334. Unlike random selection procedures, which tend to increase the likelihood of speculative or frivolous applications because all competitors have an equal opportunity to receive an authorization, the use of competitive bidding procedures should not have the same result,[629] even if a 30-day notice and cut-off is used. We also disagree with CECR's suggestion that our primary motivation for proposing a 30-day window is to increase revenues through the use of competitive bidding. Rather, we believe that a 30-day notice and cut-off procedure produces equitable results in licensing cellular unserved areas, as discussed above.

c. 900 MHz SMR

(1) *Background and Pleadings*

335. In the *Further Notice* we tentatively concluded that we should use filing windows and competitive bidding procedures in future 900 MHz licensing, because it seemed likely that there would be a large number of mutually exclusive applications if we decided to license outside the 46 Designated Filing Areas, as proposed in the *900 MHz Phase II Notice.*[630]

336. E.F. Johnson supports the proposal because 900 MHz licenses still need to be granted in many areas.[631] AMTA states that competitive bidding procedures may be appropriate for licensing 900 MHz SMR systems if the Commission creates opportunities for regional or national 900 MHz SMR networks.[632]

(2) *Discussion*

337. We adopt our proposal to establish notice and cut-off and competitive bidding for future 900 MHz licensing. As with Part 22 services, we will use 30-day notice and cut-off for filing applications. These procedures will permit all qualified applicants to file applications. Moreover, because we anticipate a large number of mutually exclusive wide-area applications in future licensing of this service, the use of competitive bidding to select among them will ensure that the qualified applicants who place the highest value on the

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[629] *E.g.*, *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2385 & n.158.

[630] *Further Notice,* 9 FCC Rcd at 2889 (para. 125), *citing* Amendment of Parts 2 and 90 of the Commission's Rules To Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-553, First Report and Order and Further Notice of Proposed Rule Making, 8 FCC Rcd 1469 (1993) (*900 MHz Phase II Notice).*

[631] E.F. Johnson Comments at 23.

[632] AMTA Comments at 39-40.

available spectrum will prevail in the selection process. These procedures will apply to all future applicants in this service, whether they are regulated as CMRS or PMRS until August 1996.[633]

d. 800 MHz SMR

(1) *Background and Pleadings*

338. The *Further Notice* sought comment on whether we should use filing windows and competitive bidding for future licensing of 800 MHz SMR frequencies.[634] We noted that the *800 MHz EMSP Notice*[635] had proposed to establish a filing window for existing licensees to apply for wide-area authorizations within their MTAs and BTAs, with mutually exclusive applications designated for random selection procedures. After the initial licensing phase, we proposed that subsequent mutually exclusive applications be processed on a first-come, first-served basis, with same-day applications treated as mutually exclusive. The *Further Notice* sought comment on whether the proposed procedures continued to be viable, particularly in light of the amount of licensing that has subsequently occurred in the 800 MHz band. We noted that the viability of the proposed procedures might depend on whether requests for wide-area authorizations by existing licensees were considered to be initial applications or modification applications for competitive bidding purposes.

339. AMTA and RMR support the continued use of first-come, first-served procedures for 800 MHz licensing because only a limited amount of unassigned spectrum is available for new licensing.[636] AMTA maintains that since most wide-area licensing in these frequency bands now consists of consolidations, it is questionable whether the statutory criteria for using competitive bidding can be satisfied for these transactions.[637] E.F. Johnson supports first-come, first-served procedures unless licensees could apply for large spectrum blocks.[638]

340. NABER suggests that a 30-day filing window be used for the 861-865 MHz band, but that first-come, first-served procedures continue to be used for the 851-860 MHz

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[633] *See* note 659, *infra.*

[634] *Further Notice,* 9 FCC Rcd at 2889 (para. 126).

[635] Amendment of Part 90 of the Commission's Rules To Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, Notice of Proposed Rule Making, 8 FCC Rcd 3950 (1993) (*800 MHz EMSP Notice*).

[636] AMTA Comments at 39-40; RMR Comments at 7 (unpaginated).

[637] AMTA Comments at 40.

[638] E.F. Johnson Comments at 22-23 & n.19.

band.[639] NABER argues that, because both CMRS and PMRS licensees are eligible to operate in the 851-860 MHz band, the use of filing windows and competitive procedures would effectively delay the processing of PMRS applicants pending completion of CMRS processing and, thus, first-come, first-served procedures are appropriate instead.

(2) *Discussion*

341. As discussed in paragraphs 103-105, *supra*, we will propose adopting two different licensing schemes for the 800 MHz frequency band. The upper band with 200 channels of contiguous spectrum will be licensed on a wide-area, multi-channel basis, whereas 80 channels of lower band spectrum will continue to be licensed on a channel-by-channel, station-by-station basis. Under both schemes, we would open the application process to any qualified applicant.[640] Thus, there would be competitive opportunities to provide SMR service in this frequency band. Consequently, we conclude that we should adopt 30-day notice and cut-off and competitive bidding procedures, for selecting among mutually exclusive initial applications in the 800 MHz band. The use of these procedures will not exclude qualified applicants from consideration, and, because the number of mutually exclusive applications in future licensing may be considerable, the use of competitive bidding to select among them will ensure that the qualified applicants who place the highest value on the available spectrum will prevail in the selection process.

342. We do not agree with NABER that, because both CMRS and PMRS applicants may apply in the 851-860 MHz band, we should use first-come, first-served procedures in order to avoid subjecting PMRS applicants to the delay caused by filing windows and auctions. We believe that the public interest benefits of permitting all qualified applicants to seek licenses in this frequency band outweigh the potential delay in the award of these authorizations. Moreover, we are confident that use of competitive bidding procedures will not lead to unreasonable delays in the issuance of these licenses.

e. 220 MHz

(1) *Background and Pleadings*

343. The *Further Notice* did not propose any changes to our 220 MHz first-come, first-served filing procedures.[641] We noted that licensing of commercial nationwide channels is essentially complete. For local 220 MHz channels, we sought comment on whether there

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[639] NABER Comments at 42-43.

[640] We note that we are suspending the acceptance of 800 MHz applications on the 280 SMR category channels, as of August 9, 1994, pending the adoption of wide-area licensing rules. *See* para. 108, *supra*.

[641] *Further Notice,* 9 FCC Rcd at 2889 (para. 127).

are alternative procedures that would allow reasonable opportunities for CMRS applicants to file competing applications without limiting the availability of frequencies to potential PMRS applicants. We also asked whether we should amend our procedures if we adopt regional licensing of 220 MHz channels, as requested in a pending petition.

344. Simrom notes that, because of a filing freeze on 220 MHz applications, most licensees who have relocated stations have done so under special temporary authority (STA). Simrom suggests that modification applications to cover those relocated facilities be accepted prior to accepting for filing applications for new stations.[642]

(2) *Discussion*

345. Commenters in this proceeding have raised a number of concerns about the status of facilities being constructed or operating under STAs and future licensing in this service. As discussed in Section III.C.1.a.4, *supra*, we intend to initiate a proceeding in the near future to address the issue of revising our 220 MHz service area and channel assignment rules. We believe that many of the licensing issues raised by commenters should be addressed in the context of this future proceeding. We will therefore defer the adoption of new application filing and selection procedures for 220 MHz service at this time.

f. 929-930 MHz Paging

(1) *Background and Pleadings*

346. We proposed in the *Further Notice* to defer the issue of mutually exclusive application procedures for 929-930 MHz paging because we tentatively concluded that these issues should be comprehensively addressed after the pending reconsideration of the *900 MHz PCP Exclusivity Order*[643] is completed.[644] Nonetheless, we emphasized that our ultimate objective is to adopt consistent licensing procedures for all CMRS paging applicants. The proposal is generally supported by the record.[645] AmP, however, supports the use of auctions

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[642] Simrom Comments at 17-18; *accord* E.F. Johnson Comments at 23; AMTA Reply Comments at 25; Global Reply Comments at 5. Simrom suggests that modification applications should be accepted before the current December 4, 1994, construction deadline.

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

[644] *Further Notice*, 9 FCC Rcd at 2889-90 (para. 128).

[645] *See, e.g.*, APACG Comments at 15.

to select among mutually exclusive initial applications, provided the applications specify the desired frequency.[646]

(2) *Discussion*

347. We will defer a decision on modifying the application filing and processing procedures for 929-930 MHz paging pending completion of reconsideration of the *900 MHz PCP Exclusivity Order*. As we noted in the *Further Notice*, we are now in the first phase of implementing local, regional, and nationwide licensing in these frequency bands.[647] Although we have not formally created wide-area licenses for 929-930 MHz paging, the issue of whether we should adopt market-based licensing has been raised for the 931 MHz paging service licensed under Part 22, and we have expressed our interest in pursuing such a licensing scheme.[648] We emphasize again that our ultimate objective is to adopt consistent licensing procedures for all CMRS paging applicants. Thus, there are several issues related to 900 MHz paging services under both Part 90 and Part 22 that we are interested in addressing comprehensively in further proceedings.

7. *Amendment of Applications and License Modifications*

a. Definitions

(1) *Background and Pleadings*

348. Under Section 309 of the Communications Act, major amendments to common carrier applications in Part 22 services must be placed on 30-day public notice and are subject to petitions to deny in the same manner as initial applications. Major amendments in Part 22 services also are subject to competing applications filed within the relevant filing window. All amendments not classified as major are considered minor and are not subject to the public notice or cut-off rule requirements. Applications to modify licenses are classified under the same terms as amendments to applications. That is, proposals to modify a license that would be considered major amendments to an initial application must be placed on public notice and are subject to petitions to deny, while minor modifications are exempt from these requirements.

349. All major amendments to CMRS applications in Part 90 services also must be placed on public notice and are subject to petitions to deny, pursuant to Section 309. For these purposes, the *Further Notice* proposed to apply the same definitions of "major" and "minor" amendments and modifications to Part 90 CMRS applications that are applicable to

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[646] AmP Reply Comments at 5.

[647] *Further Notice*, 9 FCC Rcd at 2889-90 (para. 128).

[648] *Part 22 Rewrite Order*, at para. 11.

Part 22 services.[649] In the *Further Notice*, we noted that in the *Part 22 Rewrite Notice* we had proposed to revise the Part 22 rules to define major and minor filings on a service-by-service basis, and we asked whether we should adopt a similar approach in the relevant Part 90 services as well. We also noted that in the *Part 22 Rewrite Notice* we had proposed to define initial applications for 931 MHz paging as (1) applications proposing the location of a facility more than 2 kilometers from any existing facility operating on the same frequency, or (2) applications proposing locations anywhere on a new frequency. We asked whether, if we decided to implement these definitions in Part 22, the definitions for major and minor filings should be the same for any Part 90 and Part 22 services we may determine to be substantially similar in this proceeding.

350. The record generally supports our proposal to apply the same definitions of "major" and "minor" amendments and modifications to Part 90 CMRS filings that are applicable to Part 22 filings.[650] PCIA suggests that all CMRS licensees should only be required have to submit the information being modified, which is the practice for Part 22 services, and not all of the information associated with the affected call sign, as is now done with Part 90 services.[651]

351. The record is divided on what types of system changes should be classified as major and minor amendments and modifications, although most commenters recognize that services licensed on a station-by-station basis present different concerns than those licensed on a wide-area basis. For example, Southern recommends that major amendments be defined as those which affect adjacent or co-channel licensees where station-by-station licensing is used.[652] Some commenters suggest that, to the greatest extent possible, we adopt broad definitions of "minor" amendments to pending applications and allow CMRS licensees to make "minor" modifications to existing facilities on a permissive basis, which would not even require the filing of notifications.[653] In particular, many commenters view the proposals in the *Part 22 Rewrite Notice* for defining initial applications in the 931 MHz paging service as too broad, and some suggest that the proposed system changes should be treated as modification applications, not initial applications. For example, PageNet claims that, because of the need to comply with Section 309 of the Act, the result of such broad definitions for initial applications would be substantial delay and expense in developing systems. PageNet believes that additional base stations operating on the same frequency that are within a

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[649] *Further Notice*, 9 FCC Rcd at 2890 (para. 131).

[650] *See, e.g.*, AMTA Comments at 41; APACG Comments at 15; Motorola Reply Comments at 16.

[651] PCIA Comments at 30-31.

[652] Southern Reply Comments at 11-12

[653] PCIA Comments at 30; McCaw Comments at 36-37; RMD Comments at 12-13.

licensee's existing service area should not be treated as initial applications or major filings.[654] Simrom argues that the primary concern in defining system modifications should be that the existing and proposed facilities can be operated as an integrated system, which is achieved when the predicted, reliable service contours of both facilities meet. Thus, Simrom suggests, a license modification should be based on a distance twice the expected reliable service contour for base stations licensed at maximum height and power, not 2 kilometers.[655] The composite service contours for these modifications would be based on those stations operated by licensees under substantially common ownership or as part of an integrated system.

352. In addition, Simrom suggests several other definitional changes: (1) for two-way systems, the addition of a frequency in the same frequency band which can be used for the same purposes should be treated as a modification, not an initial application; (2) certain major modifications should not be treated as newly-filed, as is done under Sections 22.23(g)(2), 22.23(g)(3), 22.23(g)(4), and 22.23(g)(6); and (3) for 220 MHz licensees, sites that are authorized under STAs should be deemed as authorized sites under the initial licenses, thereby precluding the need for major modifications of the initial licenses.[656]

353. Finally, PageNet questions whether changes in ownership and control should expose a licensee to new petitions to deny or competing applications, since anyone who wanted to file for the channel or channels affected by the transfer or assignment application would have had an opportunity to do so earlier during initial licensing.[657]

(2) Discussion

354. We will adopt the same or similar definitions for initial applications and major and minor amendments and modifications for all commercial mobile radio services in Part 22 and Part 90, to the extent practicable. For Part 90 services, the definitions will be service specific, consistent with the approach we have taken with Part 22.[658] In addition, we recognize, as do the majority of the commenters, that the definitions must account for differences in market-based and station-by-station licensing schemes. This result, which is

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[654] PageNet Comments at 40-41; *accord* Geotek Comments at 12 (licensees should be allowed to add internal base stations without filing modification applications).

[655] Simrom Comments at 19-23. Simrom would adopt the 2 kilometer distance for amendments to pending applications, however, so that the information could appear on public notice. *Cf.* PageNet Reply Comments at 11 (initial applications should be for sites which do not overlap the contours of any existing facility, *e.g.*, more than 20 miles).

[656] Simrom Comments at 19-23 (*citing* current rules).

[657] PageNet Comments at 41.

[658] *Part 22 Rewrite Order*, Appendix A (discussion of Section 22.123).

supported by the record developed in this proceeding, has certain benefits. The use of consistent definitions for initial applications, which we have determined will be subject to 30-day notice and cut-off and competitive bidding procedures, will level the competitive field for substantially similar commercial services. Thus, all qualified applicants for substantially similar commercial services will be considered for a license, and the one who places the highest value on the available spectrum will prevail in the selection process. Similarly, consistent definitions for amendments and modification applications will result in similar system proposals and modifications for substantially similar services being treated equally.

355. Initial CMRS applications in both Part 22 and Part 90 that are licensed on a market or geographically-defined basis are those that propose to construct and operate a new system in the relevant service, with some qualifications. In the cellular service, licensees of existing cellular systems within an MSA or RSA who apply for unserved area licenses within the same market are filing initial applications for that unserved area, not modification applications, if they intend to integrate facilities constructed within the unserved area with their existing system. Similarly, licensees of existing SMR systems who apply for MTA licenses that encompass their existing facilities are filing initial applications, not modification applications, in those areas. Under this approach, existing cellular and SMR licensees in a market will have to compete with other qualified applicants for the license to extend service to other parts of the market and competitive bidding will be used to select among competing applicants.[659]

356. In the case of Part 22 and Part 90 services that are licensed on a station-by-station basis, we will adopt the same definition of initial application that we have adopted for 931 MHz paging services in Part 22:

(1) Applications proposing transmitter locations anywhere on a new frequency, unless the additional channel is for paired two-way operation, is in the same frequency range as the existing channel, and will be operationally integrated with the existing channel (as Simrom suggests);[660] and

(2) Applications proposing the location of a facility more than 2 kilometers from any existing facility licensed to the applicant and operating on the same frequency.[661]

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[659] We note that treating existing SMR licensees' applications for MTA licenses in this manner does not affect our determination that existing licensees in the service will continue under private mobile radio regulation until August 1996. *See CMRS Second Report and Order*, 9 FCC Rcd at 1513-14 (paras. 280-284).

[660] By definition, this category includes applications for new systems, *i.e.*, the first station licensed to the applicant in the service, as well as the addition of a new channel to a facility already licensed to the applicant.

[661] *Part 22 Rewrite Order*, at para. 105.

Applications that meet these criteria will be subject to 30-day notice and cut-off and competitive bidding procedures. We recognize that the majority of these applications will be to expand or to develop additional capacity for existing systems. Where we employ station-by-station licensing, there may be numerous licensees in a given geographic area competing for use of the same channel as they seek to expand their capacity or service areas. We believe that these proposals are essentially new ventures and that applicants should be subject to competitive forces -- *i.e.*, all qualified applicants should be considered and the one who values the use of the spectrum most highly will prevail in the selection process. We believe that the benefits to be gained from this approach outweigh some commenters' concerns that substantial delay and expense will befall licensees. Consequently, we decline to adopt Simrom's suggestions that expansion applications be defined as modification applications based on a service contour distance formula.[662]

357. As for amendments to pending applications and applications to modify licenses, Part 90 CMRS applications will generally follow the principles established in the rules for Part 22 services.[663] Specific rules for Part 90 services reflect the unique technical and operational requirements of those services, as is the case for Part 22 services. Major amendments include those involving: (1) a change in the channel, (2) an increase in the effective radiated power or antenna height above average terrain in any azimuth, (3) a change in location, or (4) a substantial change in the technical proposal from that which was coordinated with other users. Major modification applications include those seeking an increase in the effective radiated power or antenna height above average terrain in any azimuth. Amendments and modification applications that would not be classified as major are classified as minor. We decline to adopt Simrom's suggestion that, for certain major amendments or modifications, we adopt numerous exceptions to the cut-off rules so that these filings would not be treated as newly-filed. We recently adopted new rules for Part 22 which have eliminated many of these former exceptions, although some of them have been retained.[664]

358. As we explained in the *Further Notice*, under Section 309 all major filings are subject to a 30-day public notice period and petitions to deny. This would include initial applications, major amendments, and major modification applications, as described above. Filings for substantial changes in ownership or control, *de jure* or *de facto*, are also major under Section 309 and subject to its requirements, but they are not subject to competing applications.

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[662] *But see* discussion in paras. 370-373, *infra*, regarding additional stations operating on the same frequency that are within a licensee's existing service area.

[663] *Part 22 Rewrite Order*, Appendix A (discussion of Sections 22.123 and 22.163).

[664] *See, e.g., Part 22 Rewrite Order*, Appendix A (discussion of Section 22.123).

359. As for 220 MHz service, we do not make any decisions here on how to define initial applications and major and minor amendments and modifications. As discussed in paragraph 345, *supra*, we will addresses these issues in a future rulemaking proceeding on the 220 MHz service. Finally, to the extent practicable, we will implement PCIA's suggestion that CMRS licensees only submit the license information being modified, not all of the information associated with the affected call sign. This will ease the paperwork burden on licensees and the Commission.

b. Mutual Exclusivity

(1) Background and Pleadings

360. The *Further Notice* sought comment on whether the definitions of "major" filings should dictate whether competitive bidding may be used when an application to modify an existing CMRS license is mutually exclusive with another application.[665] We suggested, consistent with our decision in the *Competitive Bidding Second Report and Order*, that competitive bidding could be used in exceptional cases where a major modification would fundamentally alter the nature or scope of the licensee's system. The *Further Notice* also stated that, to the extent we decide that modification applications should be deemed not suitable for competitive bidding in mutually exclusive situations, we tentatively concluded that first-come, first-served filing procedures should be used to limit the likelihood of competing applications being filed.[666] Under this approach, only competing applications filed on the same day as a modification application would be treated as mutually exclusive, and the grantee would be chosen by random selection or a comparative selection process.[667]

361. Several commenters argue that a major amendment to a pending application should not be subject to competitive bidding if the underlying application has already been subject to competitive bidding.[668] The record is split on how to treat mutually exclusive modification applications. Although some commenters believe that competitive bidding should not be used for any mutually exclusive modification application,[669] the majority of commenters are concerned about the processing of applications to expand existing systems, which have traditionally been treated as modification applications, particularly in those services which do not have market-based licensing. AMTA supports the use of competitive bidding for mutually exclusive modification applications in highly unusual situations, where

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[665] *Further Notice,* 9 FCC Rcd at 2890-91 (para. 132).

[666] *Id.* at 2891 (para. 133).

[667] *Id.*

[668] *See, e.g.,* Celpage Comments at 28; RAM Tech Comments at 27.

[669] *See, e.g.,* Celpage Comments at 28; RAM Tech Comments at 27.

the modification fundamentally alters the nature or scope of the service.[670] APACG favors the broad use of competitive bidding for mutually exclusive expansion applications, arguing that the expansion site will likely prove more valuable to the established carrier than to a newcomer.[671] Other parties, such as PageNet, argue that treating expansion applications as major filings or initial applications and subjecting them to competitive bidding will add substantial delay and expense to the licensing process, thereby hampering system expansion.[672] PageNet argues for the use of frequency-specific applications, first-come, first-served filing procedures, and wide-area licensing for 931 MHz services.[673] AmP would allow a licensee to file modification applications competing with initial applications of new entrants proposing co-channel facilities adjacent to the interference contours of the licensee's system, and supports using competitive bidding to resolve any mutually exclusive situations.[674]

362. In the 220 MHz service, some commenters believe that the Commission should adopt procedures to avoid mutual exclusivity between initial applicants and licensees operating pursuant to STAs that wish to modify their authorizations to cover existing operations. USM submits that the freeze on 220 MHz initial applications should be maintained until after licensees are given a reasonable time to file modification applications to improve existing systems, thereby avoiding conflicts between the two classes of applicants.[675]

(2) Discussion

363. For the reasons discussed below, we conclude that mutually exclusive initial applications will be subject to competitive bidding procedures. Modification applications will be accepted for filing on a first-come, first-served basis, and only those mutually exclusive modification applications filed on the same day will be entitled to comparative consideration. As for 220 MHz service, we do not make any decisions here on filing or selection procedures for modification applications. As discussed in paragraph 345, *supra*, we will address these issues in a future rule making proceeding regarding 220 MHz service.

364. The majority of commenters are concerned about the filing and processing of applications to modify existing systems. As discussed in paragraphs 355-356, *supra*, the

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[670] AMTA Comments at 42.

[671] APACG Comments at 16.

[672] PageNet Comments at 35.

[673] PageNet Reply Comments at 8-9.

[674] AmP Reply Comments at 6.

[675] USM Comments at 11-13; *accord* AMTA Comments at 23-24.

definition of "initial application" that we are adopting covers the major types of changes for expanding existing systems, and we believe that significant benefits will result from adopting such a broad definition. These initial applications will be subject to 30-day notice and cut-off, and mutually exclusive applications will be processed using competitive bidding.

365. Although certain modification applications -- *e.g.*, increases in tower height or power -- may also result in expansion of a service area, we do not believe that significant benefits would be gained by using competitive bidding to select among mutually exclusive modification applications in these cases. First, as we explained in the *Further Notice*, we have previously concluded that competitive bidding generally should not be used for modification applications, given the legislative history of Section 309(j).[676] Second, the types of changes involved are generally subject to adjustment, thus enabling licensees to avoid causing interference to other co-channel operations. Consequently, we believe that these types of modifications would be processed more efficiently if we accept them for filing on a first-come, first-served basis. Only modification applications that are mutually exclusive and that are filed on the same day will be entitled to comparative consideration. In those cases, we will encourage the parties to negotiate a settlement and, if this approach is not successful, we will designate the applications for comparative hearing.

366. We recognize that it also is possible for modification applications to be mutually exclusive with initial applications. Because these categories of applications are subject to different types of filing and processing procedures, mutually exclusive situations will be resolved as follows. If the modification application is filed first, it effectively cuts off any subsequently filed application, whether an initial or a modification application. A different result will occur, however, if the modification application is filed after an initial application (in cases in which the initial application has triggered a 30-day cut-off period for competing applications). In this case, the modification application will be considered part of the mutually exclusive filing group, and the whole filing group will be entitled to comparative consideration. The presence of the modification application in the group, however, will preclude the use of competitive bidding. In these cases, we will encourage the parties to negotiate a settlement and, if this approach is not successful, we will designate the applications in the filing group for comparative hearing.

367. Major amendments to pending applications raise concerns among some commenters regarding the manner in which the filing of such amendments would affect the competitive bidding process. Generally, major amendments are treated in the same manner as initial applications regarding public notice, petitions to deny, and competing applications. When applications have already gone to competitive bidding, major amendments that are filed after that process is completed will be considered newly-filed applications that may not be resubmitted after applicable filing deadlines.[677]

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[676] *Further Notice*, 9 FCC Rcd at 2890-91 (para. 132).

[677] *See* 47 CFR § 1.2105(b)(2).

c. Minor Modifications

(1) Background and Pleadings

368. The Part 22 rules allow numerous minor modifications to existing systems to be made on a permissive basis, often without requiring notification to the Commission.[678] In the *Further Notice*, we proposed to conform the Part 22 and Part 90 rules to the fullest extent practicable to allow Part 90 licensees to make permissive changes to their systems on the same basis as Part 22 licensees, particularly where such changes relate to the internal configuration of wide-area systems and do not have an impact on adjacent licensees.[679] Under current rules, Part 90 licensees must seek Commission approval on a station-by-station basis for numerous technical changes.

369. The record generally supports the proposal.[680] For example, Geotek asserts that 900 MHz licensees should be allowed to build out their systems within their service area boundaries and not be subject to competing applications.[681] Comcast, however, suggests that even if we do not require licensees to notify us of the addition or modification of internal cell sites, we should require licensees to provide information regarding internal cell sites to adjacent system operators so that they can evaluate for themselves the interference potential of cells close to the service area border.[682] AmP supports treating a paging fill-in transmitter (*i.e.*, a new base station whose reliable service contour is at least 50 percent encompassed by the contours of one or more existing or authorized stations in the system) as a permissive modification or a minor modification subject to first-come, first-served filing procedures, so that established licensees may expand to meet their customers' needs.[683] In addition, RAM Tech and Celpage suggest that the relocation of a control station, which is now treated as a major modification, should be treated as a minor modification or as a permissive change, so long as it can be accomplished without causing harmful interference to other stations.[684] RAM Tech points out that base stations associated with the control station may be moved under minor modification rules, and treating relocations of control stations as major modifications causes delay.

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[678] *See Part 22 Rewrite Order*, at paras. 22-28.

[679] *Further Notice*, 9 FCC Rcd at 2891 (para. 134).

[680] *See, e.g.*, Nextel Comments at 46; PageNet Comments at 40; PCC Comments at 13-14; Southern Comments at 12-13.

[681] Geotek Reply Comments at 12.

[682] Comcast Reply Comments at 9-10.

[683] AmP Reply Comments at 4-5.

[684] RAM Tech Comments at 27; Celpage Comments at 28.

(2) Discussion

370. We will allow minor modifications to existing CMRS systems in Part 90 services to be made on a permissive basis, to the extent practicable. For example, in the case of SMR licenses granted for a defined geographic area, we will allow the licensee to add new facilities within the MTA without filing additional applications or notifying us that construction is completed. This is consistent with procedures for cellular systems under Part 22. We will not adopt Comcast's suggestion, however, that we require licensees operating under these procedures to provide information regarding internal cell sites to adjacent system operators. By definition, internal cells are those which operate completely within the licensee's service area boundary and do not modify it.[685] Thus, it is extremely unlikely that an internal cell would cause interference to an adjacent system operator. If such a result did occur, the cell would no longer be covered under the existing authorization as a permissive change, and the licensee would be obliged to seek permission to operate the facility.

371. We recognize that the record supports allowing permissive changes for Part 90 services. However, some Part 90 services which are licensed on a station-by-station basis and which do not use protected service contours, as is done in Part 22 services, will be allowed few types of permissive system changes at this time. For example, 931 MHz paging licensees in Part 22 may add a fill-in transmitter (*i.e.*, the service area and interfering contours of the additional transmitter are totally encompassed by the composite service area contour and predicted interfering contour, respectively, of the existing station on the same channel) without applying for permission or notifying the Commission of operation.[686] The concept of fill-in transmitters does not apply to Part 90 services that do not have protected service contours and, thus, this type of permissive change will not be adopted for those Part 90 services.

372. There are several suggestions for permissive changes that we decline to adopt. We will not expand the definition of a fill-in transmitter to allow a 50 percent overlap of the reliable service contour, as AmP suggests, because this would be inconsistent with our earlier finding that system expansion should generally be subject to competitive forces.[687] Finally, we will not adopt the suggestion that relocation of a control station be treated as a minor modification or a permissive change because the increase in the number of these types of stations has resulted in increased instances of interference between stations; thus, co-channel operators should have notice of a proposed control station relocation and the opportunity to petition to deny the application.

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[685] *See, e.g.*, 47 CFR § 22.165.

[686] *See id.*

[687] *See* discussion of initial application at paras. 355-356.

373. As for 220 MHz service, we do not make any decisions here regarding how to define minor amendments and modifications. As discussed in paragraph 345, *supra*, we will address this issue in a future rule making proceeding regarding 220 MHz service.

8. *Conditional and Special Temporary Authority*

a. Pre-Grant Construction

(1) *Background and Pleadings*

374. As we explained in the *Further Notice*, our existing procedures under Part 22 and Part 90 set forth somewhat different requirements for construction and temporary operation by an applicant prior to the formal grant of a license. Under Part 22, applicants are generally prohibited from commencing construction or operating facilities prior to the license grant.[688] An applicant, however, may begin construction prior to the grant on a conditional basis if no petitions to deny or mutually exclusive applications have been filed and the application meets certain other criteria.[689] Under Part 90, there is no restriction regarding the time at which an applicant may commence construction, provided that the applicant does not begin operating its service prematurely, which would be in violation of the rules.[690]

375. In the *Further Notice*, we tentatively concluded that the same rules for pre-grant construction and operation should apply to CMRS applicants under both Part 22 and Part 90. With respect to pre-grant construction we sought comment on whether the current restrictions applicable to Part 22 applicants should be adopted for all CMRS applicants. Alternatively, we sought comment on whether CMRS licensees should be able to commence construction at any time, provided that they comply with relevant environmental and aviation hazard rules.[691]

376. Many commenters agree that the same rules for pre-grant construction should be adopted for Part 90 and Part 22 CMRS applicants. These commenters argue that the Commission should adopt liberal pre-grant construction rules permitting applicants to commence construction at any time, provided that they comply with applicable environmental and aviation hazard rules.[692] APACG and PCIA assert that granting applicants authority to

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[688] 47 CFR § 22.143. *See Further Notice*, 9 FCC Rcd at 2891 (para. 135).

[689] *See* 47 CFR § 22.143(d).

[690] *See* 47 CFR § 1.923(a) (no construction permit required in Private Radio Services).

[691] *See Further Notice*, 9 FCC Rcd at 2891-92 (para. 137).

[692] AMTA Comments at 42; APACG Comments at 12; BellSouth Comments at 19; CTIA Comments at 5; E.F. Johnson Comments at 24; GTE Comments at 15; PageNet Comments at 42;

(continued...)

engage in pre-grant construction could materially advance the date on which the public receives service.[693] APACG argues that such rights should not be limited to cases in which no petitions to deny or mutually exclusive applications are on file, and contends that there is no risk in allowing pre-grant construction.[694]

(2) *Discussion*

377. We find that the pre-grant construction rules should be modified so that the same rules apply to Part 90 and Part 22 CMRS applicants. While we favor the adoption of more liberal pre-grant construction rules, we do not believe that CMRS applicants should be able to commence construction without notice. In the *Part 22 Rewrite Order*, we determined that the existing 90-day waiting period for all Part 22 applicants to begin construction is too long and instead adopted a 35-day waiting period.[695] Consistent with that action, we will establish the same 35-day waiting period for all CMRS.

b. Pre-Grant Operation

(1) *Background and Pleadings*

378. Part 22 applicants, as common carriers, are subject to Section 309(f) of the Act, which allows the Commission to grant to a common carrier applicant a special temporary authorization (STA) to operate for up to 180 days without prior public notice under "extraordinary circumstances" where a delay in operations would seriously prejudice the public interest.[696] Because Section 309(f) of the Act does not apply to private radio applicants, requirements under Part 90 for temporary operation prior to licensing are more flexible than under Part 22.[697] Part 90 requirements for applicants seeking STAs for new or

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[692](...continued)
PageNet Reply Comments at 13-14; PCIA Comments at 34 (permit where: (1) carrier agrees to undertake construction at its own risk; (2) FAA regulations have been met or are inapplicable; and (3) environmental regulations have been met or are inapplicable); Pittencrieff Comments at 14; Southern Comments at 13.

[693] APACG Comments at 12; PCIA Comments at 34.

[694] APACG Comments at 12.

[695] *See Part 22 Rewrite Order*, Appendix A (discussion of Section 22.143). With this change, paging and cellular applicants have the same waiting period. Some period is necessary to allow the Commission to determine whether a petition to deny an application was timely filed. The impact of this change is that if a petition to deny is filed, no pre-grant construction would be permitted.

[696] *See* Communications Act, § 309(f), 47 U.S.C. § 309(f). *See also* 47 CFR § 22.125(b).

[697] *See Further Notice*, 9 FCC Rcd at 2891 (para. 136).

modified operations do not require the applicant to establish the existence of "extraordinary circumstances," and may be extended beyond 180 days.[698] Part 90 applicants may also seek temporary and conditional permits to operate prior to the issuance of a license for up to 180 days.[699]

379. In the *Further Notice*, we noted that even if we adopted liberal pre-grant construction rules for CMRS, Section 309(f) requires that a stricter standard be applied to pre-grant operation. We therefore proposed to adopt procedures applicable to reclassified Part 90 applicants that would subject STA requests by such applicants to the same requirements that are applied to similar requests by Part 22 applicants. We also proposed to prohibit any commencement of operations by CMRS applicants without prior Commission authorization.[700]

380. CTIA and E.F. Johnson argue that the Commission should liberally interpret the requirements of Section 309(f) to permit grants of STAs under conditions similar to Part 90 requirements.[701] NABER contends that the Commission has sufficient discretion under Section 309(f) to permit pre-grant operation for applications that have received frequency coordination. NABER argues that since such applications are routinely granted, there is no reason not to permit operation on a conditional basis. NABER proposes a restriction of pre-grant operation to no sooner than 45 days after issuance of a Public Notice as a reasonable safeguard, but asserts that conditional licensing should be expanded to include all applications that have received frequency coordination.[702]

381. PageNet argues that there are two possible alternatives for expediting service to the public. First, contends PageNet, the Commission could apply the conditional permit procedures of Sections 90.195(b) through (h) of the Commission's Rules to all 900 MHz paging applications, since Section 90.159 permits operation only when mutually exclusive applications are not present and after there has been frequency coordination and Federal Aviation Administration (FAA) approval. In the alternative, PageNet asserts that the Commission should adopt the approach taken for point-to-point microwave service, under

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[698] 47 CFR § 90.145.

[699] 47 CFR § 90.159.

[700] *See Further Notice*, 9 FCC Rcd at 2892 (para. 138).

[701] *See* CTIA Comments at 5-6; E.F.Johnson Comments at 24-25. *See also* AMTA Comments at 42 (preferring more flexible Part 90 STA procedures, but unable to see how that approach can be conformed to statutory requirements); Radiofone Reply Comments at 2-3; SEA Reply Comments at 7-8 (Commission should allow STA holders to file applications for modification of their licenses, so that the licenses correspond to the STAs, prior to entertaining applications for new 220 MHz facilities).

[702] NABER Comments at 45-46.

which the Microwave Branch grants blanket STAs to license applicants. PageNet contends that the blanket STA approach is consistent with the Section 309(f) 180-day limitation on STA grants of operating authority and, because the applicant certifies that the grant of blanket STA authority is required to "compete effectively and/or to transact [its] business," the blanket STA authority complies with the Section 309(f) "extraordinary circumstances" requirement.[703]

382. PCIA supports adoption of six-month, company-wide blanket STAs that permit operation of the facilities after the application for facilities is placed on Public Notice. PCIA argues that this procedure has both limited the number of STA requests the Commission staff is asked to process and has afforded carriers greater flexibility in initiating service. In addition, contends PCIA, the Commission is able to review the qualifications of the blanket STA holder. PCIA asserts that similar blanket STA procedures could be implemented for CMRS operation, perhaps to permit operation 40 days after issuance of a Public Notice, to ensure that an application is uncontested.[704] Simrom argues that, as a transitional matter, the Commission should continue to extend existing Part 90 STAs even for licensees immediately classified as CMRS carriers, since in this limited situation, the transition to CMRS regulation will itself be the extraordinary circumstance.[705]

(2) *Discussion*

383. Although several parties favor Commission flexibility in granting STAs, we conclude that Section 309(f) of the Act allows the Commission to grant STAs to CMRS providers who have filed applications subject to the public notice requirements of Section 309(b) of the Act only in extraordinary circumstances involving particular applications. The legislative history of this statutory provision indicates that Congress intended that the Commission would use this authority to abridge the normal process of public notice and comment only in "rare" cases.[706] Consequently, any CMRS provider who has filed an application subject to the public notice requirements of Section 309(b) of the Act will be granted an STA only if the applicant establishes that there are "extraordinary circumstances"

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[703] PageNet Comments at 42-44.

[704] PCIA Comments at 35.

[705] *See* Simrom Comments at 23-24. *See also* Nextel Reply Comments at 39-40 (pending wide-area SMR block licensing the Commission should provide wide area licensee authority to commence commercial operation upon a "notice" filing as allowed for cellular service providers).

[706] *See* Tender Offers and Proxy Contests, MM Docket No. 85-218, Policy Statement, FCC 86-67, 59 Rad. Reg. 2d (P&F) 1536, 1572 (1986), *citing* S.Rep. No. 690, 86th Cong., 1st Sess. 4 (1959); H.R. Rep. No. 1800, 2d Sess. 13 (1960). *See also* Revision of Part 21 of the Commission's Rules, CC Docket No. 86-128, Report and Order, 2 FCC Rcd 5713, 5721 (1987).

where a delay in operations would seriously prejudice the public interest.[707] We note that the Private Radio Bureau, which issues, under delegated authority, common carrier licenses for Part 21 domestic public fixed services,[708] has followed a policy under which, in some cases, applicants for such licenses are granted six-month, company-wide blanket STAs that permit operation of facilities prior to Commission approval. We are not adopting this procedure here.

384. As we discussed in the *Further Notice*, the Part 90 rules regarding CMRS operation under STAs must be conformed to Section 309(f). Thus, Section 90.145 and Section 90.159 of the Commission's Rules will be amended to obligate Part 90 CMRS applicants to comply with the same requirements that are applied to similar requests by Part 22 applicants. We understand that some reclassified PMRS providers possess Part 90 STAs or conditional grants that are currently in effect. Part 90 STAs or conditional grants held by reclassified, grandfathered PMRS providers will expire no later than August 10, 1996, when reclassification as CMRS becomes effective.[709] All existing Part 90 STAs or conditional grants held by reclassified PMRS providers that are not grandfathered shall terminate on the earlier of (1) the scheduled termination date, or (2) 60 days after the effective date of this Order. The Commission will not grant extensions for existing conditional grants.

9. *License Term; Renewal Expectancy*

a. Background and Pleadings

385. We proposed in the *Further Notice* to establish a uniform 10-year license term for all CMRS services, including those in Part 90, which are currently licensed for five years. We also proposed to extend to all CMRS services the existing rules and relevant case law regarding license renewal expectancy.[710] The response to these proposals is unequivocally

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[707] *See* 47 CFR § 22.125(b): "The FCC may grant STAs valid for a period not to exceed 180 days under the provisions of § 309(f) of the Communications Act of 1934, as amended, (47 U.S.C. § 309(f)) if extraordinary circumstances so require, and pending the filing of an application for regular operation. The FCC may grant extensions of STAs for a period of 180 days, but the applicant must show that extraordinary circumstances warrant such an extension." *But see* 47 CFR § 22.125(a), which allows STAs to be granted for 30 or 60 days if no application is pending, consistent with Section 309(c)(2) of the Act. STAs granted pursuant to Section 309(c)(2) apply to both CMRS and PMRS providers.

[708] *See* Certain Processing of Digital Electronic Message Service and Common Carrier Point to Point Microwave to be Transferred to Gettysburg, Public Notice, DA 92-1190 (Sept. 3, 1992).

[709] *See* Budget Act, § 6002(c)(2)(B). *See also CMRS Second Report and Order*, 9 FCC Rcd at 1512-14 (all reclassified paging services and all reclassified private mobile licensees licensed to provide service as of August 10, 1993, are subject to the three-year grandfathering period).

[710] *Further Notice,* 9 FCC Rcd at 2892 (para. 140).

favorable. Virtually every commenter addressing this issue endorses uniform 10-year license terms and accompanying renewal expectancies.[711]

b. Discussion

386. Since the record supports our tentative findings in the *Further Notice* regarding our proposals for CMRS license term and renewal expectancy, they will be adopted. Every Part 90 licensee that is reclassified and treated as a CMRS carrier when its current license term expires shall thereafter have a 10-year license term and be afforded a renewal expectancy, provided it is able to demonstrate that it: (1) has provided "substantial" service during the license term;[712] and (2) has complied with applicable Commission rules and policies, and the Act. The applicable sections of Part 22 governing license terms[713] and renewal expectancy[714] will be incorporated into Part 90.[715] These modifications are essential elements in reaching our goal of achieving regulatory symmetry for all CMRS services.

387. We will also accommodate Pittencrieff's request for a uniform renewal period for all of a carrier's licenses.[716] A CMRS licensee that holds multiple licenses in the same service, which is licensed on a station to station basis, will be allowed to select, upon expiration of the each license term, any date the licensee wishes as the expiration of its new license term, provided the term does not exceed ten years in duration. Consequently, a licensee will be able to tailor its renewal dates to fit its needs. Consolidating license terms should reduce a licensee's processing burdens and reduce the chances of filing errors, arising from a licensee's present need to stay abreast of a multitude of renewal dates.

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[711] *See, e.g.*, AMTA Comments at 42; APACG Comments at 7; BellSouth Comments at 18; Celpage Comments at 29; Dial Page Reply Comments at 7; Geotek Comments at 19; Geotek Reply Comments at 13; GTE Comments at 16; Metrocall Comments at 29; NABER Comments at 46; Network Comments at 29; PageNet Comments at 44; PCIA Comments at 35-36; Pittencrieff Comments at 14-15; RAM Tech Comments at 27-28; Southern Comments at 13; WJG Comments at 9-10.

[712] We have defined "substantial" service to be service that is sound, favorable, and substantially above a level of mediocre service, which would barely warrant renewal. *See* 47 CFR § 22.940(a)(1)(i).

[713] 47 CFR § 22.144(a).

[714] 47 CFR § 22.940.

[715] "Grandfathered" Part 90 licensees, however, because they retain their "private" status until August 10, 1996, will not be afforded either the 10-year license term or the renewal expectancy during the statutory transition period.

[716] *See* Pittencrieff Comments at 14-15; Dial Page Reply Comments at 7.

10. *Assignment of Licenses and Transfers of Control*

a. Background and Pleadings

388. In the *Further Notice* we generally proposed adopting a uniform standard for assignment and transfer of control of most CMRS licenses upon completion of construction and initiation of service, provided that the applicant demonstrates that the transfer[717] will serve the public interest, convenience, and necessity. We proposed further to allow the transfer of unconstructed facilities in cases where the transfer is involuntary, *pro forma,* or does not result in a *de facto* change in control of the license. We also proposed to allow the transfer of unconstructed CMRS facilities over which services are provided on shared frequencies, *i.e.,* Business Radio and Part 90 paging utilizing frequencies below 800 MHz. We sought comment on whether the transfer restrictions currently applicable to Part 22 cellular licensees should be applied uniformly to all wide-area CMRS licensees.[718]

389. Nearly all of the commenters addressing this issue agree that the transfer policies adopted in Part 22 should be extended to all CMRS services.[719] The commenters, on the whole, also agree with our general proposal that the transfer of a CMRS license should be restricted until construction of the system has been completed and operation has begun.[720] A few commenters, however, believe that the list of exceptions to the "constructed station" exception should be expanded to include the transfer of an ongoing communications business where some of its stations are not yet in operation.[721] Other commenters oppose any holding period for CMRS licenses, arguing that licenses for both constructed and unconstructed facilities ought to be transferred freely. These commenters submit that the unjust enrichment safeguards adopted in the *Competitive Bidding Second Report and Order*[722] have eliminated

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[717] For the sake of brevity, the term "transfer" is used herein as a synonym for the phrases: "assign and transfer of control" or "assignment and transfer of control," depending on the context.

[718] *Further Notice,* 9 FCC Rcd at 2893 (paras. 144-146).

[719] *See, e.g.,* AMTA Comments at 44; McCaw Comments at 34; PageNet Comments at 31; PCC Comments at 19-20; Pittencrieff Comments at 15; Simrom Comments at 24-25.

[720] *See, e.g.,* McCaw Comments at 34; PCC Comments at 19; Pittencrieff Comments at 15; RAM Tech Comments at 28; Simrom Comments at 24-25; Southern Comments at 13; Southern Reply Comments at 13.

[721] *See, e.g.,* AMTA Comments at 43; Geotek Comments at 20; PageNet Comments at 45-46. Geotek, however, suggests that the sale of licensed facilities that are totally unconstructed should be absolutely prohibited. Geotek Comments at 20.

[722] *See Competitive Bidding Second Report and Order,* 9 FCC Rcd at 2394-95 (paras. 258-265).

the need for alienation restrictions.[723] Adopting a narrower view, another group of commenters contends that the current alienation restrictions should apply only to licenses acquired by lottery or comparative hearing. The underlying rationale for their position is that the auction mechanism effectively minimizes speculation and places the license in the hands of a party whose intentions to provide service to the public are serious.[724]

390. Our proposal to allow the unrestricted transfer of CMRS stations that use shared frequency bands is supported by a number of commenters and opposed by none. The commenters agree with our assessment that trafficking is not a practical concern on shared frequencies.[725] The response to our request for comments concerning the viability of uniform applicability of Part 22 cellular transfer restrictions to all wide-area CMRS licensees, is split. Although all of the commenters agree with the overall concept of uniformity, they have different opinions of what the actual requirements should be. One group recommends adopting the policies currently governing the licensing of unserved cellular areas, *i.e.*, that the system must be operated for one year before it may be transferred.[726] The other group's position is that construction status should no longer be a concern, since the licenses for unserved cellular areas will be auctioned off in the future. They therefore oppose the imposition of any "holding period" before wide-area CMRS authorizations may be transferred.[727]

391. An additional concern that several commenters raise centers on the applicability of the "finder's preference" currently provided in Part 90. Finder's preferences are granted to interested parties who provide information to the Commission that an authorized channel is not being used. If the authorization is canceled, the finder's application is then deemed the first-filed for the channel.[728] Some commenters favor retention, others favor modification,

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[723] *See, e.g.*, APACG Comments at 13; BellSouth Comments at 13-14; PageNet Comments at 45-46; PageNet Reply Comments at 14-16; PCIA Comments at 36; US West Comments at 9-10.

[724] *See, e.g.*, NABER Comments at 47; Nextel Comments at 45; Southern Comments at 13.

[725] *See, e.g.*, Celpage Comments at 29; Metrocall Comments at 29; NABER Comments at 47; Network Comments at 29; RAM Tech Comments at 28.

[726] *See, e.g.*, PCC Comments at 19-20; Simrom Comments at 25.

[727] *See, e.g.*, AMTA Comments at 43; Nextel Comments at 45; Nextel Reply Comments at 37-38; Southern Comments at 13-14.

[728] *See* 47 CFR § 90.173(k).

and others prefer elimination of this rule.[729] Other comments focus on the question of the appropriate form or forms that would be employed by those seeking authority to transfer CMRS licenses. In this regard, there appears to be consensus that the FCC Form 490, which is currently used by Part 22 applicants, should be used for all CMRS transfers, at least for an interim period.[730]

b. Discussion

392. We have stated throughout this proceeding that regulatory symmetry requires the elimination of inconsistent regulatory requirements applicable to CMRS services whenever practical. In order for this objective to be met, it is essential that we adopt uniform standards and procedures governing the transfer of CMRS authorizations. Moreover, these standards and procedures must be equally applicable to Part 90 and Part 22 CMRS licensees alike. As we have noted, the record supports our tentative conclusions. We are, therefore, adopting the following transfer requirements, which mirror the current Part 22 provisions.

393. No request for authority to transfer any CMRS license not awarded by competitive bidding will be entertained until the facilities for which the license has been issued are constructed and placed in operation, or we determine that the licensee is not "trafficking" in licenses, unless the application is for a transfer that is either involuntary or *pro forma*. These are the codified requirements that have been traditionally applied to Part 22 licensees in order to deter speculation.[731] No holding period is required when the transfer is either involuntary or *pro forma*, because the risk of speculation in these instances is nonexistent. We also agree with those commenters who suggest that the list of enumerated exceptions to the "constructed station" requirement should be expanded to include the transfer of unbuilt stations, if they are part of a *bona fide* sale of an on-going business to which they are incidental. In fact, this exception is already embodied in agency case law, which holds that such instances present little risk of speculation, and thus there is no reason to disrupt legitimate mergers or acquisitions simply because the acquired company has an unbuilt facility.[732] This "incidental" exception will be incorporated into the transfer provisions of Part 90.

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[729] *See, e.g.*, PCIA Comments at 37-38 (supporting clarification); Pittencrieff Comments at 16-17 (supporting elimination or modification); SMR Systems Comments at 8-9 (supporting expansion to all CMRS).

[730] *See, e.g.*, McCaw Comments at 33; PageNet Comments at 30-31; *see also* PCIA Comments at 25-26 (supporting adoption of a single form for CMRS transfers and assignments).

[731] *See* 47 CFR § 22.139.

[732] *See, e.g.*, Airsignal International, Inc., Memorandum Opinion and Order, 81 FCC 2d 472 (1980).

394. The transfer of a CMRS license awarded by comparative hearing is subject to both the foregoing "trafficking" restrictions and "constructed station" exceptions as well as a requirement that the facilities for which the license is held must have been in operation for one year prior to transfer.

395. We do not accept the position taken by some commenters, that the recently adopted transfer disclosure rules, by themselves, are a sufficient deterrent against speculators and, accordingly, permit us to eliminate the need for the construction and holding requirements as they apply to licenses acquired by lottery. The disclosure requirements are not a substitute, but rather an additional safeguard to prevent unjust enrichment with respect to licenses issued by lottery.[733]

396. Conversely, there will be no "constructed station" or other holding requirements for a CMRS license acquired through competitive bidding. The licensee may transfer the license at any time, assuming it has obtained prior Commission authority to do so. Gaining Commission approval, however, will require that the licensee document that it will not be unjustly enriched by the transfer and that it is in compliance with applicable pre-transfer rules, such as build-out requirements.[734] We have concluded that the auction mechanism and strict build-out requirements, coupled with requirements designed to prevent unjust enrichment, effectively reduce the risk of frivolous and speculative applications to such an extent that the need for additional safeguards does not appear to be necessary. Lastly, none of the disclosure and construction requirements that we have discussed will apply to the transfer of CMRS licenses on frequency bands that are shared. The record supports our conclusion that the risk of trafficking in such licenses is too remote to justify additional regulatory oversight in determining whether the transfer of a license in one of these services meets our public interest requirement. In most cases an applicant on a shared frequency could obtain its own authorization.

397. We now turn to the remaining concerns relating to transfers raised by the commenters. We agree with the commenters that a single form should be used for all CMRS transfers. In light of the unification of all CMRS services under a single regulatory framework, there is no reasonable justification for requiring Part 90 CMRS licensees to utilize one transfer form and Part 22 CMRS licensees to use another. Furthermore, since the CMRS licensing rules and procedures are more closely allied to the current Part 22 rules than they are to those currently contained in Part 90, we conclude that FCC Form 490, rather than FCC Forms 574 and 703, is the more appropriate transfer form to be used by all CMRS licensees.

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[733] *See* Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, First Report and Order, FCC 94-32 (released, Feb. 4, 1994).

[734] *Id.*

398. We will not address the comments concerning finder's preference. Because the *Further Notice* did not solicit comment on the applicability of this rule, there is not an adequate record before us at this time to make a reasoned determination on this issue. As we indicated in the *Part 22 Rewrite Order*, the function of finder's preference mechanisms will be addressed in a future rule making proceeding.[735]

11. *Combined PMRS and CMRS Operation*

a. Background and Pleadings

399. In the *Further Notice* we proposed that applicants in Part 90 services, in which both CMRS and PMRS operations are permissible under the Commission's Rules, would be allowed to seek authority to provide both CMRS and PMRS services under a single authorization.[736] The *Further Notice* proposed that applications be treated as CMRS applications, and that the applicant be required to identify the portion of the assigned spectrum that would be dedicated to PMRS, and to describe the proposed PMRS offering in sufficient detail to demonstrate that the offering is not covered by the CMRS definition.[737]

400. CTIA contends that denying cellular licensees the right of combined operation will affect their ability to compete by unnecessarily restricting their ability to design arrangements that fully respond to customer service requirements. Moreover, CTIA argues, common carrier CMRS providers remain subject to other obligations, such as resale, which are not imposed upon PMRS. Consequently, contends CTIA, the proposed rule will create a regulatory disparity between those CMRS providers that are permitted to offer private services and those that are prohibited from doing so. CTIA asserts that PCS and Part 90 service providers will have an incentive to exploit the disparity for competitive advantage and requests that the Commission explicitly authorize all CMRS providers to engage in combined operation.[738] E.F. Johnson asserts that the Commission should adopt procedures that allow the initiation of a PMRS portion of a combined operation under STA while it considers the CMRS elements in the context of a formal application.[739]

401. PCIA argues that the Commission grant of flexibility should not be limited to Part 90 services and contends that Part 22 licensees should not be limited to CMRS

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[735] *See Part 22 Rewrite Order*, at para. 21.

[736] *Further Notice*, 9 FCC Rcd at 2893-94 (para. 148).

[737] *Id.*

[738] *See* CTIA Comments at 7. *See also* Bell Atlantic Comments at 5-8; Bell Atlantic Reply Comments at 4; McCaw Comments at 18-19.

[739] E.F. Johnson Comments at 26.