unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application.[271] We seek comment on this proposal.

149. We also propose requiring winning bidders to attach as an exhibit to the Form 600 application a detailed explanation of the terms and conditions and parties involved in any bidding consortia, joint venture, partnership or other agreement or arrangement they had entered into relating to the competitive bidding process prior to the close of bidding.[272] All such arrangements must have been entered into prior to the filing of short-form applications. Where specific instances of collusion in the competitive bidding process are alleged during the petition to deny process, the Commission would be able to conduct an investigation or refer such complaints to the United States Department of Justice for investigation.[273] Bidders who are found to have violated the antitrust laws, in addition to any penalties they incur under the antitrust laws, or who are found to have violated the Commission's rules in connection with participation in the auction process may be subject to a variety of sanctions, including forfeiture of their down payment or their full bid amount, revocation of their license(s), and may be prohibited from participating in future auctions. We seek comment on the applicability of these rules to licenses in the 220 MHz service.

5. Designated Entity Provisions

a. Introduction

150. The Communications Act, as amended by the 1993 Budget Act, directs the Commission to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services."[274] The statute requires the FCC to "consider the use of tax certificates, bidding preferences, and other procedures" in order to achieve this congressional goal. In addition, Section 309(j)(3)(B) provides that in establishing eligibility criteria and bidding methodologies the Commission shall promote "economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."[275] Finally,

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[271] *Id.*

[272] *900 MHz Second Report and Order,* at para. 96

[273] *Id.*

[274] 47 U.S.C. § 309(j)(4)(D).

[275] 47 U.S.C. § 309(j)(3)(B)

Section 309(j)(4)(A) provides that to promote these objectives the Commission shall consider alternative payment schedules including lump sums or guaranteed installment payments.

151. In instructing the Commission to ensure the opportunity for these "designated entities" to participate in auctions and spectrum-based services, Congress was well aware of the problems that they would have in competing against large, well-capitalized companies in auctions and the difficulties they encounter in obtaining capital. For example, the legislative history accompanying our grant of auction authority states generally that the Commission's regulations "must promote economic opportunity and competition," and "[t]he Commission will realize these goals by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses and businesses owned by members of minority groups and women."[276] The *House Report* states that the House Committee was concerned that, "unless the Commission is sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications industries."[277] More specifically, the House Committee was concerned that adoption of competitive bidding should not have the effect of "excluding" small businesses from the Commission's licensing procedures, and anticipated that the Commission would adopt regulations to ensure that small businesses would "continue to have opportunities to become licensees."[278]

152. Consistent with Congress's concern that auctions not operate to exclude small businesses, the provisions relating to installment payments were clearly intended to assist small businesses. The House Report states that these related provisions were drafted to "ensure that all small businesses will be covered by the Commission's regulations."[279] It also states that the provisions in section 309(j)(4)(A) relating to installment payments were intended to promote economic opportunity by ensuring that competitive bidding does not inadvertently favor incumbents with "deep pockets" "over new companies or start-ups."[280]

153. In addition, with regard to access to capital, Congress made specific findings in the Small Business Credit and Business Opportunity Enhancement Act of 1992, that "small business concerns, which represent higher degrees of risk in financial markets than do large businesses, are experiencing increased difficulties in obtaining credit."[281] As a result of

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[276] H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. 259-60, at 254 (*House Report*).

[277] *Id.*

[278] *Id.* at 255.

[279] *Id.*

[280] *Id.*

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

these difficulties, Congress resolved to consider carefully legislation and regulations "to ensure that small business concerns are not negatively impacted" and to give priority to passage of "legislation and regulations that enhance the viability of small business concerns."[282]

154. In our initial implementation of Section 309(j) of the Communications Act, we established in the *Competitive Bidding Second Report and Order* eligibility criteria and general rules that would govern the special measures for designated entities, including small businesses. We also identified several measures, including installment payments, spectrum set-asides, bidding credits and tax certificates, from which we could choose in establishing rules for auctionable spectrum-based services. We stated that we would decide whether and how to use these special provisions, or others, when we developed specific competitive bidding rules for particular services. In addition, we set forth rules designed to prevent unjust enrichment by designated entities who transfer ownership in licenses obtained through the use of these special measures or who otherwise lose their designated entity status.

155. We have employed a wide range of special provisions and eligibility criteria designed to meet the statutory objectives of providing opportunities to designated entities in other spectrum-based services. For instance, minority-owned and women-owned businesses in the nationwide narrowband PCS auction received a 25 percent bidding credit on certain channels;[283] in the regional narrowband PCS auction women-owned and minority-owned businesses received a 40 percent bidding credit on certain channels and small businesses were eligible for installment payments on all channels;[284] and in the broadband PCS auction, we established separate entrepreneurs' blocks with varying degrees of installment payments.[285] In the multi-channel multi-point distribution service (MMDS), we established bidding credits and installment payments for small businesses.[286] The measures adopted thus far for each service were established after closely examining the specific characteristics of the service and determining whether any particular barriers to accessing capital stood in the way of designated entity opportunities. After examining the record in the competitive bidding proceeding in PP Docket 93-253, we established provisions necessary to enable small

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[282] *Id.* at § 331(b)(2),(3).

[283] *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2970 (para. 72).

[284] *Competitive Bidding Third Memorandum Opinion and Order*, 10 FCC Rcd at 201 (para. 58).

[285] *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 459 (para. 103); *see also* Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Amendment of the Commission's Cellular PCS Cross-Ownership Rule, PP Docket No. 93-253, GN Docket No. 90-314, Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Further Notice of Proposed Rulemaking, FCC 95-263, released June 23, 1995, (*Cellular PCS Further Notice*).

[286] *MMDS Report and Order*, at paras. 182-189.

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

156. In response to many comments explaining how we should implement Congress's mandate, we adopted several rules designed to encourage the participation of women and minorities in broadband PCS by addressing greater difficulties these groups experience in accessing capital. We analyzed these special provisions for minorities and women under the "intermediate scrutiny" standard established in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 564-565 (1990) and determined that they were constitutional.[287]

157. However, on June 12, 1995, the Supreme Court decided in *Adarand Constructors, Inc. v. Pena*[288] (*Adarand*) that "all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny."[289] The Court ruled that any federal program that makes distinctions on the basis of race must serve a compelling governmental interest and must be narrowly tailored to serve that interest.[290]

158. The holding in *Adarand* would apply to any proposal to incorporate race-based measures into our 220 MHz auction rules. At this time, we may not have developed a record sufficient to sustain race-based measures in the 220 MHz service based on the standard established by *Adarand*.[291] We therefore propose to limit special provisions initially to small businesses in the 220 MHz service. As discussed below, we propose to define small business in a way that would increase the likelihood of women- and minority-owned businesses establishing eligibility for special provisions. We do, however, believe that race-based measures could survive strict scrutiny from the courts. Moreover, we do not concede that any of our auction rules are unconstitutional. We simply believe that auction rules we develop must now be evaluated under a stricter constitutional standard than had been previously relied upon, and that at a minimum, this requires us to build a record concerning the participation of minorities and women in spectrum-based services before we adopt race- and gender-based measures.

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[287] *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5571-5580 (paras. 93-112).

[288] 63 U.S.L.W., No. 93-1841 (U.S. June 12, 1995).

[289] 63 U.S.L.W. at 4530. The Court overruled *Metro Broadcasting* to the extent it was inconsistent with *Adarand*.

[290] *Id.* at 4533.

[291] *See, e.g., Cellular PCS Further Notice*, FCC 95-263, released June 23, 1995.

159. *Adarand* thus introduces an additional level of complexity in implementing Congress' mandate to ensure that businesses owned by minorities and women are provided "the opportunity to participate in the provisions of spectrum-based services." 47 U.S.C. § 309(j)(4)(D). Although *Adarand* did not address gender-based preferences, we have included them here in an effort to seek the broadest possible comment.[292] We welcome comment as to the appropriateness of our approach. Accordingly, we seek comment on how we can best promote opportunities for businesses owned by minorities and women in the provision of 220 MHz services in light of *Adarand*. We seek the broadest possible comments including, but not limited to, responses to the following questions:

1. Does the Commission have a compelling interest in establishing opportunity-enhancing measures in the provision of 220 MHz services specifically for minority- and women-owned businesses? If so, what is that compelling interest? Are there characteristics specific to the 220 MHz service that demonstrate that race- and/or gender-based measures are needed to satisfy the mandate of 47 U.S.C. § 309(j)(3)(A)?

2. What evidence (statistical, documentary, anecdotal or otherwise) can be marshalled to support the proposed compelling interest?

3. What techniques could the Commission employ that would be narrowly tailored to further the proposed compelling interest? Would such techniques include bidding credits and installment payments? Are race-conscious or gender-conscious measures necessary, or are there race-or gender-neutral measures that would be effective?

Commenters are encouraged to provide the Commission as much evidence as possible with regard to past discrimination, continuing discrimination, discrimination in access to capital, underrepresentation and other significant barriers facing businesses owned by minorities and women in 220 MHz services and in licensed communications services generally.

160. As in other auctionable services, we fully intend in the 220 MHz service to meet the statutory objectives of promoting economic opportunity and competition, of avoiding excessive concentration of licenses, and of ensuring access to new and innovative technologies by disseminating licenses among a wide variety of applicants, including small businesses. Accordingly, in balancing the congressional objectives set forth in the auction statute, we tentatively conclude that bidding credits, reduced down payments and installment payments should be made available to small businesses on all 220 MHz channel blocks in the national, regional and EA channel groups.

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[292] *See* Telephone Electronics Corp v. FCC, No. 95-1015 (D.C. Cir. March 15, 1995) (discussing Commission's rules establishing both gender and race-specific preferences for broadband PCS).

b. Bidding Credits

161. Bidding credits allow eligible small businesses to receive a payment discount for their winning bid in an auction. In the *Competitive Bidding Second Report and Order*, we determined that competitive bidding rules applicable to individual services would specify the designated entities[293] eligible for bidding credits and the amounts of the available bidding credits for that particular service.[294] In the *Competitive Bidding Third Report and Order*,[295] we determined that eligible designated entities in the nationwide narrowband PCS auction would receive a 25 percent bidding credit. In the regional narrowband PCS auction, small businesses receive a 40 percent bidding credit.[296] In the *900 MHz Second Report and Order*, we proposed allowing small businesses a 10 percent bidding credit.[297] In the *MMDS Report and Order*, we allowed small businesses a 15 percent bidding credit.[298]

162. The proposals set forth today are a hybrid of those bidding credits and installment payment options offered to small businesses in the *900 MHz Second Report and Order* and the *Competitive Bidding Third Report and Order*. For narrowband PCS, we began by offering a 25 percent bidding credit for women- and minority-owned businesses on two of six channel blocks.[299] However, no women- or minority-owned businesses won a nationwide PCS narrowband license. Therefore, in the *Competitive Bidding Third Memorandum Opinion and Order*, we increased this bidding credit from 25 to 40 percent for the regional license blocks, speculating that a higher bidding credit may be needed due to the nationwide licenses' very high values.[300] Due to the special provisions offered to small businesses, four of the nine winning bidders for regional licenses were small businesses owned by women and minorities.[301] Since we believe that the nationwide and regional 220 MHz licenses will be

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[293] The designated entities consisted of small businesses, minority- and female-owned businesses, and rural telephone companies. *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2395-2398 (paras. 266-288).

[294] *Id.* at 2391 (para. 241).

[295] *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2970 (para. 72).

[296] *Competitive Bidding Third Memorandum Opinion and Order*, 10 FCC Rcd at 201 (para. 58).

[297] *900 MHz Second Report and Order*, at paras. 129-131.

[298] *MMDS Report and Order*, at para. 188.

[299] *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2970-2975 (paras. 72-80).

[300] *Competitive Bidding Third Memorandum Opinion and Order*, 10 FCC Rcd at 201 (para. 58).

[301] Public Notice, FCC Announces the Receipt of Downpayments from the High Bidders in the Auction of 30 Regional Narrowband PCS, Mimeo No 50867 (Nov. 29, 1994).

similar in value to the nationwide and regional PCS narrowband licenses, we propose offering a 40 percent bidding credit to qualified designated entities. We propose offering this bidding credit on one of the four nationwide channel blocks, the block encompassing Channels 51-60, as all three blocks are equal in size and equally unencumbered. In the *900 MHz Second Report and Order*, we offered qualified small businesses a 10 percent bidding credit on any of the ten-channel blocks within each MTA.[302] We stated that due to the large number of licenses available in the service and large number of incumbents on all blocks, we believed that small businesses should be able to bid on all blocks.[303] Since we believe that the 220 MHz EA licenses are similar to the 900 MHz licenses in their number and in the presence of incumbents, we propose offering a 10 percent bidding credit to qualified designated entities on all EA licenses. Additionally, we note that the regional and EA licenses are of varying sizes, and do not know which of the sizes of the regional channel blocks would be more or less desirable for small businesses. We therefore believe that small businesses should receive bidding credits on all of the 220 MHz regional and EA channel blocks.

163. We seek comment on these proposals. Specifically, is a 40 percent credit appropriate to provide meaningful bidding opportunities for small businesses on the nationwide and regional blocks? Is a ten percent credit sufficient to enhance opportunities for small businesses in the EAs? Also, how should the presence of incumbents on the channel blocks affect the availability of bidding credits on all blocks?

164. In the event that we adopt our proposal to limit bidding credits to small businesses, should we also limit availability of the credit to the channel blocks with the fewest incumbents? We are concerned this limitation might dilute the effectiveness of a small business credit as a means of attracting broad designated entity participation in the 220 MHz service? We seek comment on the ramifications of each proposal for the incumbents in each block. If bidding credits were limited to only certain regional and EA licenses, we ask commenters to identify the licenses where bidding credits should be made available, and provide a rationale for selection of particular licenses.

165. We seek comment on whether the above bidding credit proposals satisfy the mandate of Section 309(j)(4)(D) of the Act to ensure that businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services. We ask commenters who believe that the above bidding credit proposals do not satisfy Section 309(j)(4)(D) to make specific alternative proposals. Also, to the extent such proposals are not race- and gender-neutral, we ask such commenters to address how their proposals can be reconciled with *Adarand*.

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[302] *900 MHz Second Report and Order*, at para. 130

[303] *Id.*

c. Installment Payments

166. We additionally propose adopting installment payments for small businesses bidding for any of the 220 MHz nationwide, regional and EA licenses. We have previously concluded that installment payments are an effective means to address the inability of small businesses to obtain financing and will enable these entities to compete more effectively for the auctioned spectrum.[304] As with our proposals for bidding credits, the proposals for the 220 MHz licenses are a hybrid of those offered to small businesses in the *Competitive Bidding Third Report and Order* and proposed in the *900 MHz Second Report and Order*. In the *900 MHz Second Report and Order*, we proposed that small businesses eligible for installment payments be required to pay half of the down payment (10 percent of the winning bid, as opposed to 20 percent) five days after the auction closes, with the remaining 10 percent payment deferred until five days after grant of the license.[305] We also indicated that installment payments should be made available to small businesses at an interest rate equal to the rate for U.S. Treasury obligations.[306] In the *Competitive Bidding Third Report and Order*, we offered installment payments with similar terms and conditions to small businesses bidding only on the smaller spectrum blocks, specifically the BTA, MTA and regional licenses.[307]

167. For the 220 MHz licenses, we tentatively conclude that installment payments are an appropriate preference for small businesses bidding on all license blocks. In this respect, installment payments will provide financial assistance to all small businesses. By allowing payment in installments, the government is in effect extending credit to licensees, thus reducing the amount of private financing needed prior to the auction. Such low cost government financing will promote participation by small businesses, which, because of their size, lack access to capital needed to participate in new spectrum opportunities such as 220 MHz. We seek comments on these proposals.

168. Under our proposal, the installment payment option will enable all small businesses to pay the full amount of their winning bid in installments, less the upfront payment, which must be paid in full, and the down payment, half of which is due five days after the auction closes and the other half five days after the application is granted. Generally, the terms and conditions of the installment payments would be the same as those provided in the general rules -- interest charges will be fixed at the time of licensing at a rate equal to the rate for ten-year U.S. Treasury obligations. Payments of interest only would be due for the first two years. Principal and interest payments would be amortized over the

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[304] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2389 (paras. 231-232).

[305] *900 MHz Second Report and Order*, at para. 133-134

[306] *Id.*

[307] *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2978-2979 (paras. 87-88).

remaining years of the license. Timely payment of all installments would be a condition of the license grant and failure to make such timely payment will be grounds for revocation of the license. We seek comments on these proposals.

169. We seek comment on whether the above installment payment proposals satisfy the mandate of Section 309(j)(4)(D) of the Act to ensure that businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services. We ask commenters who believe that the above installment payment proposals do not satisfy Section 309(j)(4)(D) to make specific alternative proposals. Also, to the extent such proposals are not race- and gender-neutral, we ask such commenters to address how their proposals can be reconciled with *Adarand*.

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

170. We propose to limit eligibility for bidding credits, installment payments and reduced down payments to small businesses. As discussed below, for those companies wanting to bid on EA licenses, we propose to define small businesses as those entities with less than $6 million in average annual gross revenues for the preceding three years. For companies seeking to bid on regional or nationwide licenses, we propose to define small businesses as entities with less than $15 million in average annual gross revenues for the preceding three years.

171. Small Business Definition. In the *Competitive Bidding Second Memorandum Opinion and Order*, we stated we would define eligibility requirements for small businesses on a service-specific basis, taking into account the capital requirements and other characteristics of each particular service in establishing the appropriate threshold.[308] In the *Competitive Bidding Second Report and Order*, we stated that a proper threshold for small businesses was $6 million of average gross income.[309] For regional narrowband PCS, we affirmed this $6 million threshold for small businesses as those businesses eligible to receive bidding credits.[310] We specified that narrowband PCS involved relatively low capital entry requirements.[311] However, for the broadband PCS auctions, we believed that build-out and operational costs would be much higher than for narrowband PCS, and therefore modified

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[308] *Competitive Bidding Second Memorandum Opinion and Order*, 9 FCC Rcd at 7269 (para. 145).

[309] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2396 (para. 271).

[310] *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2968-2969 (para. 68).

[311] *Id.* at 2969 (para. 69).

the small business threshold to be $40 million.[312] We believe that 220 MHz services encompass a smaller amount of spectrum than PCS and less area than regional narrowband PCS. For the EA licenses, we believe that the number of licenses available (1,401) and construction and build-out costs will be relatively low. We also believe that the 220 MHz EA channel groups are similar to those channels offered in the PCS narrowband auction, and therefore we propose defining a small business in the same way. That is, for purposes of bidding on a EA license, a small business is an entity that has average annual gross revenues for the three proceeding years of $6 million or less.

172. On the other hand, we believe that the nationwide and regional 220 MHz licenses will have higher build-out and operational costs than will the EA licenses. Additionally, based on our experiences with prior auctions, we believe it is likely that bidders will attempt to aggregate licenses across regions.[313] Capital costs are likely to be higher than for EA licenses. Therefore, for purposes of bidding on the nationwide and regional 220 MHz licenses, we propose to define a small business as an entity that, together with affiliates and attributable investors, has average gross revenues for the three preceding years of $15 million or less.

173. We therefore seek comment on our proposed small business definition. Are $6 million and $15 appropriate thresholds? Should the thresholds be higher or lower, based on the types of companies that are likely to benefit from the special provisions proposed here? Also, should different definitions of small businesses be used for the different services? For example, should the threshold for nationwide channels be higher than the threshold for regional and EA channels? We also tentatively conclude that we will consider the revenues of affiliates and certain investors, and we propose to apply the 25 percent attribution threshold and affiliation rules similar to those used in the PCS auction rules.[314] In other words, we will not attribute the gross revenues of investors that hold less than a 25 percent interest in the applicant, but we will include the gross revenues of the applicant's affiliates and investors with ownership interests of 25 percent or more in the applicant in determining whether an applicant qualifies as a small business. Is a different attribution threshold warranted for the 220 MHz service? We seek comment on these issues.

174. We also ask for comment on how we should attribute the gross revenues and assets of a small business and its investors, affiliates, and principals, for purposes of our 220

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[312] *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5609-5610 (paras. 176-180).

[313] *See, e.g.*, United States Small Business Administration Comments at 8, filed May 24, 1995, in response to the *900 MHz Report and Order*, FCC 95-159, released April 17, 1995 (advocating a small business threshold of $15 million due to potential aggregation of spectrum blocks and correspondingly high capital costs, acquisition costs, and general financial requirements).

[314] Sections 24.320(b)(2)(iv) and 24.720(j)(1) of the Commission's Rules, 47 C.F.R. §§ 24.320(b)(2)(iv), 24.720(j)(1).

MHz small business definition. Specifically, we ask for comment on the following options. Should we count revenues and assets of the entity, all investors in the entity, and all affiliates of both? Should we count revenues and assets of the entity, all attributable investors in the entity, and all affiliates of both? If so, what should the attribution threshold be? We believe that 5 percent may be an appropriate attribution threshold and we seek specific comment on this proposed threshold. Should we count revenues and assets of the entity, all controlling principals in the entity, and all affiliates of both? We seek comment on all of these issues.

175. Rural Telephone Company Partitioning. Congress directed the Commission to ensure that, together with other small businesses, rural telephone companies have the opportunity to participate in the provision of spectrum-based services. Rural areas, because of their more dispersed populations, tend to be less profitable to serve than more densely populated urban areas. Therefore, service to these areas may not be a priority or economically feasible for many licensees.[315] Rural telephone companies, however, are well positioned because of their existing infrastructure to serve these areas. Therefore, we propose a geographic partitioning scheme similar to that adopted in broadband PCS[316] and proposed in 900 MHz,[317] which we believe will encourage participation by rural telephone companies, thereby increasing the likelihood of rapid introduction of service to rural areas.

176. Our proposed partitioning scheme would prevent rural telephone companies from having to bid on the entire nationwide, regional or EA license or licenses covering their wireline service areas. In addition, partitioning would provide rural telephone companies with the flexibility to be able to serve areas in which they already provide service, while the remainder of the service area could be served by other providers.[318] Under this proposal, rural telephone companies would be permitted to acquire partitioned 220 MHz licenses in either of two ways: (1) they may form bidding consortia consisting entirely of rural telephone companies to participate in auctions, and then partition the licenses won among consortia participants; and (2) they may acquire partitioned 220 MHz licenses from other licensees through private negotiation and agreement either before or after the auction.[319] We would also require that partitioned areas conform to established geopolitical boundaries and that each area include all portions of the wireline service area of the rural telephone company applicant that lies within the service area.[320] We also propose to use the definition for rural

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[315] *See, e.g., 900 MHz Second Report and Order*, at paras. 144-145.

[316] *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5598-5599 (para. 150).

[317] *900 MHz Second Report and Order*, at paras. 144-145

[318] *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5598-5599 (para. 151).

[319] *Id.*

[320] *Id.*

telephone companies implemented in the *Competitive Bidding Fifth Report and Order* for broadband PCS.[321] Rural telephone companies would be defined as local exchange carriers having 100,000 or fewer access lines, including all affiliates.[322]

177. We also consider whether we should allow Phase II licensees to assign their channels within their EA or region to other licensees. These licensees would operate in licensee-defined "sub-areas" within the EA or region (*i.e.*, "geographic partitioning").[323] We consider, too, whether we should allow Phase II licensees to assign a portion of their channels to other licensees within their EA or Region (*i.e.*, "channel disaggregation." In the recent *MMDS Report and Order,*[324] we did not limit availability of partitioning to rural telephone companies and instead decided to make it broadly available to any interested applicants. We ask for comment on whether the 220 MHz service would also benefit from the broad availability of partitioning and/or disaggregation. In particular, we ask whether very small entities or, for example, private mobile radio service eligibles, would benefit from the ability to be licensed for portions of EAs, or to form consortia in order to bid on EAs. We also ask commenters to indicate how channel disaggregation and/or geographic partitioning of EAs or regions would be implemented from a logistic and administrative standpoint. For instance, we ask how the construction requirements we propose in Section C.5, *supra,* should be enforced. Specifically, 1) would the EA or regional licensee be responsible for ensuring that construction benchmarks would be met and 2) if the requirements are not met, would all of the licensees within the EA or region lose their authorizations? We also ask whether partitioning and/or disaggregation should be permitted immediately upon the assignment of the EA or regional license or whether, *e.g.*, it should not be allowed until after the licensee meets its initial construction benchmark.

e. Transfer Restrictions and Unjust Enrichment Provisions

178. In the *Competitive Bidding Third Report and Order,* licensees that received bidding credits and installment payments, and also chose to transfer their licenses to entities not eligible for these benefits, were required to repay the amount of the bidding credit on a graduated basis until no repayment would be required six years after the license grant. In addition, the ineligible transferee would not have the benefit of installment payments, and

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[321] *Id.* at 5615 (para. 193).

[322] *Id.*

[323] We would treat geographic partitioning as any other assignment, *i.e.*, the parties would be required to file an application containing the appropriate information for a licensing decision, and the Commission would, upon review, either grant or deny the application. *See, e.g.*, Section 22.922 of the Commission's Rules, 47 C.F.R. § 22.922.

[324] *MMDS Report and Order*, at paras. 176-181.

principal and accrued interest would come due. For the 900 MHz service, we proposed to impose a holding period of three years after the license grant, in which the small business is prohibited from voluntarily assigning or transferring its license to any other entity. After the holding period had expired, we proposed to allow a voluntary transfer in years four and five of the license term to other eligible small businesses.[325] In the *Competitive Bidding Fifth Report and Order*, we adopted restrictions on the transfer or assignment of broadband PCS entrepreneur's block licenses to ensure that designated entities do not take advantage of special provisions by immediately assigning or transferring control of their licenses.[326]

179. Permitting an immediate transfer of a discounted license to an entity that is not a small business could undermine our basis for offering special provisions to small businesses, but we note that in services with no entrepreneur's block, we have limited unjust enrichment to repayment of bidding credits or installment payments.[327] We therefore seek comment on whether, in services such as 220 MHz, where there is no entrepreneur's block to further restrict the class of entities eligible for substantial governmental benefits, we would better serve the public interest by adopting an approach similar to that used in the narrowband PCS context, in which bidding credits and installment payments immediately became due upon transfer to an ineligible entity. We also seek comment on whether an approach to unjust enrichment similar to that proposed for the 900 MHz SMR service, in which a holding period was imposed, would be optimal for the 220 MHz service,.

f. Other Provisions

180. Reduced Upfront Payments. We propose not to adopt a reduced upfront payment option in the 220 MHz service for small businesses. Considering the MHz-per-pop formula we propose to utilize, we believe a reduced upfront payment option is unnecessary and may be too costly to administer in the 220 MHz service. Moreover, we want to ensure sincere bidding by all parties. We seek comment on this proposal.

181. Set-aside Spectrum. In the *Competitive Bidding Fifth Report and Order* we established entrepreneurs' blocks on which only qualified entrepreneurs, including small businesses, could bid.[328] We tentatively conclude not to adopt an entrepreneurs' block for the 220 MHz auction for several reasons. First, the relatively large numbers of licenses

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[325] *900 MHz Second Report and Order*, at para. 141

[326] *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5588 (para. 128).

[327] *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2975-2976 (para. 80).

[328] *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5580-5586 (paras. 113-123). These rules were further refined in the *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403 (1995) *See also* Section 24.709 of the Commission's Rules, 47 C.F.R. § 24.709.

available and relatively small spectrum allocations in the 220 MHz service should allow for extensive small business participation. Second, unlike broadband PCS, we do not believe that the effectiveness of bidding credits, reduced down payments and installment payments will be diluted, due to the smaller capital outlay anticipated for this service. We request comment on this proposal. Specifically, are the capital requirements of this service anticipated to be so substantial that we should insulate certain blocks from very large bidders in order to provide meaningful opportunities for small businesses?

6. Conclusion

182. We believe that the competitive bidding rules we adopt for 220 MHz, in conjunction with our spectrum allocation rules, will promote the public policy objectives set forth by Congress. Our rules will encourage economic growth and enhance access to 220 MHz services for consumers, producers, and new entrants. Structuring our rules to promote opportunity and competition should result in the rapid implementation of new PCS services and encourage efficient spectrum use. The preferences we adopt for small businesses will help to promote access to 220 MHz services by ensuring that these groups will have genuine opportunities to participate in the auctions and in provision of service.

V. SECOND MEMORANDUM OPINION AND ORDER

A. PETITIONS

1. Petition for Reconsideration of Request for Declaratory Ruling filed by SunCom Mobile & Data, Inc.

183. In the *CMRS Third Report and Order* we denied the Request For Declaratory Ruling filed by SunCom Mobile & Data, Inc. (SunCom) on February 1, 1994.[329] In that filing, SunCom asked our approval of a plan to aggregate non-nationwide 220 MHz five-channel blocks on a regional basis to provide multiple-market service on a single system. The request dealt with Section 90.739 of our rules, which provides that no 220 MHz licensee may be authorized to operate a station in a particular service category (*e.g.*, the 5-channel non-trunked, non-nationwide category) within 40 miles of an existing system authorized to that licensee in the same category unless "the licensee can demonstrate that the additional system is justified on the basis of its communications requirements." [330] In addressing SunCom's request, we observed that we had indicated in the *220 MHz Report and Order* that a request for authorization of multiple licenses within 40 miles under the provisions of

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[329] *CMRS Third Report and Order,* 9 FCC Rcd at 8056 (paras. 128-129).

[330] Section 90.739 of the Commission's Rules, 47 C.F.R. § 90.739.

Section 90.739 would have to be "supported by documentation of the need for additional capacity and/or an expanded service area, based on customer demand for additional channel capacity or economic factors."[331] We also noted that in the *220 MHz Report and Order* we had stated that "any applicant that seeks to justify a need for additional channels prior to construction of a first system in a geographic area will face a heavy burden of proof."[332] We decided that we would continue to "permit licensees who have already constructed and commenced operations to aggregate channels based on appropriate showing of need under Section 90.739," but that we would "generally not allow aggregation of channels by 220 MHz licensees who have not completed initial construction of facilities."[333] Our decision to deny SunCom's Request for Declaratory Ruling was thus based on the fact that SunCom sought to "aggregate channels assigned to licensees who have not yet competed construction."[334]

184. SunCom has filed a Petition For Reconsideration of our denial of its Request for Declaratory Ruling, arguing that we had "failed to address the specific question that Suncom posed -- whether channels could be aggregated *after* licensees had constructed their 220 MHz facilities."[335] SunCom further states that our denial of its request was based on "the erroneous belief that SunCom proposed the pre-construction aggregation of channels," noting that in their Request for Declaratory Ruling it had in fact "proposed post-construction aggregation."[336] Finally, SunCom states that it "does not plan to ask the Commission to issue any authorizations for additional systems or channels", but merely "seeks Commission consent to the assignment of licenses for already authorized and constructed systems."[337]

185. Section 90.739 of our Rules provides that no nationwide 220 MHz licensee may hold more than one nationwide authorization and that no local 220 MHz licensee may be authorized at two locations less than 40 miles away from one another on channels in the

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[331] *220 MHz Report and Order*, 6 FCC Rcd at 2364 n 126 (para. 59).

[332] *Id.* at 2364 (para. 59)

[333] *CMRS Third Report and Order*, 9 FCC Rcd at 8056 (para. 129).

[334] *Id.*

[335] SunCom, Petition for Reconsideration, filed December 21, 1994, at 3. SunCom also filed on the same date a Petition to Sever its Requests for Declaratory Ruling and for Waiver from GN Docket No. 93-252 and from reconsideration with other petitions for reconsideration of the *CMRS Third Report and Order*. SunCom asks that we act expeditiously on its Petition for Reconsideration. We are incorporating SunCom's Petition for Reconsideration for disposition in this proceeding, and its Petition to Sever is therefore granted.

[336] SunCom Petition for Reconsideration at 5 n 8.

[337] *Id.* at 6.

same category without "demonstrating that the additional system is justified on the basis of its communications requirements."[338] The comparable "40-mile" rule contained in Subpart S at Section 90.627(b)[339] was designed to prevent licensees from acquiring additional amounts of spectrum in a given geographic area without demonstrating the need for such spectrum. We enabled licensees authorized under Subpart S to demonstrate that need by showing that their channels were "loaded" to a particular level. In the *220 MHz Report and Order*, we declined to adopt such a loading requirement to justify additional 220 MHz spectrum[340] but, instead, provided for the acquisition of additional spectrum by a licensee if it could "demonstrate that its communications needs warrant additional channels or channel groups."[341] In offering guidance as to how a licensee could adequately justify its need for additional spectrum, we said that it could make a submission that could include, but not be limited to, information relating to "loading on assigned channels, [an] explanation of the geographic coverage required, and documentation of the additional number of mobiles/portables needed, including, for commercial systems, the number of outstanding requests for communications service."[342] By this statement, we intended that licensees using 220 MHz spectrum for their internal communications needs would have to demonstrate how their current spectrum was insufficient to meet their needs, and that licensees using the spectrum for commercial purposes would have to demonstrate that they had more demand for service (*i.e.*, customers) than could be accommodated on their authorized spectrum.

186. We believe that the request by SunCom does not provide the required demonstrations. SunCom supports its Request for Declaratory Ruling by asserting that "five narrowband channels does not provide sufficient spectrum capacity to obtain enough subscribers to justify the high costs of establishing and operating a quality system . . . ,"[343] that the 220 MHz service "will require multiple sites per market to achieve competitive coverage [with other mobile communications services],"[344] and that "without the levels of capacity and coverage obtainable only via multiple licenses per market, the 220 [MHz] industry, will not be able to project itself as a long-term successful alternative to SMR,

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[338] Section 90.739 of the Commission's Rules, 47 C.F.R. § 90.739.

[339] Section 90.627(b) of the Commission's Rules, 47 C.F.R. § 90.627(b). This rule was modified in the *CMRS Third Report and Order* to apply to non-SMR licensees only. *CMRS Third Report and Order*, 9 FCC Rcd at 8251 (para. 37).

[340] *220 MHz Report and Order*, 6 FCC Rcd at 2367 (para. 81).

[341] *Id.* at 2364 (para. 59).

[342] *Id.* at 2364 n. 126 (para. 59).

[343] SunCom Petition for Reconsideration at 3.

[344] *Id.* at 4.

ESMR, cellular, etc.''[345] These arguments do not form the basis for relief under Section 90.739. Specifically, in the *220 MHz Report and Order* we indicate that an adequate showing of need under Section 90.739 could be granted to commercial entities such as SunCom through a showing of ''outstanding requests for communications service.''[346] By so indicating, we clearly intended that 220 MHz licensees providing commercial services first construct their stations, begin operation and, at some point *after* operation was underway, submit their request for relief of the ''40-mile'' rule providing empirical evidence that customer demand for communications service in their area of operation could not be met without authorization for multiple licenses in that area of operation. What SunCom has asked for in its Request for Declaratory Ruling is a current decision that, upon completion of construction of its stations five years hence, it would be permitted to aggregate these licenses under Section 90.739 to form a regional network. However, we cannot be certain that the conditions which might justify SunCom's need for additional spectrum capacity to meet ''the number of outstanding requests for communications service'' will exist at the time it completes construction. We therefore can only view SunCom's request as premature. We thus again deny SunCom's Request for Declaratory Ruling.[347]

2. Request for Rule Waiver of Section 90.739 Filed by Wireless Plus, Inc.

187. Wireless Plus, Inc. (Wireless Plus), a company that manages a network of five-channel trunked stations in Northern and Southern California, has filed a Request for Rule Waiver also requesting relief under Section 90.739 of our rules to permit it to hold authorizations for more than one station per market.[348] Wireless Plus states that ''all of the stations in its network are either constructed and operating or will be contructed by the appropriate deadline''[349] and indicates that, in order to provide the blanket coverage desired by its customers, it is necessary for its stations to be less than 40 miles apart.[350] Wireless Plus seeks relief under Section 90.739 because it claims that ''in order . . . to attract the capital necessary for the continuation and expansion of the system, it must be able to secure authorizations in its own name rather than be subject to the uncertainties associated with

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[345] *Id.* at 5.

[346] *220 MHz Report and Order,* 6 FCC Rcd at 2364 n. 126 (para. 59).

[347] We note that SunCom may request relief under Section 90.739 of the Commission's Rules in accordance with the provisions of footnote 126 of the *220 MHz Report and Order* at some point *after* it has begun operations of its stations and can effectively evaluate the need for additional spectrum in its areas of operation.

[348] Wireless Plus, Inc., Request for Rule Waiver, filed Feb 8, 1995, at 1.

[349] *Id.* at 5.

[350] *Id.* at 4.

having stations licensed to many entities and affiliated with Wireless Plus only through management contract."[351] A further benefit of holding the authorizations of the stations in their network, Wireless Plus claims, will be to allow Wireless Plus to "provide service to end [users] with greater efficiency and greater certainty than if each of the associated facilities continued to be operated under [separate] management contracts," which will "increase Wireless Plus' administrative burdens, ultimately resulting in higher costs to customers."[352] Wireless Plus concludes that consolidating the licenses in its name "will promote the efficiency of the system and ultimately result in improved service and lower costs to the public."[353]

188. In determining whether to grant Wireless Plus relief under Section 90.739, we must, as we did in addressing SunCom's request, return to the *220 MHz Report and Order* for guidance. The *220 MHz Report and Order* states that relief for commercial systems would be granted through a showing of "outstanding requests for communications service."[354] Wireless Plus has not provided such a showing and we must therefore deny its request.

3. Petition for Reconsideration of Request for Rule Waiver of Section 90.725 Filed by SunCom

189. At the time SunCom filed its Request for Declaratory Ruling on February 1, 1994, seeking relief under Section 90.739, it also filed a Request for Rule Waiver of Section 90.725(f) of our Rules.[355] Section 90.725(f) requires licensees authorized non-nationwide systems to construct their systems and place their systems in operation within eight months of the initial license grant date.[356] In its waiver request SunCom stated that the "scope and complexity" of "constructing a Network comprised of multiple, five-channel licenses per market . . . require[s] an extended period of time."[357] It further indicated that its network would require extensive "re-engineering," and that relocation of stations will be necessary "in order to satisfy market demand." Because of the additional need to undertake this system "redesign" on a wide-area, regional basis, SunCom requested an extended

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[351] *Id.*

[352] *Id.*

[353] *Id.* at 5.

[354] *220 MHz Report and Order*, 6 FCC Rcd at 2364 n. 126 (para. 59).

[355] SunCom, Request for Rule Waiver, filed February 1, 1994.

[356] Section 90.725(f) of the Commission's Rules, 47 C.F.R. § 90.725(f).

[357] SunCom Request for Rule Waiver at 9.

implementation period of eight years to complete the construction of its network.[358] Finally, SunCom pointed out that its waiver request was "fully consistent with Commission waiver grants to other, similarly situated entities proposing to construct complex [SMR and ESMR] networks."[359] In addressing SunCom's waiver request in the *CMRS Third Report and Order*, we found that SunCom had not "demonstrated the existence of extraordinary circumstances that would justify grant of an extended implementation construction period to licensees who agree to become part of SunCom's network," and, therefore, we denied its request for waiver of our construction rules.[360]

190. The Petition for Reconsideration filed by SunCom also seeks reconsideration of our denial of its waiver request, asserting that we had not given its request the required "'hard look.'"[361] SunCom observed that for a number of years we had "followed a waiver policy under which the construction of large-scale, spectrally efficient and technologically complex networks constitutes a 'unique' circumstance that makes Part 90 construction schedules inappropriate"[362] and that in our 1991 decision addressing a request for waiver filed by Fleet Call, Inc. (Fleet Call), we indicated that we would continue to apply the waiver policy adopted in that proceeding "so as to avoid discrimination."[363] SunCom claimed that its filing of a waiver request that "mirrored requests granted in the past was sufficient to entitle SunCom to a reasoned decision under process principles."[364]

191. In granting the waiver request of Fleet Call for extended implementation, we indicated that our decision followed existing policies for dealing with requests for extended implementation by other Part 90 licensees, and that we intended to "continue to apply" the policies established in those decisions to future requests "in a similar fashion."[365] Since then, we have acted on a number of requests by SMR entities wishing to provide wide-area

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[358] In its comments subsequently filed on June 20, 1994, in response to the request for comments in the *CMRS Further Notice* (9 FCC Rcd 2863 (1994)), SunCom revised its waiver request to reduce its construction schedule to five years.

[359] SunCom Request for Rule Waiver at 1

[360] *CMRS Third Report and Order*, 9 FCC Rcd at 8056 (para. 129).

[361] SunCom Petition for Reconsideration at 7.

[362] *Id.* at 8.

[363] *Id.* at 9, *citing* Request of Fleet Call, Inc., for Waiver and Other Relief to Permit Creation of Enhanced Specialized Mobile Radio Systems in Six Markets, Memorandum Opinion and Order, 6 FCC Rcd 1533, 1536 (para. 27) (1991) (*Fleet Call Order*)

[364] *Id.*

[365] *Fleet Call Order*, 6 FCC Rcd at 1536 (para. 27)

service similar to that proposed by Fleet Call. In 1993, we modified Subpart S of Part 90 of our Rules governing the Part 90 services above 800 MHz to outline a specific procedure for SMR applicants to follow in requesting extended implementation authority.[366]

192. SunCom argues that, because their request for extended implementation is similar to those of various SMRs applicants, we should deal with their request in a similar manner. Many of those applications, however, were processed in accordance with Section 90.629 of our rules, as it applies to SMRs,[367] and there is no such provision in our rules for providing extended implementation for commercial applicants in the 220 MHz service.[368] In addition, the fact that we indicated in the *Fleet Call Order* that we were adopting a waiver policy for SMR applicants such as Fleet Call that would "'prevent discriminatory application' of our waiver policy and 'put future parties on notice as to its operation' "[369] was not intended to provide a waiver policy that would apply in perpetuity and to applicants in all Part 90 services. The 220 MHz service is not the 800 MHz SMR service. Our decision to outline an extended implementation policy for *SMR* applicants in the *Fleet Call Order* and the fact that we have processed requests by SMRs based on that policy is not governing in deciding whether to process SunCom's request. To the contrary, in the *CMRS Third Report and Order*, we decided not to relax our existing Part 90 rules with respect to obtaining extensions of the standard construction period, stating that extensions would only be granted "if the licensee can demonstrate unique circumstances beyond its control that justify an extension."[370] We further stated that all CMRS licensees, in justifying an

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[366] Amendment of Part 90 of the Commission's Rules Governing Extended Implementation Periods, PR Docket No. 92-210, Report and Order, 8 FCC Rcd 3975 (1993) (*Extended Implementation Report and Order*); Section 90.629 of the Commission's Rules, 47 C.F.R. § 90.629. In the *Extended Implementation Report and Order*, we indicated that, "an increasing number of SMR applicants have expressed interest in operating technically innovative, wide area system" and that "to fully implement their systems, SMR applicants are . . . often in need of an extended implementation period." *Id.* 8 FCC Rcd at 3976 (para. 5).

[367] Section 90.629 of the Commission's Rules, 47 C.F.R. § 90.629.

[368] The only provision for extended implementation for 220 MHz service applicants under our rules is provided in Section 90.727, which permits certain *non-commercial* 220 MHz service applicants to seek extended implementation. 47 C.F.R. § 90.727. This rule does not allow *commercial* 220 MHz entities, such as SunCom, to obtain extended implementation authority. With regard to Section 90.629 itself, we are now proposing, in our *800 MHz SMR Further Notice of Proposed Rulemaking*, to *eliminate* the rule, stating that to do so would "protect against channels being underutilized for long periods." *800 MHz SMR Further Notice of Proposed Rulemaking,* 9 FCC Rcd 1647 (paras. 24-26)

[369] *Fleet Call Order*, 6 FCC Rcd at 1536 (para 27).

[370] *CMRS Third Report and Order*, 9 FCC at 8074-75 (para. 177).

extension, would be required to adhere to the showing provided in Section 22.43(b) of our Rules and formerly applicable only to Part 22 licensees. Section 22.42(b) states that no extension will be granted for delays caused by lack of financing, lack of site availability, for the assignment or transfer of control of an authorization, or for failure to order equipment in a timely manner.[371] As we indicated in deciding not to grant SunCom's request in the *CMRS Third Report and Order*, SunCom has not demonstrated the prescribed circumstances necessary to justify the extended construction period. We therefore deny SunCom's Petition for Reconsideration.

4. Request for Rule Clarification or Waiver of Section 90.719 Filed by the 220 MHz QO Coalition

193. The 220 MHz QO Coalition (Coalition) filed a request for clarification of Section 90.719 of our rules[372] to confirm that licensees of Channels 171-180 may trunk their channels or, alternatively, seeks waiver of this rule to permit its members to trunk their authorized Channels 171-180.[373] We deny the Coalition's requested clarification and waiver request for the following reasons.

194. First, the Coalition refers to our discussion in paragraph 40 of the *220 MHz Report and Order* regarding Channels 161-200 as being a set aside for "non-trunked local use," and asks whether channels are "restricted to non-trunked use only" or whether they "can be used in either trunked or non-trunked systems."[374] We see no lack of clarity in our discussion in the *220 MHz Report and Order* as to whether these channels were intended to be used for trunked or non-trunked operation. As the Coalition points out, we referred to these channels as being "non-trunked" channels[375] and this reference accurately indicates our intended use for these frequencies.

195. Second, the Coalition refers to Section 90.719 of our Rules, which states that the "Channels 171-180 are available for any use consistent with this subpart"[376] and suggests

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[371] Section 22.43(b) of the Commission's Rules, 47 C.F.R. § 22.43(b).

[372] Section 90.719 of the Commisison's Rules, 47 C.F.R. § 90.719.

[373] Request of 220 MHz QO Coalition for Clarification of the Rules or, in the Alternative, for Waiver of the Rules, filed June 10, 1994.

[374] Coalition Request at 3.

[375] *220 MHz Report and Order*, 6 FCC Rcd at 2362 (para. 40).

[376] Section 90.719 of the Commission's Rules, 47 C.F.R. § 90.719.

that this language is ambiguous as to whether "any use" includes trunking of these channels.[377] In the *220 MHz Report and Order*, we indicated in Table 2 of paragraph 16 that the Channels 171-180 channels would be assigned for "any use." Our use of the term "any use" in this Table, however, was meant to distinuguish Channels 171-180 from the Channels 181-200, which were designated in the Table as being for "data-only" use. Our designation of "any use" for the Channels 171-180 was not meant to be an indication of the type of transmission *technology* that licensees of these channels could or could not employ.

5. Petition for Rule Waiver of Section 90.719 Filed by the Northeast Florida Telephone Company

196. A second petition requesting waiver of Section 90.719 of our Rules to permit trunked operation on Channels 171-180 was filed by the Northeast Florida Telephone Company (NTFC).[378] NFTC points out that the five channels on which it is authorized are to be used "solely to provide for the internal communications needs of the company's telephone business as the primary system used to facitilate phone maintenance and repair" and seeks permission to trunk its channels "in order to increase systems efficiency and meet the expanding communications needs of its company."[379] NFTC, like the Coalition, questions[380] whether we had expressly prohibited trunked operation on the Channels 171-180 in the *220 MHz Report and Order*. For the reasons stated above with regard to the Petition for Waiver of the 220 MHz QO Coalition, we deny the NFTC Petition for Rule Waiver.

B. Licensees Authorized Near Canadian Border

197. Commission staff is currently involved in negotiations with the Canadian government to determine how 220-220 MHz spectrum near the U.S.-Canadian border will be shared between the two countries. The eventual agreement could result in certain 220 MHz channels currently authorized to U.S. licensees being designated for primary Canadian use and, if this were to occur, the authorizations of 220 MHz licensees operating on those channels could be subject to cancellation. The authorizations of all non-nationwide 220 MHz licensees situated within Line A[381] of the border have been conditioned on the outcome of these negotiations. Given that licensees located within Line A could, after beginning

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[377] Coalition Request at 5.

[378] NFTC, Petition for Rule Waiver, filed September 30, 1994.

[379] NFTC Petition at 2.

[380] *Id.* at 2-3.

[381] Section 90.7 of the Commission's Rules, 47 C.F.R. § 90.7.

operation, could lose their authorizations, we understand their possible reluctance to commit resources for the construction of their facilities.

198. We believe that the uncertainties surrounding the future of 220 MHz licenses near the Canadian border warrant Commission action. We will therefore extend the deadline for non-nationwide 220 MHz licensees authorized within Line A of the border to construct and operate their stations to a date 12 months after the date the terms of an agreement with Canada are released.

VI. PROCEDURAL MATTERS

199. Pursuant to applicable procedures set forth in Section 1.415 and 1.419 of the Commission's Rules,[382] interested parties may file comments on or before **September 27, 1995**, and reply comments on or before **October 12, 1995**. 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 the Office of the Secretary, Federal Communications Commission, Washington D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Reference Center of the Federal Communications Commission, 1919 M Street, N.W., Room 239, Washington, D C 20054.

200. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission Rules.[383]

201. As required by the Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of this expected impact on small entities of the proposals suggested in this document. The IFRA is set forth in Appendix A of this document. 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.[384]

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[382] 47 C.F.R. §§ 1.415, 1.419.

[383] Sections 1.1202, 1.1203, and 1.1206(a) of the Commission's Rules, 47 C.F.R. §§ 1.1202, 1.1203, 1.1206(a).

[384] Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1980).

202. For further information concerning this proceeding, contact Martin Liebman at (202) 418-1310 or Rhonda Lien at (202) 418-0620 of the Wireless Telecommunications Bureau.

VII. ORDERING CLAUSES

203. Authority for issuance of this Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking is contained in Sections 4(i), 303(r), 309(j), and 332 of the Communications Act of 1934, as amended; 47 U.S.C. §§ 154(i), 303(r), 309(j), and 332.

204. Accordingly, IT IS ORDERED that the Petition for Rulemaking in RM-8506 filed by Fairfield Industries, Inc., IS GRANTED to the extent indicated herein.

205. IT IS FURTHER ORDERED that the Petition to Sever filed by SunCom Mobile & Data, Inc., IS GRANTED.

206. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by SunCom Mobile & Data, Inc., IS DENIED.

207. IT IS FURTHER ORDERED that the Request for Rule Waiver filed by Wireless Plus, Inc., IS DENIED.

208. IT IS FURTHER ORDERED that the Request for Rule Waiver filed by the 220 MHz QO Coalition IS DENIED.

209. IT IS FURTHER ORDERED that the Petition for Rule Waiver filed by Northeast Florida Telephone Company IS DENIED.

210. IT IS FURTHER ORDERED that the deadline for non-nationwide 220 MHz licensees authorized within Line A of the Canadian border to construct and operate their stations is extended to a date 12 months after the date that the terms of an agreement with Canada are released.

FEDERAL COMMUNICATIONS COMMISSON

William F. Caton
Acting Secretary

APPENDIX A

INITIAL REGULATORY FLEXIBILITY ANALYSIS

I. Reason for Action:

The action is taken to propose a new framework for the licensing and operation of the 220 MHz service, and as part of the Commission's continuing implementation of Congress's revisions to Sections 3(n) and 332 of the Communications Act in the Omnibus Budget Reconciliation Act of 1993.

II. Objectives of this Action:

The Commission's primary goal is to establish a flexible regulatory scheme that will allow for more efficient licensing, eliminate unnecessary regulatory burdens on both existing and future licensees, and enhance the competitive potential of 220 MHz services in the mobile marketplace.

III. Legal Basis:

The proposed action is authorized under Sections 4(i), 303(r), 309(j) and 332 of the Communications Act of 1934, as amended.

IV. Description, Potential Impact and Number of Small Entities Affected:

There are approximately 3,800 non-nationwide licensees in the 220 MHz band. The potential impact of the proposals contained in this Notice on small businesses is hard to predict without the benefit of comment, and the actual impact will depend on the final action taken. The intention of this action is to provide licensees with more flexibility, with a minimum increased burden. Thus, the Commission, in drafting these proposals tried to balance the needs of all licensees and potential licensees. For example, to afford licensees increased flexibility to meet consumer demand and to increase their ability to compete with other CMRS licensees, the Commission has proposed that 220 MHz licensees be permitted to operate paging and fixed systems on a primary basis and to aggregate their 5 kHz channels to operate on channels of wider bandwidth.

V. Reporting, Recordkeeping and Other Compliance Requirements:

The Commission is proposing to generally decrease the burden on licensees. For example, rather than being required to obtain separate authorization for each of their base stations, non-nationwide, Phase II licensees will be permitted to operate over Commission-defined geographic areas (EAs and 220 MHz Regions) and will be allowed to construct and operate base stations anywhere within their authorized area as long as signals from those stations do not exceed a prescibed level. On the other hand, Phase II licensees who desire to operate less than 120 kilometers from Phase I co-channel stations will be required to submit