

FCC MAIL SECTION

SEP 15 4 18 PM '95 **Before the FEDERAL COMMUNICATIONS COMMISSION** FCC 95-395  
**DOCKET FILE COPY ORIGINAL** Washington, D.C. 20554

DISPATCHED BY

In the Matter of )

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 the 935-940 MHz Bands )  
Allotted to the Specialized Mobile Radio Pool )

PR Docket No. ~~89-553~~ *[Handwritten signature]*

Implementation of Section 309(j) )  
of the Communications Act - )  
Competitive Bidding )

PP Docket No. 93-253

Implementation of Sections 3(n) and 322 )  
of the Communications Act )

GN Docket No. 93-252 *[Handwritten mark]*

**SECOND ORDER ON RECONSIDERATION AND SEVENTH REPORT AND ORDER**

Adopted: September 14, 1995

Released: September 14, 1995

By the Commission: Commissioner Barrett issuing a statement.

TABLE OF CONTENTS

	<u>Paragraph</u>
I. INTRODUCTION .....	1
II. EXECUTIVE SUMMARY .....	2
III. BACKGROUND .....	22
IV. SECOND ORDER ON RECONSIDERATION	
A. Coverage Requirements .....	27
B. Treatment of Incumbents	
1. MTA Licensee's Interference Protection Obligations to Incumbents .....	35

2. Incumbents' Interference Protection Obligations to MTA Licensee . . . .	38
C. Secondary Site Licensing . . . . .	43
D. Finders' Preference Program . . . . .	48
E. Loading Requirements . . . . .	50
F. Discontinuance of Operation . . . . .	54
G. Foreign Ownership Waivers . . . . .	57
V. SEVENTH REPORT AND ORDER	
A. Competitive Bidding Issues	
1. Competitive Bidding Design . . . . .	60
2. License Grouping . . . . .	66
B. Bidding Issues	
1. Bidding Procedures . . . . .	67
2. Bid Increments and Tie Bids. . . . .	69
3. Stopping Rules . . . . .	73
4. Duration of Bidding Rounds . . . . .	78
5. Activity Rules . . . . .	80
6. Rules Prohibiting Collusion . . . . .	88
C. Procedural and Payment Issues	
1. Pre-auction Application Procedures . . . . .	95
2. Amendments and Modifications . . . . .	103
3. Upfront Payments . . . . .	107
4. Down Payments and Full Payments . . . . .	114
5. Bid Withdrawal, Default, and Disqualification . . . . .	118
6. Long-Form Applications . . . . .	125
7. Petitions to Deny and Limitations on Settlements . . . . .	126
8. Transfer Disclosure Requirements . . . . .	128
9. Performance Requirements . . . . .	130
E. Treatment of Designated Entities	
1. Overview, Objectives and Impact of <i>Adarand Constructors, Inc. v. Peña</i>	131
2. Eligibility for Bidding Credits, Installment Payments and Reduced Down Payments . . . . .	141
3. Bidding Credits . . . . .	157
4. Reduced Down Payment/Installment Payments . . . . .	166
5. Transfer Restrictions and Unjust Enrichment Provisions . . . . .	171
6. Partitioning . . . . .	175
7. Reduced Upfront Payments . . . . .	180
8. Set-aside Spectrum . . . . .	181
9. Other Matters . . . . .	185
VI. CONCLUSION . . . . .	187
VII. PROCEDURAL MATTERS AND ORDERING CLAUSES . . . . .	188
APPENDIX A - FINAL RULES	

## APPENDIX B - FINAL REGULATORY FLEXIBILITY ANALYSIS

## APPENDIX C - PETITIONERS AND COMMENTERS

### I. INTRODUCTION

1. In this *Second Order on Reconsideration and Seventh Report and Order*, we adopt final auction rules for the 900 MHz SMR service and address reconsideration petitions concerning the service rules adopted in the *Second Report and Order and Second Further Notice of Proposed Rule Making ("Second R&O and Second Further Notice")*.<sup>1</sup> The rules adopted and the policies set forth herein will permit licensing the 900 MHz SMR service in a fast, fair and efficient manner, and will promote competition. At the same time, they will protect incumbents' current services to the public while providing such incumbents with a more flexible environment in which to expand their systems.

### II. EXECUTIVE SUMMARY

2. The following paragraphs summarize the principal decisions made in this *Second Order on Reconsideration* regarding service rules, and those made in the *Seventh Report and Order* regarding auction rules.

#### A. Second Order on Reconsideration: Service Rules

3. As decided in the *CMRS Third Report & Order*,<sup>2</sup> the 900 MHz SMR band will be divided into 20 ten-channel blocks in each of 51 service areas based on Major Trading Areas ("MTAs"), which match the blocks previously licensed for the Designated Filing Areas ("DFAs"). Each MTA license will authorize the licensee to operate throughout the MTA on the designated channels except where a co-channel incumbent licensee already is operating. MTA licensees also will be allowed to aggregate multiple blocks within an MTA and to aggregate blocks geographically in multiple MTAs.

4. As decided in the *Second R&O and Second Further Notice*, MTA licensees in this service will be required to meet coverage requirements of one-third of the population in the service area within three years of the initial license grant and two-thirds of the population

---

<sup>1</sup> 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 Bands Allotted to the Specialized Mobile Radio Pool, *Second Report and Order and Second Further Notice of Proposed Rule Making*, PR Docket No. 89-553, PP Docket No. 93-253, GN Docket No. 93-252, FCC 95-159, released April 17, 1995, 60 FR 21987, 22023 (May 4, 1995).

<sup>2</sup> Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services, *Third Report and Order*, GN Docket No. 93-252, 9 FCC Rcd 7988 (1994) (*CMRS Third Report & Order*).

within five years. Alternatively, a licensee may make a showing at five years that it is providing "substantial service." The Commission denies reconsideration of these benchmarks, and reiterates that MTA licensees must satisfy these requirements regardless of the area or percentage of the MTA population that is served by incumbent licensees. We clarify that MTA licensees may use options such as resale or management agreements<sup>3</sup> to fulfill the coverage requirements.

5. To ensure that incumbent licensees receive protection from interference by MTA licensees, the *Second R&O and Second Further Notice* provides that MTA licensees either must maintain a minimum 113 kilometer (70 mile) geographic separation or comply with our short-spacing rules with respect to all incumbent facilities in their service area or in adjacent MTAs. We affirm our intention to allow MTA licensees to use short-spacing rules to comply with interference protection standards, and do not believe it will result in a plethora of interference disputes at the Commission. We also affirm our adoption of the 40 dBu median field strength contour as the protected service area in which incumbents may modify or add facilities, and reject petitioners' requests to use the 22 dBu contour instead. We will allow, however, incumbents to negotiate with wide area licensees to expand the incumbents' service areas. We also will reissue a single "partitioned" license to incumbents who are not successful bidders for the MTAs in which they are currently operating in exchange for their multiple site licenses.

6. As decided in the *Second R&O & Second Further Notice*, no secondary site licenses will be granted once an MTA licensee has been selected. We believe it is important to provide some degree of reliability to potential MTA bidders that the spectrum upon which they are bidding will not become subsequently encumbered with secondary sites. We clarify that all pending finders' preference requests for 900 MHz SMR licenses will be processed, but we are eliminating future finders' preference for the 900 MHz SMR service. As provided by our rules, any stations licensed to incumbents that are not constructed or placed in operation will revert automatically to the MTA licensee for that channel block.

7. We deny further reconsideration of our decisions in the *CMRS Third Report & Order* and the *Second R&O and Second Further Notice* with respect to loading requirements in the 900 MHz service, as petitioners have raised no new arguments that would merit reconsideration. Consequently, incumbent 900 MHz SMR licensees will continue to be subject to the loading requirements that were in effect when they were licensed.

8. We clarify that our amended rule regarding discontinuance of operation (Section 90.631(f)), which provides that stations taken out of service for 90 consecutive days are considered permanently discontinued, applies only to stations that were taken out of service after June 5, 1995 (the effective date of the rule). The former rule provided that stations

---

<sup>3</sup> Management agreements should not result in a *de facto* transfer of control. See In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, *Fourth Report and Order*, 9 FCC Rcd 7123 (1994) at ¶¶ 20-28.

taken out of service for 12 months were considered permanently discontinued. Consequently, stations that were taken out of service prior to June 5, 1995, are entitled to stay out of service for the remainder of the original 12 months provided in the former rule, before they will be considered permanently discontinued. Those stations taken out of service on or after June 5, 1995, will be considered permanently discontinued after 90 days. With regard to wide-area SMR licensees that are replacing high power analog sites with low power digital sites, however, we will deem all the base stations "in operation" if the system meets the standards and conditions set out in *Fleet Call, Inc.*<sup>4</sup>

## **B. Seventh Report and Order**

### **1. Auction Rules**

9. A total of 1,020 MTA licenses<sup>5</sup> will be awarded in the 900 MHz SMR service. We will use a single simultaneous multiple round auction to award these licenses, because the licenses are interdependent, and licensees are likely to aggregate and/or substitute across spectrum blocks and geographic areas. Both incumbents and new entrants are eligible to bid for all MTA licenses subject only to the spectrum cap in Section 20.6 of the Commission's Rules.<sup>6</sup> All applicants for MTA licenses are treated as initial applicants for public notice, application processing, and auction purposes. The Wireless Telecommunications Bureau will announce the time and place of the auction and provide additional information to bidders by future public notice.

10. Applicants will apply for the 900 MHz SMR auction by filing a short-form application (FCC Form 175) and paying an upfront payment. We adopt the standard upfront payment formula of \$0.02 per pop-MHz, based on the number of 10-channel blocks in each MTA identified on the applicant's Form 175 and the total MTA population. The Wireless Telecommunications Bureau will announce, by public notice, the population calculation of each block in the MTA, using a formula that takes into account incumbents within the MTA. We also adopt the Milgrom-Wilson activity rule used in previous multiple-round simultaneous auctions, which requires bidders to declare their maximum eligibility in terms of MHz-pops and limits them to bidding on licenses encompassing no more than the MHz-pops covered by their upfront payment.

11. Each applicant will be required to specify on its FCC Form 175 its classification,

---

<sup>4</sup> *Fleet Call, Inc., Memorandum Opinion and Order*, 6 FCC Rcd 1533 (1991), *recon. dismissed*, 6 FCC Rcd 6989 (1991).

<sup>5</sup> 51 MTAs times 20 licenses in each MTA.

<sup>6</sup> Broadband PCS, cellular, and SMR licensees may have attributable interests in no more than 45 MHz of licensed broadband PCS, cellular, and SMR spectrum regulated as CMRS with significant overlap in any geographic area. *See* 47 C.F.R. § 20.6.

status as a designated entity (if applicable), markets and frequency blocks for which it applied,<sup>7</sup> and persons authorized to place or withdraw bids. Applicants must identify any arrangements or agreements with other parties relating to the licenses that are being auctioned and certify that there are no arrangements other than those specified. Applicants may correct minor defects in their short-form applications prior to the auction, but may not make any major modifications to their applications, including geographic license area changes, cognizable ownership changes or changes in the identification of parties to bidding consortia, until after the auction. Applicants may modify their short-form applications to reflect formation of consortia or changes in ownership at any time before or during an auction, provided such changes do not result in a change in control of the applicant, and provided that the parties forming consortia or entering into ownership agreements have not applied for licenses in any of the same geographic license areas. In instances where only a single applicant has applied for a particular MTA channel block, the Commission will cancel the auction for that block and establish a deadline for filing of the applicant's long-form application. In all instances where mutually exclusive applications are filed, the MTA channel block will be included in the auction.

12. The timing and duration of auction rounds will be determined by the Wireless Telecommunications Bureau and announced by public notice. As in prior auctions, we expect to start the auction with relatively large bid increments and reduce increments as bidding activity falls. We will use a simultaneous stopping rule for this auction to afford bidders flexibility to pursue back-up strategies, and to ensure that bidders will not hold back bids until the final round. During the auction, we will retain the discretion to declare that the auction will end after a specified number of additional rounds.

13. We will specify bid increments, *i.e.*, the amount or percentage by which the bid must be raised above the previous round's high bid in order to be accepted as a valid bid in the current bidding round. The application of a minimum bid increment helps to ensure that the auction closes within a reasonable period and is expressed in both a percentage and fixed dollar amount. We may impose a minimum bid increment of five percent or \$0.02 per pop-MHz, whichever is greater,<sup>8</sup> but we also retain the discretion to set, vary and announce, before or during the auction, the minimum bid increments for licenses over the course of an auction.

14. We will use bid withdrawal and default rules for this auction similar to those used in prior auctions. Under these rules, any bidder that withdraws a high bid during an auction before the Commission declares bidding closed must reimburse the Commission for the difference between the amount of the ultimate winning bid and the withdrawn bid if the winning bid is lower than the withdrawn bid. An auction winner defaulting after the close of

---

<sup>7</sup> The Commission modifies the tables in 47 C.F.R. §§ 90.617 and 90.619 to assign block letters to frequency block numbers.

<sup>8</sup> See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Fifth Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 5532 (1994) at ¶ 44 (*Competitive Bidding Fifth Report & Order*).

the auction will have to make an additional payment equal to the lesser of three percent of the subsequent winning bid or three percent of the amount of the defaulting bid. In the event that an auction winner defaults or is disqualified, or if its license is revoked or terminated, the Commission will re-auction the license, except that we may offer the license to the second highest bidder if the default occurs within five days after the auction closes.

15. At the conclusion of the auction, winning bidders must supplement their upfront payments and file their long-form applications (FCC Form 600). The upfront payment must be supplemented in an amount sufficient to bring the winning bidder's deposit up to 20 percent of its winning bid within five days after the close of the auction. Designated entities eligible for installment payments, however, must bring their deposits up to five percent of the winning bid within five days after the close of the auction. Once each applicant has filed its long form and submitted its down payment, the Wireless Telecommunications Bureau will issue a public notice announcing the application's acceptance for filing and open a 30-day window for filing petitions to deny.

16. The 900 MHz SMR auction will be subject to the same regulatory safeguards as prior auctions to prevent applicants from colluding during the auction or obtaining unjust enrichment from subsequent transfer of the license. To prevent collusion, bidders who have applied for licenses in any of the same geographic license areas on their short-form applications may not cooperate, collaborate, discuss, or disclose the substance of their bids or strategies with other bidders except pursuant to a consortium or arrangement identified in the short-form application. Bidders also must attach an exhibit to the Form 600 explaining the terms, conditions, and parties involved in any bidding arrangement. With respect to transfers, licensees transferring their licenses within three years of the initial license grant must disclose to the Commission all contracts and other documentation associated with the transfer.

## **2. Designated Entities**

17. Because of the large number of available licenses and the presence of incumbents throughout the 900 MHz SMR band, we will not create an entrepreneurs' block in this service. Nevertheless, we adopt several provisions for bidding in the 900 MHz auction by small businesses. Taking commenters' suggestions into account, we define two categories of small businesses: (1) an entity that, together with affiliates, has average gross revenues for the three preceding years of \$3 million or less; and (2) an entity that, together with affiliates, has average gross revenues for the three preceding years of \$15 million or less. We will define any investor in the applicant with a 20 percent or greater interest to be attributable for purposes of determining small business status. The 20 percent attribution threshold is derived from the measure of SMR attribution for purposes of applying the CMRS spectrum cap. In sum, we will consider the gross revenues of the entity and its affiliates and its attributable investors and affiliates.

18. Under this "tiered" approach, small businesses falling under the \$3 million benchmark are eligible for a 15 percent bidding credit on any MTA license; those falling

under the \$15 million benchmark are eligible for a 10 percent bidding credit. All small businesses may make a reduced down payment (five percent of the winning bid following the close of the auction, with the balance of the down payment paid five days after a Public Notice announcing that the Commission is prepared to grant the license), and are entitled to pay the bid balance in quarterly installments over the remaining license term. Small businesses falling under the \$3 million benchmark will be able to make interest-only payments for the first five years of the license term; small businesses falling under the \$15 million benchmark will be able to make interest-only payments for the first two years of the license term. We believe that broadening the scope of opportunities for small businesses, particularly on a tiered basis, will result in substantial participation by women and minorities, and we believe that the expected capital outlay for the 900 MHz service will not present the same type of obstacles for those entities as a more costly spectrum-based service like PCS.

19. We do not adopt reduced upfront payments for small businesses in the 900 MHz service but will allow partitioning for rural telephone companies, similar to those that we have applied to broadband PCS.

20. Small businesses entitled to special provisions in the 900 MHz SMR service seeking to transfer their licenses, as a condition to approval of the transfer, must remit to the government a payment equal to a portion of the total value of the benefit conferred by the government. Thus, a small business that received bidding credits which seeks transfer or assignment of a license to an entity that is not a small business or does not qualify as a smaller business under Section 90.814(b)(1), will be required to reimburse the government for the amount of the bidding credit, plus interest at the rate imposed for installment financing at the time the license was awarded, before transfer will be permitted. The amount of this reimbursement will be reduced over time as follows: a transfer in the first two years of the license term will result in a reimbursement of 100 percent of the value of the bidding credit; in year three of the license term the payment will be 75 percent; in year four the payment will be 50 percent and in year five the payment will be 25 percent, after which there will be no assessment. If a small business under the \$3 million definition seeks to transfer or assign a license to a small business under the \$15 million definition, for the purposes of determining the amount of payment, the value of the bidding credit is 5 percent, the difference between the 10 and 15 percent bidding credits. The 5 percent difference will be subject to the same percentage reductions over time as specified above. These reimbursements must be paid back to the U.S. Treasury as a condition of approval of the assignment or transfer.<sup>9</sup>

21. If a licensee that was awarded installment payments seeks to assign or transfer control of its license to an entity that is not a small business under Section 90.814(b)(1) during the term of the license, we will require payment of the remaining principal and any interest accrued through the date of assignment as a condition of the license assignment or

---

<sup>9</sup> See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Third Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2941 (1994) at ¶ 80. (*Competitive Bidding Third Report and Order*).

transfer. Moreover, if a small business under the \$3 million definition seeks to assign or transfer control of a license to a small business under the \$15 million definition (that does not qualify for as favorable an installment payment plan), the installment payment plan for which the acquiring entity qualifies will become effective immediately upon transfer. However, a licensee may not switch its payment plan to a more favorable plan. If an investor subsequently purchases an "attributable" interest in the businesses during the first five years of the license term and, as a result, the gross revenues or total assets of the business exceed the applicable financial cap, thereby requiring the applicant to forfeit eligibility for an installment payment scheme, unjust enrichment provisions also will apply.

### III. BACKGROUND

22. The 900 MHz SMR service was established in 1986, when the Commission allocated 200 channel pairs in the 896-901 MHz and 935-940 MHz bands for SMRs in order to alleviate congestion in the 800 MHz SMR band.<sup>10</sup> To expedite service in major markets where demand for SMR service was greatest, the Commission used a two-phase licensing process. In Phase I, licenses were assigned in 46 "Designated Filing Areas" ("DFAs") comprised of the top 50 markets. Following Phase I, the Commission envisioned licensing facilities in areas outside these markets in Phase II. In the meantime, however, licensing outside the DFAs was frozen after 1986, when the Commission opened its filing window for the DFAs.<sup>11</sup>

23. In 1989, the Commission adopted a *Notice of Proposed Rule Making* in PR Docket 89-553<sup>12</sup> ("*NPRM*"), proposing to begin Phase II licensing of 900 MHz SMR facilities nationwide. The *NPRM* contained proposals intended to add flexibility to 900 MHz SMR systems. The Commission continued its freeze on licensing outside the DFAs while the rule making was pending, but did license 900 MHz providers on a secondary basis (*i.e.*, facilities that may not cause interference to primary licensees and must accept interference from primary licensees) outside their DFAs to meet growing demand for regional service.

---

<sup>10</sup> Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, GEN Docket No. 84-1231, Amendment of Parts 2, 15, and 90 of the Commission's Rules and Regulations To Allocate Frequencies in the 900 MHz Reserve Band for Private Land Mobile Use, GEN Docket No. 84-1233, Amendment of Parts 2, 22, and 25 of the Commission's Rules To Allocate Spectrum for, and To Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services, GEN Docket No. 84-1234, *Report and Order*, 2 FCC Rcd 1825 (1986) (*900 MHz SMR Report & Order*).

<sup>11</sup> Public Notice, Private Land Mobile Application Procedures for Spectrum in the 896-901 MHz and 935-940 MHz Bands, rel. Nov. 4, 1986, 1 FCC Rcd 543 (1986) (Public Notice of Nov. 4, 1986).

<sup>12</sup> 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 Bands Allotted to the Specialized Mobile Radio Pool, *Notice of Proposed Rule Making*, PR Docket No. 89-553, 4 FCC Rcd 8673 (1989).

24. In 1993, the Commission adopted a *First Report & Order and Further Notice of Proposed Rule Making* in PR Docket 89-553,<sup>13</sup> modifying its Phase II proposal and seeking comment on whether to license the 900 MHz SMR band to a combination of nationwide, regional, and local systems. Shortly after the *First Report & Order/Further Notice*, Congress amended the Communications Act to reclassify most SMR licensees as Commercial Mobile Radio Service (CMRS) providers, and to establish the Commission's authority to use competitive bidding to select from among mutually exclusive applicants for certain licensed services.<sup>14</sup> Accordingly, the Commission deferred further consideration of Phase II and incorporated the 900 MHz docket (as well as the companion docket relating to 800 MHz SMR)<sup>15</sup>, into its *CMRS* proceeding to ensure that the regulation of all SMRs would be consistent with the regulation of competing CMRS services, such as cellular and PCS,<sup>16</sup> and to consider the impact of auction authority on the record of the pending 900 MHz proceeding.<sup>17</sup>

25. In the *CMRS Third Report and Order*, the Commission further revised its Phase II proposals and established the broad outlines for the completion of licensing in the 900 MHz SMR band. The Commission concluded that (1) the 900 MHz SMR band will be licensed in 20 ten-channel blocks using MTAs as service areas; (2) licensing of mutually exclusive applicants for this spectrum will be based on competitive bidding; and (3) incumbent licensees in the band will retain the right to operate under their existing authorizations, but will be required to obtain the relevant MTA license (or obtain the consent of the MTA licensee) to be able to expand their systems.<sup>18</sup> The Commission noted that some licensees had been granted secondary authorizations to construct facilities outside of the DFAs, so they could link

---

<sup>13</sup> 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 Bands Allotted to the Specialized Mobile Radio Pool, *First Report and Order and Further Notice of Proposed Rule Making*, PR Docket No. 89-553, 8 FCC Rcd 1469 (1993) (*Phase II First Report & Order & Further Notice*).

<sup>14</sup> Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 (Budget Act), § 6002(b), 107 Stat. 312, 392 (1993) (codified at 47 U.S.C. §§ 309(j) and 332).

<sup>15</sup> Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *Further Notice of Proposed Rule Making*, PR Docket No. 83-144, FCC 94-271, rel. Nov. 4, 1994, 59 Fed. Reg. 60,111 (Nov. 22, 1994) (*800 MHz Further Notice*).

<sup>16</sup> See Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services, *Second Report and Order*, 9 FCC Rcd 1411 (1994) (*CMRS Second Report & Order*); Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services, *Third Report and Order*, GN Docket No. 93-252, 9 FCC Rcd 7988 (1994) (*CMRS Third Report & Order*).

<sup>17</sup> Due to the passage of the Budget Act, the issues raised in the 1993 *Phase II First Report & Order*, (e.g., primary status of secondary sites; license terms, eligibility for nationwide or regional licenses; limitation on number of licenses controlled by single licensee), were addressed in the *CMRS Third Report & Order*.

<sup>18</sup> *CMRS Third Report & Order* at ¶ 119.

facilities in different markets. With respect to those unprotected sites (*i.e.*, "secondary sites"),<sup>19</sup> the Commission stated that those that were licensed on or before August 9, 1994, would be entitled to primary site protection.<sup>20</sup> The Commission also eliminated loading requirements for future MTA licensees, but retained them for incumbent 900 MHz SMR licensees that do not obtain MTA licenses.<sup>21</sup>

26. While the *CMRS Third Report & Order* established the framework for 900 MHz licensing, the Commission left the adoption of specific auction and service rules for the Phase II *Order*. In the *Second Report and Order and Second Further Notice of Proposed Rule Making*, we adopted final service rules, and requested comment on proposed auction rules. We established technical and operational rules for the new MTA licensees, and also defined the rights of incumbent SMR licensees already operating in the 900 MHz band. We also addressed issues raised on reconsideration of the *CMRS Third Report & Order* pertaining specifically to the 900 MHz SMR service.<sup>22</sup> The *Further Notice* requested comment on further aspects of the Commission's decision in the *CMRS Third Report & Order* to license the 900 MHz band on an MTA basis, and to use competitive bidding to select from among mutually exclusive applicants. We set forth proposals for new licensing rules and auction procedures for the service, including provisions for designated entities. We later issued a Public Notice requesting further comment on the impact of the Supreme Court's subsequent decision in *Adarand Constructors Inc. v. Peña*<sup>23</sup> on our proposed treatment of designated entities in the *Second R&O and Second Further Notice*.<sup>24</sup>

#### IV. SECOND ORDER ON RECONSIDERATION

##### A. Coverage Requirements

27. Background. In the *Second R&O and Second Further Notice*, the Commission adopted Section 90.665(c), which requires 900 MHz MTA licensees to provide coverage to one-third of the population of their service area within three years of initial license grant and to two-thirds of the population of their service area within five years or, at the five year mark,

---

<sup>19</sup> See 47 C.F.R. § 90.7 (defining "secondary operation").

<sup>20</sup> *CMRS Third Report & Order* at ¶ 119.

<sup>21</sup> *Id.* at ¶ 194.

<sup>22</sup> Petitions for Reconsideration of the *CMRS Third Report & Order* that raise general CMRS issues, or specific issues pertaining to other CMRS services, will be addressed in a separate Order.

<sup>23</sup> 115 S.Ct. 2097 (1995).

<sup>24</sup> Request for Comments in 900 MHz SMR Proceeding, *Public Notice*, PR Docket No. 89-553, DA 95-1479, released June 30, 1995.

to submit a showing of substantial service.<sup>25</sup> We stated that this requirement fits squarely between the 10 MHz broadband PCS rules (one-fourth population coverage at five years or substantial service) and the narrowband PCS rules (one-fourth population coverage at five years, three-fourths population coverage at 10 years).<sup>26</sup>

28. Petitions. By and large, petitioners request that we both amend the coverage requirements and clarify certain aspects of the rule. Several petitioners request that the Commission adopt a less stringent coverage requirement than that contained in Section 90.665(c).<sup>27</sup> In particular, Personal Communications Industry Association ("PCIA") and Advanced Mobilecomm, Inc. ("AMI") contend that it will be difficult for an MTA licensee to meet these coverage requirements unless it can establish a relationship with the incumbent licensee which may already cover significantly populated areas of an MTA.<sup>28</sup> Both petitioners point to the Los Angeles-San Diego MTA as an example of an anomaly created by the rule. AMI states that, if a San Diego incumbent wishes to obtain an MTA license to expand its San Diego offering, it would have to reach an agreement with the incumbent Los Angeles licensees in order to meet the MTA coverage requirement, as well as those in Las Vegas. As AMI notes, there is little roaming crossover, as Las Vegas was not one of the DFAs that was licensed in 1987.<sup>29</sup> Conversely, PCIA points out that, if a potential applicant wishes to serve only Las Vegas, it would have to reach agreements with the Los Angeles and San Diego incumbents to meet coverage requirements.<sup>30</sup> AMI elaborates that the problem with establishing such a relationship is that the equipment with which each licensee already has constructed may be totally incompatible with that of the potential MTA licensee.<sup>31</sup>

29. Both RAM and Geotek request that the Commission clarify Section 90.665(b) and (d) to indicate that an incumbent licensee who becomes the MTA licensee, then fails to satisfy the coverage requirements, does not forfeit the entire MTA license but, retains those facilities

---

<sup>25</sup> 47 C.F.R. § 90.665(c); *Second R&O and Second Further Notice, supra*, at ¶ 40.

<sup>26</sup> *Second R&O and Second Further Notice* at ¶ 40; 47 C.F.R. §§ 24.203(b) and 24.103(c).

<sup>27</sup> Comments of RAM Mobile Data USA Limited on Petition for Reconsideration & Clarification, filed July 27, 1995 at 4.

<sup>28</sup> Petition for Partial Reconsideration of the Personal Communications Industry Association, filed June 5, 1995, at 6-7; Petition for Partial Reconsideration of the Advanced Mobilecomm, Inc., filed June 5, 1995, at 2-3.

<sup>29</sup> AMI Petition at 3; *See* Public Notice, Private Land Mobile Application Procedures for Spectrum in the 896-901 MHz and 935-940 MHz Bands, rel. Nov. 4, 1986, 1 FCC Rcd 543 (1986) (Public Notice of Nov. 4, 1986).

<sup>30</sup> PCIA Petition at 7.

<sup>31</sup> AMI Petition at 3.

licensed to it prior to the auction.<sup>32</sup> Petitioners contend that, if the Commission intends to subject incumbents to forfeiture of the entire MTA license, including their existing systems, incumbents will be dissuaded from participating in the auction<sup>33</sup> and non-incumbents will be given an unfair competitive advantage.<sup>34</sup> Geotek states that, absent clarification, an incumbent licensee will be risking substantial capital to bid on the MTA license, as well as its prior investment in the license and facilities associated with its existing system.<sup>35</sup>

30. Southern California Edison Company ("SCE") requests a number of clarifications of the Commission's coverage requirements. First, SCE requests that the Commission clarify Section 90.665(c) to indicate precisely how population coverage will be counted.<sup>36</sup> SCE urges the Commission to choose a geographically determined benchmark, such as the U.S. Census Bureau's census tracts, to allow for more precise computation of population coverage.<sup>37</sup> Otherwise, SCE contends, since county population is essential to calculating MTA population, an MTA licensee may provide coverage to one corner of a county and claim credit for the entire county.<sup>38</sup> SCE predicts that the failure to clarify population computation methodology will result in protracted disputes between MTA license holders and the Commission.<sup>39</sup> Second, SCE requests that the Commission indicate precisely which edition and population table of *Rand McNally's Commercial Atlas and Marketing Guide* the Commission will use to determine whether an MTA licensee has complied with Section 90.665(c), a clarification which SCE deems critical in view of the five years that have passed since the last U.S. Census.<sup>40</sup> Third, SCE requests clarification of the coverage rule to indicate that MTA licensees must meet coverage requirements regardless of the percentage of the MTA population already served by incumbent licensees.<sup>41</sup>

31. Discussion. We will retain the coverage requirements outlined in Section

---

<sup>32</sup> Petition for Reconsideration of Geotek Communications, Inc., filed June 5, 1995, at 8-9; Petition for Reconsideration and Clarification of RAM Mobile Data USA Limited Partnership, Inc., filed June 5, 1995, at 5.

<sup>33</sup> RAM Petition at 5.

<sup>34</sup> Geotek Petition at 9; RAM Petition at 5.

<sup>35</sup> Geotek Petition at 8.

<sup>36</sup> Petition for Clarification of the Southern California Edison Company, filed June 5, 1995, at 6-7.

<sup>37</sup> *Id.*

<sup>38</sup> SCE Petition at 6.

<sup>39</sup> SCE Petition at 7.

<sup>40</sup> SCE Petition at 7.

<sup>41</sup> SCE Petition at 8.

90.665(c), which require 900 MHz MTA licensees to provide coverage to one-third of the population of their service area within three years of initial license grant and to two-thirds of the population of their service area within five years or, at the five year mark, to submit a showing of substantial service. We are convinced that these benchmarks are not too stringent, particularly in light of the "substantial showing" mechanism designed for specialized users, who may not be able to meet the two-thirds requirement due to individualized circumstances. We will review these showings on a case-by-case basis. We believe that any winning MTA bidder should have the ability to meet these coverage requirements.

32. The percentage of population served by the incumbent in a DFA is a factor that MTA bidders will have to take into account in determining whether and how it will meet the coverage requirements of a particular MTA on which it seeks to bid. We expect bidders to have a realistic plan for meeting coverage requirements, by investigating the possibility of resale, affiliation with other bidders, or buyouts of incumbents. Those with an interest in serving only part of an MTA also are free to enter into private contractual arrangements with the MTA licensee. If a bidder expects that it will not be able to reach an agreement with an incumbent, that factor should be considered in the bidding strategy. Developing separate coverage requirements for the portions of the MTA that currently are unserved by incumbents is tantamount to establishing the 900 MHz SMR auction as an "unserved area" auction. That principle is at odds with the Commission's policy for the 900 MHz SMR service of providing the system user with ubiquitous regional coverage.<sup>42</sup> Therefore, we disagree with PCIA and AMI regarding coverage requirements. We will not condition compliance with Section 90.665(c) on the success (or lack thereof) of the MTA's licensee's ability to reach a satisfactory agreement with the incumbent. Thus, the MTA licensee must meet these coverage requirements regardless of the presence of an incumbent licensee.

33. We do, however, agree with RAM and Geotek and will modify Section 90.665(d) to state that an MTA licensee who also is the incumbent within the MTA will not forfeit the entire MTA for failure to meet coverage requirements. Such licensees will forfeit only the spectrum gained in the MTA license, and not the spectrum to which it originally was licensed as the incumbent in the DFA (including any secondary sites that have achieved primary status). In other words, only the right to use channels any place in the MTA will be forfeited, but any channels for which individual sites were constructed and operating prior to auction will be retained by the MTA licensee.

34. Finally, in response to SCE's request, we will use the 1992 edition of *Rand McNally's Commercial Atlas and Marketing Guide* (which is based on the April 1, 1990 U.S. Census) in determining whether the licensee has met its coverage requirement. Under our standard, a licensee will not be able to claim coverage of an entire county if it covers only a small portion of the county. As discussed at ¶ 112, *infra*, the Commission will provide, by Public Notice, population information corresponding to each MTA, which also will be used to

---

<sup>42</sup> See *Competitive Bidding Third Report and Order* at ¶ 13.

calculate the upfront payment.

## **B. Treatment of Incumbents**

### **1. MTA Licensee's Interference Protection Obligations to Incumbents**

35. Background. The Commission stated in the *Second R&O and Second Further Notice*, that MTA licensees will be required to afford interference protection to incumbent SMR systems, as provided in Section 90.621(b), in one of three ways: (1) By locating their stations at least 113 km (70 miles) from any incumbent's facilities; (2) by complying with the co-channel separation standards in the short-spacing rule (§ 90.621(b)(4)), if they seek to operate stations located less than 113 km from an incumbent's facilities; or (3) by negotiating an even shorter distance with the incumbent licensee.<sup>43</sup>

36. Petitions. Geotek requests that the Commission require the MTA licensee to comply with the minimum distance criteria without short spacing in order to avoid having the MTA licensee contain the growth of an incumbent's geographic service area.<sup>44</sup> Geotek notes that this is of particular concern in markets in which an incumbent operates with few or one transmitter(s) and the MTA licensee surrounds the incumbent, thereby preventing the incumbent from making modifications or supplementing its service.<sup>45</sup> Geotek claims that allowing the incumbents more flexibility will reduce the Commission's involvement in co-channel disputes.<sup>46</sup>

37. Discussion. We will retain the rule as adopted. Geotek has not presented a sufficient justification to warrant our elimination of the short-spacing option in defining the MTA licensee's interference obligations. We find no merit to Geotek's claim that short-spaced MTA licensees will "box in" incumbents, as we have considered and rejected similar arguments in the past. When we developed the short-spacing table in the *Report and Order* for PR Docket 93-60,<sup>47</sup> Fleet Call (now Nextel) argued that the short-spacing table would impede the development of wide-area digital SMR systems. We denied this request and decided that the use of the short-spacing table offered a balance between increased spectrum efficiency, adequate co-channel protection and administrative convenience.<sup>48</sup> We continue to

---

<sup>43</sup> *Second R&O and Second Further Notice* at ¶ 44.

<sup>44</sup> Geotek Petition at 5-6.

<sup>45</sup> *Id.* at 5.

<sup>46</sup> *Id.* at 6.

<sup>47</sup> Co-Channel Protection Criteria for Part 90, Subpart S Stations Operating above 800 MHz, *Report and Order*, PR Docket No. 93-60, 8 FCC Rcd 7293 (1993) at ¶¶ 11,12 and n. 20.

<sup>48</sup> *Id.* at 13.

believe the use of the short-spacing table will afford maximum flexibility to the MTA licensee, will allow incumbents to fill in "dead spots,"<sup>49</sup> and still will protect the incumbent licensee from actual interference. Considering the likelihood that incumbent licensees will bid on the MTAs that surround their systems, we believe that the short-spacing option will not result in a plethora of interference disputes to be resolved by the Commission.

## 2. Incumbents' Interference Protection Obligations to MTA Licensee

38. Background. In the *Second R&O and Second Further Notice*, the Commission defined the incumbent licensee's existing service area by its originally-licensed 40 dBu median field strength contour.<sup>50</sup> We rejected commenters' suggestions that we use the 22 dBu contour as an incumbent's protected service area, because we have consistently applied the 40 dBu signal strength contour to incumbent operations.<sup>51</sup> We noted that incumbents would be able to add new transmitters in their existing service area as long as they did not expand their original 40 dBu signal strength contour.<sup>52</sup> We also required incumbents to notify the Commission of any changes in technical parameters or the construction of additional stations with a minor modification application.<sup>53</sup> We stated our intention to allow incumbents to continue existing operations without harmful interference and to give them flexibility to modify or augment their system without encroaching on the MTA licensee's operations.<sup>54</sup>

39. Petitions. Several petitioners urge the Commission to reconsider its rejection of the 22 dBu contour as the definition of an incumbents' service area. Geotek contends that the 40 dBu contour is too restrictive, and suggests that the Commission use the 40 dBu contour to define the incumbent's protected contour while allowing modifications within the 22 dBu contour.<sup>55</sup> Geotek states that the proposed modifications would neither offer incumbents any more interference protection than they would receive under the current rules, nor expand incumbents' service area.<sup>56</sup> RAM insists that the 22 dBu contour definition enhances an incumbent's operational flexibility and ability to serve more effectively customers in its

---

<sup>49</sup> "Dead spots" are those areas where theoretically there should be enough signal/field strength to provide good service to the area, but due to any of a variety of reasons (e.g., high skyscrapers blocking the signal, mountain ranges shading the signal, etc.), the field strength in that region is insufficient to provide good service.

<sup>50</sup> *Second R&O and Second Further Notice* at ¶ 46.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at ¶ 47.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Geotek Petition at 2-4; RAM Comments on Petition for Reconsideration at 2.

<sup>56</sup> Geotek Petition at 4.

service area without impinging on the adjacent MTA licensee's operations.<sup>57</sup> AMTA suggests that the Commission allow incumbents to implement additional or modified facilities at any site that does not expand the 22 dBu contour of an existing site, which facilities would not have to be protected from interference from subsequently granted MTA licenses.<sup>58</sup> AMTA claims that incumbents could cover what otherwise would be "dead spots" without adversely affecting the MTA licensee.<sup>59</sup> RAM also submits an engineering statement purporting to show many instances in which existing systems have added new sites to intensify coverage of already-served areas or fill in "dead spots," which extends the 40 dBu contour but does not increase the interference contour.<sup>60</sup>

40. RAM also argues that the Commission should grant wide-area licenses to incumbents, rather than site-by-site licensing.<sup>61</sup> RAM contends that, to give existing licensees flexibility to operate within their protected areas, the Commission should allow incumbents to trade in their site-specific licenses for a wide-area license, demarcated by the aggregate of the 40 dBu contours around each of the incumbent's contiguous sites operating in the same ten-channel block.<sup>62</sup> RAM suggests that where the incumbent does not apply for, or does not win, the MTA license, it should be able to trade in its "site-by-site" licenses for a license that accurately reflects the 40 dBu contour to which it is now entitled.

41. Discussion. We are not persuaded to change our determination to use the 40 dBu contour to define an incumbent's service area in which they can make modifications without Commission action, rather than the 22 dBu contour, as petitioners request. As RAM points out, we recognized in the *Second R&O and Second Further Notice* that there would be instances where the 40 dBu contour could be expanded without expanding the 22 dBu contour<sup>63</sup> and that it would occur infrequently. RAM does not dispute this conclusion, nor has it submitted new information or raised new arguments that would persuade us to change our initial determination. We continue to believe that the use of the 40 dBu contour to determine the protected service area strikes the most reasonable balance between the rights of the incumbent to add sites within its protected contour and the interest of prospective MTA licensees in obtaining clear spectrum. However, we will modify incumbent notification

---

<sup>57</sup> RAM Petition at 3.

<sup>58</sup> Petition for Partial Reconsideration and Clarification of American Mobile Telecommunications Association, filed June 5, 1995, at 11.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 4.

<sup>61</sup> RAM Petition at 2; RAM Comments on Petition for Reconsideration at 3.

<sup>62</sup> RAM Petition at 2.

<sup>63</sup> *Id.*

requirements. All incumbents are prohibited from expanding their 40 dBu field strength contours. Therefore, we will not require incumbents who are making modifications to their systems within the 40 dBu signal strength contour to notify the Commission of modifications to their facilities. Elimination of the notification requirement in Section 90.667(a) of the Commission's Rules will reduce administrative burdens on incumbents without increasing problems of signal interference.

42. We will grant RAM's request to allow incumbents to have their licenses reissued if they are not the successful bidder for the MTA in which they are currently operating. This procedure, which would be granted post-auction upon the request of the incumbent, would essentially convert their current site licenses to a single "partitioned" license, authorizing operations throughout the contiguous and overlapping 40 dBu signal strength contours of the multiple sites. Incumbents seeking reissued "partitioned" licenses, however, will have to make a one-time filing of specific information for each of their external base sites that will assist the staff in updating the Commission's database after the close of the 900 MHz SMR auction. We believe that facilities added or modified without prior approval or subsequent notification under these new sections will not receive interference because they will be indirectly protected by the presence of surrounding stations of the same licensee on the same channel or channel block. If incumbents seek to gain additional geographic coverage beyond the 40 dBu protected contour, they must apply for the MTA license.

### C. Secondary Site Licensing

43. Background. In the *Order on Reconsideration*<sup>64</sup> in this docket, we stated our intention to continue authorizing secondary sites, because it would allow incumbents, many of whom will seek to become MTA licensees, to continue building out their systems and provide service to consumers.<sup>65</sup> We also reasoned that such continued authorizations in advance of MTA licensing would not contribute to spectrum contamination, because such sites are not entitled to interference protection from MTA licensees, and would have to discontinue operations that interfere with MTA-licensed operations.<sup>66</sup> In the *Second R&O and Second Further Notice*, the Commission decided to afford primary site protection to secondary site applications filed on or before August 9, 1994, but stated that any applications filed after that date would continue to be authorized on a secondary site basis.<sup>67</sup> In adopting Section 90.667(b), the Commission also affirmed its intention not to authorize any secondary sites

---

<sup>64</sup> Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services, *Order on Reconsideration*, GN Docket No. 93-252, 10 FCC Rcd 1568 (1995) at ¶ 5.

<sup>65</sup> *Order on Reconsideration* at ¶ 4.

<sup>66</sup> *Id.* at ¶ 5.

<sup>67</sup> *Second R&O and Second Further Notice* at ¶ 53.

once the MTA licensee has been selected.<sup>68</sup>

44. Petitions. AMTA and RAM now request that the Commission continue to grant applications for secondary sites after an MTA license has been granted.<sup>69</sup> RAM argues that the restriction in Section 90.667(b) conflicts with the Commission's objective of affording flexibility to incumbents, and that the continued licensing of such sites will not compromise the MTA licensing process.<sup>70</sup>

45. Advanced Mobilecomm, Inc. ("AMI") and PCIA request that the Commission clarify one aspect of our decision to afford primary site status to secondary site authorizations which were licensed, or for applications that were filed, on or before August 9, 1994. Specifically, Petitioners request that the Commission require that such secondary sites (which have since been granted primary status) nevertheless should be required to take into account the original primary sites of incumbent licensees in adjacent markets.<sup>71</sup> In particular, Advanced Mobilecomm points to the Los Angeles and San Diego co-channel systems, where the distance between sites is minimal.<sup>72</sup> Advanced Mobilecomm also requests that the Commission reaffirm the special requirements for transmitters south of 33° 45' Latitude serving the Los Angeles DFA to protect subsequent grants in San Diego.<sup>73</sup>

46. Discussion. We deny AMTA and RAM's request regarding post-auction secondary site licensing. No secondary site licenses will be granted once an MTA licensee has been selected. Notwithstanding the secondary nature of these sites, we believe it is important to assure potential MTA bidders that the spectrum upon which they are bidding will not become subsequently encumbered with secondary sites. We believe the better approach is to require an incumbent to negotiate with the MTA winner for the right to build additional secondary sites *after* the MTA licenses have been awarded, rather than to subject the MTA winners at the outset to potential disputes with incumbents on issues such as whether a particular secondary site will cause actual interference. Considering the proximity of the 900 MHz auction, we believe this approach provides the proper balance between the interest of the MTA bidders in assessing the value of the MTA, and the interest of the incumbent in building out its system.

47. We reiterate the special requirements for transmitters serving the Los Angeles

---

<sup>68</sup> 47 C.F.R. § 90.667(b).

<sup>69</sup> AMTA Petition at 11-12; RAM Petition at 4.

<sup>70</sup> RAM Petition at 4.

<sup>71</sup> Advanced Mobilecomm Petition at 4-5; PCIA Petition at 8.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 5 n.6.

DFA. In a 1986 Public Notice, the Commission stated that licensees serving the Los Angeles DFA that employ base station transmitters located on Santiago Peak and other peaks located south of 33° 45' North Latitude have special conditions attached to their licenses requiring that they protect subsequent grants to licensees that serve the San Diego DFA.<sup>74</sup>

#### **D. Finders' Preference Program**

48. DW Communications, Inc. ("DW") and AMTA request that the Commission modify Section 90.667 to include licenses granted through the finders' preference program as incumbents entitled to co-channel interference protection.<sup>75</sup> Section 90.173(k) of the Commission's rules describes the Commission's "finders' preference program," which provides that an applicant finding unused spectrum will receive a dispositive preference for use of a channel in the 900 MHz band on an exclusive basis.<sup>76</sup> DW, a finders' preference licensee, is particularly concerned that, without such clarification, it would not be considered an incumbent and its primary site authorization would be only secondary in nature.<sup>77</sup> AMTA, going one step further, states that, to the extent the Commission retains the finders' preference program, it should exempt finders' preference licenses from the August 9, 1994 primary status cut-off requirement.<sup>78</sup>

49. We will clarify Section 90.667 to include successful applicants for a finders' preference as "incumbents" within the meaning of the rule. As such, they will be entitled to co-channel protection from an MTA licensee. In response to AMTA's request, the Commission has stated that the function of finders' preference mechanisms with respect to CMRS services will be addressed in a future rule making proceeding.<sup>79</sup> While the broad issue of finders' preferences will be addressed in that proceeding, we are eliminating it immediately for the 900 MHz SMR service. The Commission will no longer accept finders' preference applications following the adoption of this *Order*.<sup>80</sup> The MTA licensee will have the

---

<sup>74</sup> Private Land Mobile Application Procedures for Spectrum in the 896-901 MHz and 935-940 MHz Bands, *Public Notice*, released November 4, 1986, at 7-8.

<sup>75</sup> Petition for Reconsideration of DW Communications, Inc., filed May 19, 1995, at 3-5; AMTA Petition at 9-10.

<sup>76</sup> 47 C.F.R. § 90.173(k).

<sup>77</sup> DW Petition at 3-4.

<sup>78</sup> AMTA Petition at 10.

<sup>79</sup> *CMRS Third Report and Order* at ¶ 398.

<sup>80</sup> The imposition of this freeze is procedural in nature and therefore is not subject to the notice and comment and effective date requirements of the Administrative Procedure Act (APA). *See Kessler v. FCC*, 326 F.2d 673 (D.C. 1963). Furthermore, good cause exists for noncompliance with these APA requirements. Adherence to the notice and comment and effective date requirements in this matter would be contrary to the

exclusive right to recover unconstructed or non-operational channels on blocks for which it is licensed.

### E. Loading Requirements

50. Background. In the *Third Report & Order* in GN Docket No. 93-252 ("*CMRS Third Report & Order*"), we declined to apply the loading/automatic cancellation requirement for MTA licensees in the 900 MHz band, but decided to retain the loading requirement for 900 MHz SMR incumbent licensees.<sup>81</sup> On reconsideration, we affirmed our decision in the *CMRS Third Report and Order* to retain the loading requirement for incumbent 900 MHz SMR licensees.<sup>82</sup> We stated three reasons why we were retaining loading requirements for incumbents: (1) We already had granted incumbents an additional two year loading extension;<sup>83</sup> (2) incumbents who could not fulfill loading requirements because they were limited to operating in the DFAs now can obtain an MTA license; and (3) the public interest is not served by allowing an incumbent who does not obtain the MTA license to retain spectrum that it has been unable to utilize fully for seven years.<sup>84</sup> However, we did grant temporary relief in the form of a waiver from the loading rules to RAM until 30 days after the completion of the 900 MHz auction, based on the unique circumstances of RAM's substantially-constructed wide area network.<sup>85</sup> Recently, the Wireless Telecommunications Bureau granted the same type of temporary relief to Celsmer, which demonstrated that it had constructed a virtually seamless wide area network in Florida, that already is operating and serving customers.<sup>86</sup>

51. Petitions. Several petitioners once again request that the Commission eliminate the five-year loading rule for all 900 MHz SMR systems. AMTA, PCIA and Celsmer take issue with the Commission's justification that 900 MHz SMR is "less mature" than the 800

---

public interest because compliance would undercut the purposes of the freeze.

<sup>81</sup> *CMRS Third Report & Order* at ¶ 194. The loading rule, 47 C.F.R. § 90.631(i), requires that each applicant for a trunked system certify that a minimum of 70 mobiles for each channel authorized will be placed in operation within five years of the initial license grant (with the exception of the two-year renewal provided in subsection (i)); otherwise authorizations cancel automatically.

<sup>82</sup> *Second R&O and Second Further Notice* at ¶ 57.

<sup>83</sup> See Amendment of Section 90.631 of the Commission's Rules and Regulations Concerning Loading Requirements for 900 MHz Trunked SMR Stations, *Report and Order*, PR Docket No. 92-17, 7 FCC Rcd 4914 (1992).

<sup>84</sup> *Second R&O and Second Further Notice* at ¶ 57.

<sup>85</sup> *Second R&O and Second Further Notice* at ¶¶ 58-59.

<sup>86</sup> Celsmer Request for Waiver of 47 C.F.R. § 90.631 Loading Standards for 900 MHz SMR Licensees, *Order*, DA 95-1537, released July 10, 1995.

MHz SMR service, for which no loading requirements were retained,<sup>87</sup> and AMTA points to PCS as an even newer service for which there are no loading requirements.<sup>88</sup> AMTA, PCIA and Advanced Mobilecomm argue that maintaining loading requirements for incumbent 900 MHz SMR systems, while eliminating the requirements for other services, does not promote regulatory symmetry.<sup>89</sup> PCIA and Advanced Mobilecomm argue that the MTA licensee has greater rights than the incumbent, with respect not only to loading but with respect to station cancellation, whereby the incumbent's unused channels revert to the MTA licensee.<sup>90</sup> Celsmer, PCIA and Advanced Mobilecomm contend that not all incumbents, particularly independent operators, have the means to solve their loading problem by obtaining the MTA license.<sup>91</sup> Celsmer, PCIA and Advanced Mobilecomm blame regulatory delay in concluding the 900 MHz "Phase II" licensing proceeding for licensees' inability to build out their systems.<sup>92</sup> As an alternative, AMTA requests that the Commission grant a limited waiver of the loading requirements similar to that granted to RAM.<sup>93</sup>

52. DW contends finders' preference licensees that have received grants in 1995 should be specifically exempt from loading requirements.<sup>94</sup> While DW concedes that loading requirements are justified with respect to 900 MHz SMR licenses granted in 1987, DW also points out that 800 MHz SMR licensees that were granted on or after June 1, 1993, are not subject to loading requirements.<sup>95</sup> Therefore, to achieve regulatory symmetry with the 800 MHz SMR service, DW requests that the Commission amend Section 90.631(i) to exempt licensees of primary 900 MHz SMR stations whose initial licenses were granted after June 1, 1993.

53. Discussion. We have considered this issue fully in both the *CMRS Third Report and Order* and the *Second R&O and Second Further Notice*. Petitioners have raised no arguments that would persuade us to reconsider our determination to retain loading requirements for incumbent 900 MHz SMR licenses. The 900 MHz SMR service has a

---

<sup>87</sup> AMTA Petition at 7-8; Celsmer Petition at 2; PCIA Petition at 3.

<sup>88</sup> AMTA Petition at 7-8.

<sup>89</sup> AMTA Petition at 6-7; PCIA Petition at 4; Advanced Mobilecomm at 8.

<sup>90</sup> PCIA Petition at 4; Advanced Mobilecomm Petition at 8-9 (citing *Second R&O and Second Further Notice* at ¶ 57); RAM Comments on Petition for Reconsideration at 3.

<sup>91</sup> Celsmer Petition at 3; PCIA Petition at 5; Advanced Mobilecomm at 6-7.

<sup>92</sup> Celsmer Petition at 2; PCIA Petition at 3, 5; Advanced Mobilecomm Petition at 7-8.

<sup>93</sup> AMTA Petition at 7 n.13 and 8.

<sup>94</sup> DW Petition at 5.

<sup>95</sup> See 47 C.F.R. § 90.631(b).

unique history, in that the Commission has, at the request of the SMR industry, substantially extended the deadline for loading systems.<sup>96</sup> It simply does not serve the public interest to allow licensees, who have had a full seven years to load their system, to retain that spectrum.<sup>97</sup> Although finders' preference licensees may not have had seven years in which to meet the requirements, they will still be subject to loading requirements as incumbent licensees. Such finders' preference licensees will have seven years from their license grant to comply with the loading requirements.<sup>98</sup> We reemphasize that every incumbent, including a finders' preference licensee, has the opportunity to bid for an MTA license, for which it will have no loading requirements. Thus, we are not convinced that incumbents should be entitled to relief from this requirement. Nor are we convinced that every incumbent is entitled to temporary relief, such as that granted to both RAM and Celsmer. However, we will entertain waiver petitions and determine, on a case-by-case basis, whether a licensee, who bears the burden of proof, has made a showing justifying why loading standards should not apply to its unique situation.

### G. Discontinuance of Operation

54. Background. Section 90.931(f) provides that if a station is not placed in operation within one year, its license cancels automatically. Prior to the *Second R&O and Second Further Notice*, the rule also provided that SMR licensees which had discontinued operations for more than 60 consecutive days were considered permanently discontinued, unless the Commission received prior notification. If the Commission rejected the licensee's justification, the licensee was required to resume operations within five days. In the *Second R&O and Second Further Notice*, the Commission modified Section 90.631(f) to permit licensees to discontinue operations for 90 continuous days without being considered permanently discontinued, and removed any provision for licensees to request an additional extension of this period.<sup>99</sup>

55. Discussion. AMTA and Nextel request that the Commission specify that the 12-month period continues to govern SMR stations discontinued before the effective date of the rule, and that the 90-day period applies prospectively to stations discontinued after the

---

<sup>96</sup> See Amendment of Section 90.631 of the Commission's Rules and Regulations Concerning Loading Requirements for 900 MHz Trunked SMR Stations, *Report and Order*, PR Docket No. 92-17, 7 FCC Rcd 4914 (1992).

<sup>97</sup> Contrary to AMTA's argument, the coverage and construction goals for the PCS service are fairly stringent. See 47 C.F.R. §§ 24.103(c) and 24.203(b).

<sup>98</sup> See 47 C.F.R. §§ 90.173(k) and 90.631(b) and (i).

<sup>99</sup> *Second R&O and Second Further Notice* at ¶ 26; 47 C.F.R. § 90.631(f).

effective date of the rule.<sup>100</sup> We agree that SMR stations that were taken out of service before the effective date of the new rule would not be governed by the 90-day requirement.

56. With regard to wide-area SMR licensees that are replacing high power analog sites with low power digital sites, however, we will deem all the base stations that comprise the system "in operation" if the system meets the standards set out in *Fleet Call, Inc.*<sup>101</sup> In *Fleet Call*, the Commission waived the one-year construction requirement so that Fleet Call (now Nextel) could convert its existing base stations with aggregate loading from single high-power sites to multiple low-power sites on an integrated basis in six major markets.<sup>102</sup> It is established that permitting SMR licensees to undergo conversion to multiple low power sites increases spectrum efficiency, and poses little risk of spectrum warehousing. The conversion process does, however, result in intervals when, for example, high powered base stations are taken out of operation in order to bring low-power digital sites on-line. As a result, we will view the entire wide-area system as "operating" if, consistent with *Fleet Call*, particular base stations of the system have discontinued operation as part of the conversion to low power digital sites.

#### H. Foreign Ownership Waivers

57. Background. In Section 332(c)(6) of the Act,<sup>103</sup> Congress reclassified certain categories of private land mobile radio providers ("PLMRS") as commercial mobile radio service ("CMRS") providers, and provided for their treatment as common carriers. As a result, reclassified providers are subject to the Section 310(b) foreign ownership restrictions applicable to common carriers.<sup>104</sup> Congress provided for limited grandfathering of existing foreign interests in such licensees through a waiver petition process, whereby any reclassified PLMRS licensee could petition the Commission by February 10, 1994 for waiver of the application of Section 310(b) to any foreign ownership that lawfully existed as of May 24, 1993. The *CMRS First Report and Order* established the specific waiver petition procedure. In the *Second R&O and Second Further Notice*, pursuant to a request from Geotek, the Commission decided to grandfather any timely-filed petitions for waiver of the foreign

---

<sup>100</sup> AMTA Petition at 12-13; Nextel Petition at 2-4. The rule became effective on June 5, 1995. See 60 F.R. 22023 (May 4, 1995).

<sup>101</sup> *Fleet Call, Inc., Memorandum Opinion and Order*, 6 FCC Rcd 1533 (1991), *recon. dismissed*, 6 FCC Rcd 6989 (1991) (*Fleet Call*).

<sup>102</sup> *Id.* at 1536 ¶ 26. See also Letter from Ralph A. Haller, Chief, Private Radio Bureau to David Weisman, DA 92-1734, 8 FCC Rcd 143 (*Weisman Letter*).

<sup>103</sup> 47 U.S.C. § 332(c)(6).

<sup>104</sup> 47 U.S.C. § 332(c)(6); See also Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services, *First Report and Order*, GN Docket No. 93-252, 9 FCC Rcd 1056 (1994) (*CMRS First Report & Order*) at ¶¶ 2-3.

ownership restrictions filed by an incumbent in the event the incumbent wins the MTA license.<sup>105</sup>

58. Petitions. Geotek now requests that the Commission extend that grandfathered status to *any* 900 MHz SMR MTA license that an incumbent may acquire, not just the MTA in which the applicant is also the incumbent.<sup>106</sup> In other words, Geotek requests that the grandfathered status apply to the licensee, not the license.<sup>107</sup> Geotek contends that such an interpretation would be consistent with common carrier precedent regarding waivers, and is a proper reading of Section 332(c)(6).<sup>108</sup> Geotek, however, does not cite to any specific Commission precedent in this area. Geotek also points out that the Commission's interpretation would prohibit reclassified CMRS providers from holding common carrier licenses, including microwave or other such licenses used to link base station facilities in the MTA.<sup>109</sup>

59. Discussion. Geotek asks the Commission not only to apply its waiver to other licenses in the same service, but also to other licenses it may acquire in different services. With respect to Geotek's first request, we note that since Geotek filed its petition for reconsideration in this proceeding, the Wireless Telecommunications Bureau has resolved 33 requests for waiver of Section 310(b), including that filed by Geotek.<sup>110</sup> We do not address Geotek's first request here as it is an issue discussed in petitions for reconsideration filed in the Bureau's proceeding. We note, however, that in light of the Bureau's decision, Geotek may bid in the upcoming auction. In the *Foreign Ownership Order*, the Bureau granted Geotek's petition, among others,<sup>111</sup> noting that the waivers apply to additional licenses granted to petitioners in the same service after May 24, 1993 and prior to August 10, 1996, provided the same ownership structure is maintained.<sup>112</sup> Thus, the Bureau held that such entities may acquire other SMR licenses, including MTA licenses in which it is not the incumbent. The Bureau stated that this decision was consistent with Congressional intent in grandfathering the foreign ownership interests of reclassified licensees and provided greater flexibility for the

---

<sup>105</sup> *Second R&O and Second Further Notice* at ¶ 71.

<sup>106</sup> Geotek Petition at 6.

<sup>107</sup> Geotek Petition at 8.

<sup>108</sup> Geotek Petition at 6-7.

<sup>109</sup> Geotek Petition at 7.

<sup>110</sup> Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services -- Foreign Ownership Waiver Petitions, *Order*, GN Docket No. 93-252, DA 95-1303, released June 12, 1995 (*Foreign Ownership Order*) (petition(s) for recon. pending).

<sup>111</sup> *Id.* at ¶ 9.

<sup>112</sup> *Id.* at ¶ 10.