permitted to reapply for another EMSP license in the same market for six months from the date the EMSP license is cancelled. We request comment on this proposal and whether there are other, more effective means for ensuring that EMSPs meet their conditions of license. We also request comment on whether the time provided for a licensee to construct its system be dependent in some way on the size of the proposed system (i.e., number of proposed transmitter sites, size of the BTA/MTA, or number of channels to be included in the system)? Additionally, we request comment on whether the same construction standard should apply for new licensees as well as licensees that are converting existing constructed and operational stations to wide-area operations? Should we require a new licensee to meet a benchmark, such as requiring the new licensee to serve 20 percent of the area or population in the BTA/MTA two years after license grant?

40. In addition to the above requirements we propose an additional requirement for any applicants that wish to construct their system over an extended period of up to five years. Currently, the licensee of a trunked SMR system has one year to complete construction and place the station in operation.[76] We have, however, routinely waived this requirement to grant existing 800 MHz SMR licensees five years to convert to wide-area operations.[77] Because of the flexibility and inherent value of an EMSP license, which

[69] *See* 47 C.F.R. § 90.631(a). This Section states that channels are authorized using a loading criterion of 100 mobiles per channel.
[70] *See* Weisman letter, *supra* note 14.
[71] AMTA Blueprint at 6.
[72] Fleet Call comments at 9.
[73] *See, e.g.*, 47 C.F.R. § 90.725.
[74] We do not propose to require that every channel included in the EMSP license meet this coverage requirement.
[75] *See* Report and Order, Amendment of Part 90 of the Commission's Rules Governing Extended Implementation Periods, PR Docket No. 92-210, adopted May 13, 1993, FCC Rcd (1993).
[76] *See* 47 C.F.R. §§ 90.631(e) and (f).
[77] We have adopted a Report and Order today which essentially codifies this practice. *See* Report and Order, PR Docket No. 92-210, *supra* note 75.

gives the licensee the exclusive right to apply to reuse a large number of channels throughout a BTA/MTA, we believe that it is necessary to impose on EMSP licensees additional prerequisites to obtaining extended implementation authority. Accordingly, we propose that EMSP licensees be required to make a reasonable estimate of the cost of constructing a system that would meet our minimum coverage requirements and to place a sum equal to this estimate in an escrow account or obtain a performance bond in that amount. We propose that EMSPs that include existing facilities in their EMSP systems not be required to include the cost of those stations in their estimate. For example, if an EMSP has existing facilities operating on its EMSP channels that provide coverage to 50 percent of either the population or area of the BTA/MTA, the licensee would only submit an estimate of the cost to construct stations to cover an additional 30 percent of either the population or area of the BTA/MTA. The licensee would place that amount in an escrow account or would obtain a performance bond in that amount.[78] In such an case, the EMSP license application must clearly indicate how much of the minimum construction requirements are satisfied by existing stations. A licensee that has enough existing stations at the time the EMSP license is granted to satisfy the minimum construction standards would not be required to place funds in an escrow account or purchase a performance bond. We propose to permit an EMSP licensee that places funds in escrow to withdraw funds from the escrow account in accordance with the cost estimates of the original construction schedule, to cover the ongoing costs of constructing the EMSP system.[79] If the licensee withdraws funds in excess of the amount approved by the Commission, then the underlying EMSP license would cancel automatically. We request comment on this proposal regarding withdrawal of escrowed funds. If a licensee that placed funds in escrow later failed to fulfill the coverage requirements, any remaining funds held in escrow would be paid to the United States Treasury. In the alternative, an EMSP licensee could elect to post a performance bond, with the United States Treasury named as the beneficiary. The licensee's failure to satisfy our coverage requirements would trigger payment of the applicable performance bond amount to the United States Treasury.[80] The requirement that EMSP licensees post a bond or place funds in escrow could serve as an incentive to the licensee to make productive use of the spectrum resource, and, in the event that the licensee fails to fulfill the minimum construction requirements within five years, the funds would serve as a mechanism to compensate the public for the spectrum being encumbered and not used in a productive manner. Any licensee that does not place sufficient funds earmarked for construction of its wide-area system in an escrow account, or post a bond for that amount, will be required to construct its system in one year.

41. We ask for comment on the legal justification for requiring the posting of a bond or establishment of an escrow account, whether the amount of the escrow or bond reasonably relates to the loss that would be suffered by the public in the event the licensee fails to construct, and whether the escrow or bond provides a means of ensuring that the licensee will put the spectrum to use in a manner consistent with the public interest. We also ask for comment on whether the escrow or bond amount should correspond to a value the Commission places on an EMSP system rather than the cost estimated by an applicant, and if so, we seek data to be included in the record that would reliably project such costs. We also ask commenters to discuss whether EMSP systems should be authorized a reduced extended implementation period of three years to construct an EMSP system and place it in operation, with the possibility of receiving a five year extended implementation period if they volunteer to post a performance bond or place funds in escrow. We further request comment on alternatives the Commission could consider to encourage productive use of the spectrum by EMSP licensees. For example, we could condition the entire EMSP license on timely meeting our coverage requirements, with failure to meet these conditions resulting in automatic cancellation of *all* stations covered by the EMSP license, including those constructed and placed in operation. In addition, we request comment on the effect that authority to award licenses by competitive bidding would have on the issue of assuring that licensed spectrum is used productively. Would the cost of obtaining a license through competitive bidding be sufficient to assure its productive use, or would additional safeguards remain necessary?

42. To prevent trafficking in licenses, we now restrict transfers of unconstructed private land mobile licenses. Licensees in the 800 MHz SMR service may not assign or transfer a license prior to completing construction of the facility.[81] Nationwide commercial licensees in the 220-222 MHz band may not assign the nationwide license until at least 40 percent of the system is constructed. These licenses may not be partially assigned.[82] Similarly, we have proposed that 900 MHz nationwide and regional licensees not be permitted to assign their license until 40 percent of their system is constructed and that partial assignment of these licenses not be allowed.[83] For 800 MHz, we propose that an EMSP not be permitted to assign its license for at least three years, and in no event will transfer be permitted before construction has been completed. We further propose to permit an 800 MHz EMSP to make a partial assignment of its license, but only after fulfilling the construction requirements. We propose that a licensee not be permitted to assign its license in a portion of the BTA/MTA. Rather, the licensee could make a partial assignment for a portion of its channels throughout the BTA/MTA. Licensees could, however, lease their licensed EMSP spectrum at any time for either the entire

[78] If a licensee elects to post a performance bond, we would require that the surety company be deemed acceptable within the meaning of 31 U.S.C. § 9304 *et. seq.* (*See, e.g.* Department of the Treasury Fiscal Service, Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and As Acceptable Reinsuring Companies, 57 Fed. Reg. 29356 (1992)) and that the United States Treasury be the named beneficiary in the event of the licensee's default. *See* proposed section 90.677.

[79] See proposed 47 C.F.R. § 90.677.

[80] The surety could establish an incremental payment schedule whereby the amount paid to the Treasury in the event of default would track the EMSP licensee's actual performance in meeting the coverage requirements. Thus, for example, as the licensee comes closer to meeting the coverage requirements, the amount paid by the surety in the event of default could decrease proportionately.

[81] *See* 47 C.F.R. § 90.609(b).

[82] *See* 47 C.F.R. §§ 90.709(a)(3),(d).

[83] *See 900 MHz Phase II*, 8 FCC Rcd at 1477 n.74.

BTA/MTA or a portion of the BTA/MTA, and could count any use of leased spectrum toward completion of their construction requirements. We ask for comment on this proposal, especially whether any restriction on transfers or assignments is necessary given the mature nature of the 800 MHz SMR market.

IV. CONCLUSION

43. We adopt this *Notice of Proposed Rule Making* to solicit public comment regarding the accommodation of wide-area Specialized Mobile Radio systems in the 800 MHz band. This *Notice* proposes amendment of Part 90 of our Rules to establish a framework for licensing wide-area SMR systems. The proposed rule changes are set forth in Appendix A.

V. PROCEDURAL MATTERS

Regulatory Flexibility Act

44. An Initial Regulatory Flexibility Analysis is contained in Appendix B to this *Notice of Proposed Rule Making*. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix B. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981).

Ex Parte Rules - Non-Restricted Proceeding

45. This is a non-restricted notice and comment rule making proceeding. *Ex Parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

Comment Dates

46. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47. C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **July 19, 1993,** and reply comments on or before **August 5, 1993**. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the F.C.C. Reference Center of the Federal Communications Commission, Room 239, 1919 M Street, N.W., Washington, DC 20554.

Ordering Clause

47. Authority for issuance of this *Notice of Proposed Rule Making* is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r).

Contact Persons

48. For further information concerning this proceeding, contact Julia Kogan, Steve Sharkey, Rosalind Allen or Martin Leibman, Private Radio Bureau, (202) 632-7125 or 634-2443.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Parts 1 and 90 of Chapter 1 of Title 47 of the Code of Federal Regulations are proposed to be amended as follows:

Part 1 - Practice and Procedure.

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

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303: Implement, 5 U.S.C. 552 and 21 U.S.C. 853a, unless otherwise noted.

2. Section 1.1102 is amended by adding 6.a.(ix) and 6.b.(ix) to read as follows:

§ 1.1102 Schedule of charges for private radio service

Action	FCC Form No.	Fee amount	Fee type code	Address
		* * * * * * *		
6. * * *				
a. * * *				
		* * * * * * *		
(ix) EMSP license	FCC 574	35	PAL	Federal Communications Commission, EMSP License P.O. Box _____, Pittsburgh, PA 15251-5360
b. * * *				

* * * * * * *

(ix) EMSP license	FCC 574	35	PAL	Federal Communications Commission, EMSP License P.O. Box _____, Pittsburgh, PA 15251-5360

* * * * * * *

Part 90 - Private Land Mobile Radio Services.

3. The authority citation for Part 90 continues to read as follows:

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

4. Section 90.7 is amended by adding the definition for "EMSP license" following the definition for "Effective Radiated Power" to read as follows:

§ 90.7 Definitions

* * * * *

EMSP License. A license authorizing an Expanded Mobile Service Provider (EMSP) the exclusive right to reuse specified SMR Category channels at base stations located throughout one of the 47 Major Trading Areas defined in the *Rand-McNally 1992 Commercial Atlas and Marketing Guide,* 123rd Edition.

* * * * *

5. Section 90.135 is amended by revising paragraph (a) introductory text to read as follows:

§ 90.135 Modification of license.

(a) Except as provided in § 90.673, the following changes in authorized stations require an application for modification of license:

* * * * *

6. Section 90.159 is amended by revising paragraph (b) introductory text to read as follows:

§ 90.159 Temporary and conditional permits.

* * * * *

(b) An applicant proposing to modify an EMSP license may operate the proposed facility for a period of up to 180 days under a conditional permit in accordance with § 90.673. An applicant proposing to operate a new private land mobile radio station or modify an existing station below 470 MHz, or in the one-way paging 929-930 MHz band that is required to submit a frequency recommendation pursuant to §§ 90.175(a)-(e) may operate the proposed station during the pendency of its application for a period of up to 180 days under a conditional permit upon the filing of a properly completed formal application that complies with § 90.127 if the application is accompanied by evidence of frequency coordination in accordance with §§ 90.175 and 90.176, and provided that the applicant certifies that the following conditions are satisfied:

* * * * *

7. Section 90.609 is amended by revising paragraphs (a) introductory text, (d)(3), and (d)(7) to read as follows:

§ 90.609 Special Limitations on amendment of applications for assignment or transfer of authorizations for radio systems above 800 MHz.

(a) No application for a conventional or trunked radio system may be amended so as to substitute a new entity, except as provided in § 90.669(b) for EMSP systems, or in the following circumstances:

* * * * *

(d) * * *

(3) For all trunked systems that are not SMRs, the assignment application must include a statement from the trunked system's own frequency coordinator verifying that there are no available frequencies in the trunked system's service category in the frequency bands 806-824/851-869 MHz (trunked systems that are SMRs must demonstrate that there are no SMRS Category channels available at the base station coordinates in lieu of this requirement).

* * * * *

(7) As a result of the assignment the assignee must have a number of channels that does not exceed one channel more than its current loading warrants.

* * * * *

8. Section 90.611 is amended by revising paragraphs (c) and (d) to read as follows:

§ 90.611 Processing of applications.

* * * * *

(c) Each application will be reviewed to determine whether it can be granted. Applications for frequencies in the Public Safety, Business, Industrial/Land Transportation, and General Categories must specify the intended frequency (or frequencies) of operation. Except as specified in § 90.663, applicants for frequencies in the SMRS Category may either specify the intended frequency (or frequencies) of operation in accordance with the provisions of § 90.621 or request that the Commission make the selection.

(d) Applications for channels in the SMR category that cannot be granted due to a lack of available channels in a particular area will be dismissed. Where channels are available but the number of applications for channels received on the same day exceeds the number of channels, we will grant licenses to operate on the channel(s) through our

random selection procedures. *See* § 1.972 of this Chapter. *See also* § 90.671 for procedures on processing applications for SMR channels to be included in an EMSP license.

* * * * *

9. Section 90.621 is amended by revising paragraphs (a) introductory text, (a)(1) introductory text, (b) introductory text, (g)(3)(i), and (g)(3)(ii), to read as follows:

§ 90.621 Selection and assignment of frequencies.

(a) Applicants for frequencies in the Public Safety, Industrial/Land Transportation, Business, and General Categories must specify on the application the frequencies on which the proposed system will operate pursuant to a recommendation by the applicable frequency coordinator. Applicants for frequencies in the SMRS Category, except EMSP license applicants, may either request specific frequencies by including in their applications justification for the frequencies requested or request that the Commission select frequencies for the system from the SMRS Category.

(1) For trunked systems, other than EMSP systems, the assignment of frequencies will be made in accordance with applicable loading criteria and in accordance with the following:

* * * * *

(b) Systems authorized on frequencies in the SMRS Category, except as described in § 90.675(b), will be afforded protection solely on the basis of fixed distance separation criteria. Only co-channel interference between base station operations will be taken into consideration. Adjacent channel and other types of possible interference will not be taken into account. The ordinary separation between co-channel systems will be 113 km (70 miles) with the following exceptions:

* * * * *

(g) * * *

(3) * * *

(i) For non-SMR applicants, the application must include a statement from the applicant's own frequency coordinator verifying that there are no available frequencies in the applicant's service category in the frequency bands 806-824/851-869 MHz. For SMR applicants, the application must '" demonstrate that no SMRS Category frequencies are available in the 806-824/851-869 MHz frequency bands at the base station coordinates.

(ii) As a result of the addition of any unused channels in the General Category to an existing trunked system, the number of channels that may be assigned to the station(s) authorized to operate that system may not exceed one channel more than its current loading warrants.

* * * * *

10. Section 90.627 is amended by revising paragraphs (a) and (b)(3), and by adding new paragraph (b)(4) to read as follows:

§ 90.627 Limitation on the number of frequency pairs that may be assignable for trunked systems and on the number of trunked systems.

(a) The maximum number of frequency pairs that may be assigned at any one time for the operation of a trunked radio system is twenty, except as specified in §§ 90.621(a)(1)(iv) and 90.667.

(b) * * *

(3) A licensee of an SMR system in the 806-821/851-866 MHz bands seeks authorization to operate an SMR system in the 896-901/935-940 MHz bands; or,

(4) The channels requested are part of the licensee's EMSP system as described in § 90.661.

11. Section 90.629 is amended by revising paragraph (a) introductory text to read as follows:

§ 90.629 Extended implementation schedules.

* * * * *

(a) Except for EMSP systems as provided in § 90.677, the applicant must justify an extended implementation period. The justification must include an implementation schedule for construction of the complete system, *including* a detailed description of the applicant's proposed system, benchmarks for construction of the proposed base stations (including identification of channels to be constructed at each station at each of the indicated benchmarks), and must show that:

* * * * *

12. Section 90.631 is amended by revising the first sentence of paragraphs (a), (b) and (f), and by revising paragraphs (c), (d) and (e) to read as follows:

§ 90.631 Trunked systems loading, construction and authorization requirements.

(a) Trunked systems, except EMSP systems, will be authorized on the basis of a loading criterion of 100 mobile stations per channel. * * *

(b) Each applicant for a trunked system, except applicants for EMSP systems, shall certify that a minimum of 70 mobiles for each channel authorized will be placed in operation within five years of the initial license grant. * * *

(c) Except as provided in § 90.667 and paragraph (d) of this section, an applicant seeking to expand a trunked system by requesting additional channels from the Commission, or through intercategory sharing, or through an assignment must have a loading level of 70 mobiles per channel on the existing system that is the subject of the expansion request.

(d) In rural areas, a licensee of a trunked system may request to increase its system capacity by five more channels than it has constructed without meeting the loading requirements specified in paragraphs (b) and (c) of this section. A rural area is defined for purposes of this section as being beyond a 100-mile radius of the designated centers of the following urbanized areas: New York, NY; Los Angeles, CA; Chicago, IL; Philadelphia, PA; San Francisco, CA; Detroit, MI; Boston, MA; Houston, TX; Washington, DC; Dallas-Fort Worth, TX; Miami, FL; Cleveland, OH; St. Louis, MO; Atlanta, GA; Pittsburgh, PA; Baltimore, MD; Minneapolis-St. Paul, MN; Seattle WA; San Diego, CA; and Tampa-St. Petersburg, FL. The coordinates for the centers

of these areas are those referenced in § 90.635, except that the coordinates for Tampa-St. Petersburg are latitude 28°00'00" N. longitude 82°27'00" W.

(e) Except as provided in §§ 90.629 and 90.677, licensees of trunked facilities must complete construction within one year.

(f) If a station is not placed in permanent operation, in accordance with the technical parameters of the station authorization, within one year, except as provided in §§ 90.629 and 90.677, its license cancels automatically and must be returned to the Commission. * * *

* * * * *

13. Section 90.651 is amended by revising paragraph (d) to read as follows:

§ 90.651 Supplemental reports required of licensees authorized under this subpart.

* * * * *

(d) Licensees of trunked systems, except EMSP systems, must report to the Commission's Private Radio Bureau, Licensing Division, Land Mobile Branch in Gettysburg, PA 17326, within thirteen months of the date of the grant, whether or not construction of the facility has been completed.

14. Section 90.658 is amended by revising paragraph (a) to read as follows:

§ 90.658 Loading data required for base station licensees of trunked Specialized Mobile Radio systems to acquire additional channels or to renew trunked systems licensed before June 1, 1993.

(a) Except for EMSP licensees, a base station licensee of a trunked Specialized Mobile Radio system that applies for additional channels to expand an existing system or to construct a new system within 40 miles of its existing system, or a base station licensee of a trunked system applying for its first renewal in an urban area as defined in § 90.631(d) for a system licensed before June 1, 1993 must identify on the appropriate application form the number of mobiles and control stations loaded on its system as calculated in paragraph (b) of this section.

* * * * *

15. Subpart S is amended by adding a new heading following Section 90.659 to read as follows:

POLICIES GOVERNING THE LICENSING AND USE OF EXPANDED MOBILE SERVICE PROVIDER (EMSP) SYSTEMS IN THE 806-821 AND 851-866 MHZ BANDS.

16. A new section 90.661 is added to Subpart S to read as follows:

§ 90.661 Expanded Mobile Service Provider Systems.

EMSP licenses on SMR Category channels in the 806-821 and 851-866 MHz bands are available for each of the 47 Major Trading Area (MTAs) as described in the *Rand-McNally 1992 Commercial Atlas and Marketing Guide,* 123rd Edition. EMSP licensees have the exclusive right to construct and operate base stations using the SMR Category frequencies identified in the EMSP license anywhere within the MTA except that:

(a) The EMSP licensee must protect, in accordance with § 90.621(b), all previously-authorized co-channel stations and all previously filed applications for co-channel facilities that are not associated with another EMSP license.

(b) The EMSP licensee must comply with any rules and international agreements that restrict use of its EMSP channels in certain areas.

(c) The EMSP licensee must protect co-channel EMSP licensees in adjacent MTA regions in accordance with § 90.675(b).

17. A new Section 90.663 is added to Subpart S to read as follows:

§ 90.663 Channels available for EMSP systems.

Any SMR category channel in the 806-821/851-866 MHz band as listed in Table 4A of Section 90.617 may be included in an EMSP license. An EMSP license will not be comprised of channels from any other 800 MHz Service Category.

18. A new Section 90.665 is added to Subpart S to read as follows:

§ 90.665 Filing of Applications for EMSP licenses.

(a) Applications for EMSP licenses will be accepted in two stages. For the first stage, an "initial filing period" will be designated during which applications for EMSP licenses in each MTA will only be accepted from applicants who:

(1) are licensed for SMR Category channels in the MTA on or before May 13, 1993; and

(2) are operating these channels on constructed base stations in the MTA on the date the EMSP license application is filed.

(b) An existing SMR licensee may only include each of its licensed channels in a single EMSP application in the MTA where the channels are currently licensed and operating on constructed base stations.

(c) A person or entity that is not licensed for 800 MHz SMR Category channels operating on constructed base stations within a particular MTA may not have any interest in more than one application for an EMSP license in that MTA.

(d) All applications for EMSP licenses must be submitted in accordance with § 0.401 of the rules and must be accompanied by the appropriate fee as set forth at Part 1, Subpart G of this Chapter.

(e) The Commission shall announce by Public Notice information that must be submitted as a part of the EMSP license application and supplements, as well as the required format for submission of these filings. The Commission will require that EMSP applications be filed electronically if, at the time EMSP applications are accepted for filing, the Commission has adequate data management resources to receive such applications. At a minimum EMSP applications must include:

(1) The MTA for which the applicant is applying;

(2) All frequencies to be included in the EMSP system;

(3) For frequencies that the applicant is authorized to use within the MTA at the time the EMSP application is filed, the applicant must include:

(i) The call sign under which the applicant is authorized to operate the channels;

(ii) Certification that the frequencies are constructed and in operation as of the date the EMSP application is filed; and

(iii) The coordinates of the station(s) at which the frequencies are operating.

(4) Certification that the applicant will meet the construction requirements set forth in § 90.677;

(5) A plan consisting of a schedule for the construction of the base stations of the proposed system, an estimate of the costs for constructing the system and a description of how the proposed system will satisfy the coverage requirements of § 90.677. This plan need not specify base station coordinates. The estimate of the costs of constructing and implementing the system must include individual estimates for the costs of constructing each base station facility and must be accompanied by a thorough justification of the method used to calculate these costs. To the extent that the proposed system includes existing facilities that are constructed and operating, the EMSP applicant must demonstrate the percentage of the coverage requirements of § 90.677 that will be satisfied by such existing facilities.

(6) If the applicant seeks an extended implementation period (*see* § 90.677(c)), certification that, within 30 days of grant of its application, the licensee will place funds in an escrow account or obtain a performance bond equal to the estimated cost of constructing the proposed system.

(7) An indication of the minimum number of EMSP channels that the applicant would find acceptable in the event that channels specified in the application cannot be included in the EMSP license because they are included in a previously granted EMSP authorization. Applications for which this minimum cannot be granted will be dismissed.

19. A new Section 90.667 is added to Subpart S to read as follows:

§ 90.667 Limitation on the number of channels assignable for an EMSP license.

(a) Except as specified in paragraph (b), the maximum number of channel pairs that will be assigned to an EMSP licensee at one time is 42 per MTA.

(b) During the initial filing period, applicants for EMSP licenses may request any number of channel pairs to be included in the EMSP license. Any channels requested, however, must meet the requirements of § 90.665(a).

(c) Except as provided in paragraph (d), an EMSP licensee may not request additional EMSP channels until it has fully satisfied the requirements of § 90.677(b) for its EMSP license within the particular MTA.

(d) An EMSP licensee granted less than 42 channels within an MTA during the initial filing period may apply for additional EMSP channels prior to meeting the requirements of § 90.677(b). The total number of EMSP channels pairs not satisfying the requirements of § 90.677(b) may not, however, exceed 42 channels within the particular MTA.

20. A new Section 90.669 is added to Subpart S to read as follows:

§ 90.669 Limitations on amendment of applications for assignment or transfer of EMSP radio systems.

(a) Except as indicated in paragraph (b) of this section, the Commission will not consent to the following:

(1) Any request to amend an EMSP license application to substitute a new entity as the applicant;

(2) Any application to assign or transfer a license for an EMSP system before the licensee has fulfilled the construction requirements described in § 90.677(b) or three years from the date the EMSP license was granted, whichever is longer.

(b) The Commission will grant the applications described in paragraph (a) of this section if:

(1) The request to amend an EMSP application or to transfer or assign an EMSP license does not involve a substantial change in ownership or control of the applicant; or

(2) The changes in the ownership or control of the EMSP applicant are involuntary due to the original applicant's insolvency, bankruptcy, incapacity, or death; or

(3) The changes in the ownership or control of the EMSP applicant are necessary to resolve a conflict between mutually exclusive applications, the application is submitted within the 60-day period designated for applicants to resolve mutually exclusive applications and no consideration has passed between negotiating entities in exchange for amendment of the application. *See* § 90.671(b).

(c) The assignee or transferee of an EMSP system is subject to the construction and reporting requirements of § 90.677, and will receive the assignor's license expiration date.

(d) The Commission will not consent to any request to amend an EMSP application if any consideration has passed between negotiating entities in exchange for amendment of the application.

(e) EMSP licensees that have fully satisfied the requirements of § 90.677(b) may partially assign the EMSP license. The Commission will only accept applications for partial assignment proposing exclusive use of one or more EMSP channels throughout the MTA region. The Commission will not accept any application proposing to assign the use of the EMSP channels in limited geographic areas of an MTA.

21. A new Section 90.671 is added to Subpart S to read as follows:

§ 90.671 Processing of EMSP applications.

Applications for EMSP licenses will be processed as follows:

(a) All applications recieved will be given a file number. The assignment of a file number is for administrative convenience and does not represent a determination that the application is acceptable for filing. Applications will then be considered to determine whether they are substantially complete and acceptable for filing. If so, they will be put in pending status. If not, they will be returned to the applicant.

(b) All applications in pending status will be examined to determine whether they are mutually exclusive. Any applications received during the initial filing period and specifying *any* of the same frequencies will be considered mutually exclusive. EMSP applications received after the initial filing period ends will be processed on a first-come, first-served basis, in the order they are received by the Commission in its Gettysburg, PA office (or the address set forth at § 1.1102 of this chapter for applications requiring the fees established by Part 1, Subpart G of this Chapter). Such applications will be considered mutually exclusive if they are filed on the same day for *any* of the same frequencies in the same MTA. Applications that are not mutually exclusive and are otherwise acceptable will be granted.

(c) Applicants that file mutually exclusive applications will be designated for random selection by Public Notice and will receive 60 days from the date the Public Notice appears in the Federal Register to amend their applications to resolve the mutual exclusivity. Mutually exclusive applications that are amended to resolve overlapping requests for channels, and that are otherwise acceptable, will be granted. The Commission will rank order any remaining mutually exclusive applications by random selection. Applications will then be granted in order of their ranking, pursuant to § 1.972 of this chapter. Channels specified in an application that conflict with a previously granted EMSP license will be deleted from the application and the application will be granted for any remaining channels unless otherwise indicated in the application. *See* § 90.665(e)(7).

22. A new Section 90.673 is added to Subpart S to read as follows:

§ 90.673 Modification of EMSP license.

(a) The following changes to an EMSP system require an application for modification of the EMSP license:

(1) Addition of a new base station

(2) Change in location of an authorized base station

(3) Change in frequency of an authorized base station

(4) Change in power of an authorized base station

(5) Change in antenna height of an authorized base station

(6) Any change in ownership, control, or corporate structure

(b) Applications to modify an EMSP license must be filed electronically in a format to be announced by Public Notice.

(c) Applications to modify an EMSP license must include a list of all relevant co-channel facilities, not under the control of the EMSP licensee, including call signs, coordinates, effective radiated power, antenna height above average terrain, applicable directional antenna heights above average terrain, and a certification that the proposed modification complies with section 90.621(b).

(d) An EMSP licensee can operate a proposed new or modified station that is to be included in its EMSP system during the pendency of the EMSP modification application for a period of up to 180 days under a conditional permit (*See* § 90.159) provided that:

(1) The applicant has submitted an application to the Commission satisfying the requirements of paragraph (c) of this section;

(2) The facility provides the required protection to certain locations in accordance with § 90.177;

(3) The facility will not have a significant environmental effect, as described in § 1.1307 of this chapter;

(4) The facility does not require notification to the Federal Aviation Administration as described in § 17.7 of this chapter;

(5) The facility does not require a coordination in accordance with an international agreement;

(6) The facility's proposed operation does not require waiver of any of the Commission's Rules.

(e) Conditional authorization pursuant to paragraph (d) is evidenced by retaining the original executed conditional licensing 572C Certification Form with the station records. Conditional authorization does not prejudice any action the Commission may take on the subject application. Conditional authority is accepted with the express understanding that such authority may be modified or cancelled by the Commission at any time without hearing if, in the Commission's discretion, the need for such action arises.

23. A new Section 90.675 is added to Subpart S to read as follows:

§ 90.675 Limitations on use of EMSP channels

(a) EMSP licensees must provide co-channel protection, in accordance with § 90.621(b), to any previously authorized co-channel facilities or previously filed co-channel applications that are not licensed to the EMSP licensee. This includes all co-channel facilities, whether inside or outside of the MTA in which the licensee is authorized.

(b) The signal field strength of any base station that is part of the EMSP system cannot exceed 22 dBu at the border of the MTA region, except when:

(1) The station was constructed and placed in operation on the EMSP channels, before the EMSP license was granted. In such instances, the licensee will not be permitted to increase the signal field strength at the border of the MTA above the field strength created by the facility at the time the EMSP license was granted, unless the conditions in subparagraph (2) below are met.

(2) The EMSP licensee submits with its application for the licensing of base stations letters of concurrence from affected co-channel EMSP licensees indicating agreement to accept any interference resulting from the increased signal strength at the MTA border. The applicant must also certify, pursuant to § 1.47, that all concurring co-channel licensees have been served with an actual copy of the application.

24. A new Section 90.677 is added to Subpart S to read as follows:

§ 90.677 Authorization, Construction and Implementation of EMSP Systems.

(a) EMSP authorizations will be issued for a term not to exceed five years. (*See* § 90.149.)

(b) Except as provided in paragraph (c), an EMSP licensee must, within one year, construct and place in operation a sufficient number of base stations to provide coverage to at least 80 percent of either the land area or the population of the MTA. Although each individual channel does not have to provide the required coverage, each channel must be constructed on an operating base station within the MTA. Within thirteen months from grant of the license or as part of the application to renew its authorization if the licensee has been granted an extended period to implement its system, the EMSP licensee must provide the Commission with one or more U.S. Geological survey map(s) of the MTA with a 1:25 0,000 scale. The map(s) must depict all of the licensee's authorized base station sites within the MTA, and their respective 40 dBu contours as determined from the Commission R6602 F(50,50) curves with a 9 dBu adjustment (*See* § 73.699). The licensee must also include a description of how the depicted stations cover the required land area or population of the MTA. If the licensee does not believe that the R6602 curves accurately predict the 40 dBu contours, then the licensee must explain and justify, including all supporting data and calculations, any alternative method used to calculate these contours.

(c) An EMSP licensee will be granted an extended implementation period of five years to fulfill the requirements of paragraph (b) if:

(1) The licensee requested, in its EMSP license application, an extended implementation period; and

(2) The licensee places funds equal to the cost estimate, filed pursuant to § 90.665(d)(5), for construction and implementation of the proposed system in an escrow account, or posts a performance bond sufficient to guarantee costs equal to that estimate, within 30 days of the EMSP license grant.

(d) An EMSP licensee that places funds in escrow to obtain an authorization term that exceeds one year, as provided in paragraph (c), must provide the Commission with the name of the financial institution that holds the escrow account and the account number. The licensee may withdraw funds from the escrow account to cover the ongoing costs of constructing the EMSP system. Funds may only be withdrawn, however, after the Commission has issued a license for a station and only in the amount that the original construction schedule, submitted with the EMSP license application, specified as the estimated construction costs for an individual station. The licensee must specify in each application to add or modify a facility the amount that the licensee intends to withdraw from the escrow account, and must supply with each application a statement from the financial institution holding the escrow account the account balance at the time a modification application is filed. The amount of funds to be withdrawn is subject to review and modification by the Commission. If the licensee withdraws funds in excess of the amount approved by the Commission, then the underlying EMSP license cancels automatically. If an EMSP licensee fails to satisfy the requirements of paragraph (b) or if its license cancels because the licensee withdrew excess funds, any funds remaining in the escrow account will be forfeited to the United States Treasury.

(e) If the EMSP licensee elects to post a performance bond to obtain an authorization term that exceeds one year, as provided in paragraph (c), the surety company must be deemed acceptable within the meaning of 31 U.S.C. § 9304 *et. seq.* (*See, e.g.* Department of the Treasury Fiscal Service, Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and As Acceptable Reinsuring Companies, 57 Fed. Reg. 29356 (1992)) and the United States Treasury must be named the beneficiary in the event of the licensee's default. The EMSP licensee must provide the Commission with a copy of the performance bond, including all details and conditions.

(f) If the construction and implementation requirements of paragraph (b) are not satisfied within the authorized term, then the EMSP license cancels automatically and must be returned to the Commission. The licensee will, however, retain an SMR Category license for any stations already constructed and placed in operation at the time that the EMSP license cancelled. The licensee may continue to operate these stations, but it loses the exclusive right to apply to reuse the EMSP channels throughout the MTA. The licensee may not apply again for an EMSP license in that MTA for a period of six months from the date that the former EMSP license cancelled.

25. A new Section 90.679 is added to Subpart S to read as follows:

§ 90.679 Station Identification for EMSP Systems.

EMSP licensees must comply with the station identification requirements of § 90.647. All stations operating as part of the EMSP system must identify themselves using the call sign issued for the entire EMSP system.

APPENDIX B

INITIAL REGULATORY FLEXIBILITY ANALYSIS

1. *Reason for Action:* This rule making proceeding is initiated to obtain comment regarding whether marketplace developments should lead the Commission to change Part 90 of its Rules. The Part 90 changes proposed herein would respond to those developments by enhancing use of the 806-824 MHz and 851-869 MHz bands for Specialized Mobile Radio (SMR) systems.

2. *Objectives:* The Commission seeks to permit development of spectrally efficient wide-area SMR systems while continuing to allow entities that do not evolve into wide-

area systems to acquire spectrum and remain viable. It also seeks to encourage more efficient use of spectrum in congested areas and to accommodate technologically advanced systems supporting enhanced services such as seamless wide-area roaming and clear data transmission.

3. *Legal Basis:* The legal basis for these rule changes is found in Sections 4(i), 302, 303(g), 303(r), and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 302, 303(g), 303(r), and 332(a).

4. *Reporting, Recordkeeping, and Other Compliance Requirements:* Applicants for Expanded Mobile Service Provider (EMSP) licenses must electronically file their EMSP license applications, and subsequent EMSP licensees must electronically file their applications for conditional authorizations for individual base station sites, using a particular computer-readable format, provided that the Commission has the capacity to accept information in such a format. The EMSP license applications must include the names of participants in the application; information regarding channels sought to be incorporated into the EMSP license; certification that the applicant will protect co-channel licensees and pending applications for co-channel facilities in the MTA/BTA from harmful interference; a construction schedule and cost estimates. EMSP licensees applying for conditional authorizations must include a list of all co-channel stations and previously filed co-channel applications in the area, including call signs and coordinates, and the stations' effective radiated power and antenna heights if co-channel spacing requirements are not met. In addition, EMSPs that do not have constructed and operational base stations in the relevant BTA/MTA must place into escrow sums equal to their reasonable estimates of costs of constructing their proposed EMSP systems, or obtain a performance bond in that amount. These licensees must demonstrate within five years after the license grant that they have constructed their EMSP channels so as to cover 80 percent of the geographic area or 80 percent of the population in the BTA/MTA, or any funds remaining in escrow that were not used for construction, or the amount of the performance bond, will be paid over to the U.S. Treasury.

5. *Federal Rules Which Overlap, Duplicate or Conflict with These Rules:* None.

6. *Description, Potential Impact, and Number of Small Entities Involved:* Many small entities, including SMR licensees, could be positively affected by this proposal because additional SMR service offerings and authorized service areas would be made available to them. The number of small entities that will be affected is unknown. In addition, expanded service opportunities will generate demand for new SMR equipment, benefiting equipment manufacturers. After evaluating comments in this proceeding, the Commission will further examine the impact of any rule changes on small entities and set forth our findings in the Final Regulatory Flexibility Analysis.

7. *Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives:* This *Notice* solicits comment on a variety of alternatives. All significant alternatives presented in response to the petitions for rule making have been addressed in this *Notice of Proposed Rule Making.*