until full payment is made. In the unlikely event that there is more than one bid withdrawal on the same license, we will hold each withdrawing bidder responsible for the difference between its withdrawn bid and the amount of the winning bid the next time the licenses are offered for auction by the Commission.

220. These payment requirements will discourage default and ensure that bidders meet all eligibility and qualification requirements. If a default or disqualification involves gross misconduct, misrepresentation or bad faith by an applicant, the Commission may declare the applicant and its principals ineligible to bid in future auctions, and may take any other action that it deems necessary, including institution of proceedings to revoke any existing licenses held by the applicant.

221. If the EA license winner defaults, is otherwise disqualified after having made the required down payment, or the license is terminated or revoked, then the Commission will re-auction the license. If the default occurs within five business days after the bidding has closed, the Commission retains the discretion to offer the license to the second highest bidder at its final bid level, or if that bidder declines the offer, to offer the license to other bidders (in descending order of their bid amounts) at the final bid levels. If only a short time has passed since the initial auction, the Commission may choose to offer the license to the highest losing bidders if the cost of running another auction exceeds the benefits.

### 4. Regulatory Safeguards

#### a. Rules Prohibiting Collusion

222. Background. In the *Competitive Bidding Second Report and Order*, as modified by the *Competitive Bidding Reconsideration Order*, we adopted special rules prohibiting collusive conduct in the context of competitive bidding.[521] In the *Further Notice*, we proposed to apply these rules prohibiting collusion to the 800 MHz SMR service.[522] Our rules prevent parties from agreeing in advance to bidding strategies that divide the market according to their strategic interests and/or disadvantage other bidders. Bidders will be required to (i) disclose all parties with whom they have entered into any agreement that relates to the competitive bidding process, and (ii) certify they have not entered into any explicit or implicit agreements, arrangements, or understandings with any parties, other than those identified, regarding the amount of their bid, bidding strategies, particular properties on which they will

[521] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2386-2388, ¶¶ 221-226; Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Second Memorandum Opinion and Order*, 9 FCC Rcd 7245, 7253-54, ¶¶ 48-53 (*Competitive Bidding Reconsideration Order*), *Erratum*, PP Docket No. 93-253, released October 19, 1994.

[522] *Further Notice*, 10 FCC Rcd at 8012, ¶ 86.

or will not bid or any similar agreement.[523]

223. Comments. IC&E supports adoption of the Commission's collusion rules.[524] IC&E and Dial Call contend that the rules should have sufficient flexibility to allow formation of bidding consortia, partnerships or other arrangements prior to auctions.[525] Genesee, on the other hand, expresses concern that wide-area operators not be permitted to utilize 800 MHz SMR auctions as a mechanism to combine their holdings.[526]

224. Discussion. We will subject 800 MHz SMR licensees to the reporting requirements and rules prohibiting collusion embodied in Sections 1.2105 and 1.2107 of the Commission's rules. Bidders will be required by Section 1.2105(a)(2) to identify on their FCC Form 175 applications all parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements or understandings which relate to the competitive bidding process. If parties agree in principle on all material terms, those parties must be identified on the short-form application, even if the agreement has not been reduced to writing.[527] Only at such level of agreement can it be fairly stated that the parties have entered into a bidding consortium or other joint bidding arrangement. If the parties have not agreed in principle by the short-form filing deadline, an applicant would not include the names of those parties on its application, and may not continue negotiations with those parties. Bidders will be required to certify that they have not entered and will not enter into any explicit or implicit agreements, arrangements or understandings with any parties, other than those identified, regarding the amount of their bid, bidding strategies or the particular properties on which they will or will not bid. In this connection, any communications between EA bidders and incumbent licensees should take place prior to the deadline for filing FCC Form 175 applications.

225. After the FCC Form 175 filing deadline, applicants may not discuss the substance of their bids or bidding strategies with bidders, other than those identified on their FCC Form 175 application, that are bidding in the same license areas, *i.e.*, EAs.[528] This prohibition on discussions extends to providing indirect information that affects bids or

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[523] *Id.*

[524] IC&E Reply Comments at 12-13.

[525] IC&E Reply Comments at 12-13; Dial Call Reply Comments at 14.

[526] Genesee Comments at 5.

[527] *See* 47 CFR § 1.2105(c).

[528] 47 CFR § 1.2105(c)(1); *Competitive Bidding Fourth Memorandum Opinion and Order*, 9 FCC Rcd at 6868.

bidding strategy.[529] For example two applicants not listed on each other's FCC Form 175 applications for the 800 MHz SMR auctions may not discuss bids or bidding strategies with each other if they are bidding for licenses in any of the same EAs, even if they are not bidding for the same spectrum blocks.

226. Section 1.2105(c), however, provides certain exceptions to the rule prohibiting discussions with other applicants after the filing of the short-form application. First, applicants may make agreements to bid jointly for licenses, so long as the applicants have not applied for licenses in any of the same license areas.[530] Second, an applicant may modify its short-form application to reflect formation of bidding agreements or changes in ownership at any time before or during the auction, as long as the changes do not result in change of *de jure* or *de facto* control of the applicant, and the parties forming the bidding agreement have not applied for licenses in any of the same license areas.[531] Finally, a holder of a non-controlling attributable interest in an applicant may acquire an ownership interest in, or enter into a bidding agreement with other applicants in the same license area, if (1) the owner of the attributable interest certifies that it has not communicated and will not communicate bids or bidding strategies of more than one of the applicants in which it holds an attributable interest or with which it has a bidding agreement; and (2) the arrangements do not result in any change of control of the applicant.[532] However, once the short-form application has been filed, a party with an attributable interest in once bidder may not acquire a controlling interest in another bidder bidding for licenses in any of the same license areas.

227. Where the applicant does not meet one of these exceptions, it may not discuss matters relating to bidding with other applicants. Even when an applicant has withdrawn its application after the short-form filing deadline, the applicant may not enter into a bidding agreement with another applicant bidding on authorizations in the license areas from which the first applicant withdrew.[533]

228. If an applicant has the high bid for a license, Section 1.2107(d) requires the applicant to include with its long-form application a detailed explanation of the terms and conditions and parties involved in any bidding consortia, joint venture, partnership or other agreement or arrangement it had entered into relating to the competitive bidding process prior

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[529]*See* Letter to R. Michael Senkowski from Rosalind K. Allen, Acting Chief, Commercial Radio Division, released Dec. 1, 1994.

[530]47 CFR § 1.2105(c)(2).

[531]47 CFR § 1.2105(c)(2).

[532]47 CFR § 1.2105(c)(4).

[533]*Competitive Bidding Fourth Memorandum Opinion and Order*, 9 FCC Rcd at 6867.

to the time bidding was completed.[534] Under the Commission's rules prohibiting collusion, the term "applicant" includes the entity submitting the application, owners of 5 percent or more of the entity, and all officers and directors of such entity.[535]

229. We note that even where the applicant discloses parties with whom it has reached on agreement on the short-form application, thereby permitting discussions with those parties, the applicant nevertheless is subject to existing antitrust laws.[536] As discussed in the *Competitive Bidding Fourth Memorandum Opinion and Order*, under the antitrust laws, the parties to an agreement may not discuss bid prices if they have applied for licenses in the same license area. In addition, agreements between actual or potential competitors to submit collusive, non-competitive or rigged bids are *per se* violations of Section One of the Sherman Antitrust Act.[537] Further, actual or potential competitors may not agree to divide territories horizontally in order to minimize competition, regardless of whether they split a license area in which they both do business, or whether they merely reserve one license area for one and another for the other.[538]

230. We note that where specific instances of collusion in the competitive bidding process are alleged during the petition to deny process, we may conduct an investigation or refer such complaints to the United States Department of Justice for investigation. 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 their 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.[539]

### b. Transfer Disclosure Requirements

231. Background. In Section 309(j)(4)(E) of the Communications Act, Congress directed the Commission to "require such transfer disclosures and anti-trafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits."[540] In the *Competitive Bidding Second*

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[534] 47 CFR § 1.2107(d).

[535] 47 CFR § 1.2105(c)(6)(i).

[536] *Competitive Bidding Fourth Memorandum Opinion and Order*, 9 FCC Rcd at 6869, n.134.

[537] *Id.*

[538] *Id.*

[539] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2388, ¶ 226.

[540] 47 U.S.C. § 309(j)(4)(E).

*Report and Order*, the Commission adopted safeguards designed to ensure that the requirements of Section 309(j)(4)(E) are satisfied. We decided that it was important to monitor transfers of licenses awarded by competitive bidding to accumulate the necessary data to evaluate our auction designs and to judge whether "licenses [have been] issued for bids that fall short of the true market value of the license."[541] Therefore, we imposed a transfer disclosure requirement on licenses obtained through the competitive bidding process, whether such licenses were held by a designated entity or not. We proposed in the *Further Notice* to adopt the transfer disclosure requirements of Section 1.2111(a) of our Rules to all 800 MHz SMR licenses obtained through the competitive bidding process.[542]

232. Comments. Pittencrief agrees with the Commission's proposal. Pittencrief believes that such provisions will help deter submission of speculative applications and assist the Commission in identifying real-party-in-interest concerns.[543] Genesee, however, supports a three-year ownership requirement.[544]

233. Discussion. We believe that a three-year holding period is unnecessary. In other auctionable services, we have required holding periods only in limited circumstances. For example, our broadband PCS rules require those successful bidders benefitting from special provisions for designated entities to hold their licenses for a certain period of time and restrict the type of transfers and assignments of such licenses during that time.[545] As discussed *infra*, we are not adopting special provisions for designated entities on the upper 10 MHz block of 800 MHz SMR spectrum. When we have not established special provisions for designated entities in other auctionable services, we generally have required only disclosure of certain information regarding transfers or assignments within the first three years after initial license grant. We conclude that this is the most appropriate course of action here. Thus, we will apply Section 1.2111(a) to all 800 MHz SMR licenses obtained through the competitive bidding process. Generally, licensees transferring their licenses within three years after the initial license grant will be required to file, together with their transfer applications, the associated contracts for sale, option agreements, management agreements, and all other documents disclosing the total consideration received in return for the transfer of their licenses.[546] We will give particular scrutiny to auction winners who have not yet begun

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[541] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2385, ¶ 214 (quoting H.R. Rep. No. 103-111 at 257).

[542] *Further Notice*, 10 FCC Rcd at 8011, ¶ 84.

[543] Pittencrief Comments at 19.

[544] Genesee Comments at 5.

[545] *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5583, ¶ 117.

[546] If potential assignors document total consideration for the license transfer, they have met the transfer disclosure requirements.

commercial service and who seek approval for a transfer of control or assignment of their licenses within three years after the initial license grant, so that we may determine if any unforeseen problems relating to unjust enrichment have arisen.

#### c. Performance Requirements

234. Background. The Communications Act requires the Commission to "include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services."[547] In the *Competitive Bidding Second Report and Order*, we decided it was unnecessary and undesirable to impose additional performance requirements, beyond those already provided in the service rules, for all auctionable services.[548] In the *Further Notice*, we did not propose to adopt any additional performance requirements for competitive bidding purposes.[549]

235. Comments. Genesee suggests imposition of a performance bond of $5,000 per channel for the five-year term of the license to ensure that the successful wide-area applicant will construct and operate over the term of the license. Genesee further suggests that an additional penalty of a mandatory six-month imprisonment should be imposed for falsifying reports and status to the Commission.[550]

236. Discussion. We disagree with Genesee's suggestion that additional performance requirements are necessary for the 800 MHz SMR service. The service rules for the upper 10 MHz block contain specific performance requirements, such as the requirement to construct within a specific period of time, channel construction requirements, and interim coverage requirements. Because the failure to meet these requirements will result in automatic cancellation of the EA license, we believe this is a sufficient incentive to promote prompt service and prevent spectrum warehousing. Thus, we will not adopt any performance requirements for the 800 MHz SMR service beyond those required by Section 90.685.[551]

### C. Treatment of Designated Entities

#### 1. Overview, Objectives, and the Impact of *Adarand Constructors v. Peña*

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[547] 47 U.S.C. § 309(j)(4)(B).

[548] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2386, ¶ 219.

[549] *Further Notice*, 10 FCC Rcd at 8012, ¶ 85.

[550] Genesee Comments at 4.

[551] *See* 47 CFR § 90.685 (Appendix A)

237. Overview and Objectives. The Communications Act provides that, in developing competitive bidding procedures, the Commission shall consider various statutory objectives and consider several alternative methods for achieving them. Specifically, the statute provides that in establishing eligibility criteria and bidding methodologies the Commission shall "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people 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."[552] Small businesses, rural telephone companies and businesses owned by minorities and/or women are collectively referred to as "designated entities."[553] Section 309(j)(4)(A) provides that in order to promote the Communications Act's objectives, the Commission shall "consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods . . . and combinations of such schedules and methods."[554] The Communications Act also requires 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."[555]

238. In our initial implementation of Section 309(j) of the Communications Act, we established in the *Competitive Bidding Second Report & Order* eligibility criteria and general rules that would govern the special measures available for designated entities.[556] We also identified several measures, including installment payments, spectrum set-asides, and bidding credits, from which we could choose in establishing special provisions for designated entities in the auction process. 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.

239. To meet the statutory objectives of providing opportunities for designated entities, we have employed a wide range of special provisions and eligibility criteria in other

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[552] 47 U.S.C. § 309(j)(3)(B).

[553] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2388, ¶ 227.

[554] 47 U.S.C. § 309(j)(4)(A).

[555] 47 U.S.C. § 309(j)(4)(D).

[556] *See Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2388-2393, 2395-2398, ¶¶ 227-251, 266-288. *See also Competitive Bidding Reconsideration Order*, 9 FCC Rcd at 2359-2376, ¶¶ 64-165.

spectrum-based services.[557] 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 impeded opportunities for designated entities. After examining the record in the Competitive Bidding proceeding in PP Docket 93-253, we established provisions to enable designated entities to overcome the barriers to accessing capital in each particular service. Moreover, these provisions were designed to increase the likelihood that designated entities who win licenses in the auctions become strong competitors in the provision of wireless services.

240. Impact of *Adarand Constructors, Inc. v. Peña*. In the broadband PCS docket, we determined that, on separate entrepreneurs' blocks, the bidding credits would vary according to the type of designated entity that applied (*i.e.*, a small business would receive a 10 percent bidding credit, a business owned by minorities or women would receive a 15 percent bidding credit, and a small business owned by women or minorities would receive an aggregated bidding credit of 25 percent),[558] and all entrepreneurs' block licensees would be eligible for varying degrees of installment payments.[559] The Commission adopted special provisions for businesses owned by members of minority groups or women and analyzed their constitutionality using the "intermediate scrutiny" standard of review articulated in *Metro Broadcasting v. FCC*,[560] because, as in *Metro Broadcasting*, the proposed provisions involved Congressionally-mandated benign race- and gender-conscious measures.[561]

241. After the release of the *Further Notice*, the Supreme Court decided *Adarand*

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[557]For instance, we determined that minority-owned and women-owned businesses in the nationwide narrowband PCS auction would receive a 25 percent bidding credit on certain channels. *Competitive Bidding Third Report and Order* at ¶ 72. In the regional narrowband PCS auction women-owned and minority-owned businesses would receive a 40 percent bidding credit on certain channels and small businesses would be eligible for installment payments on all channels. *Id.* at ¶ 87; Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Third Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, 10 FCC Rcd 175 (1994) (*Competitive Bidding Third Memorandum Opinion & Order & Further Notice*) at ¶ 58. For the Interactive Video and Data Service (IVDS), we adopted a 25 percent bidding credit for one license in each market for women-owned and minority-owned businesses and installment payments for small businesses. Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Fourth Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2330 (1994) (*Competitive Bidding Fourth Report & Order*) at ¶¶ 39, 53.

[558]*Competitive Bidding Fifth Report & Order* at ¶ 133. *See also* Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403 (1994) (*Competitive Bidding Fifth Memorandum Opinion & Order*) at ¶ 99.

[559]*Competitive Bidding Fifth Memorandum Opinion & Order* at ¶ 103.

[560]497 U.S. 547, 564-65 (1990).

[561]Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Notice of Proposed Rule Making*, PP Docket No. 93-253, 8 FCC Rcd 7635 (1993) at ¶ 73.

*Constructors, Inc. v. Peña*,[562] which overruled *Metro Broadcasting* "to the extent that *Metro Broadcasting* is inconsistent with" the holding in *Adarand* that "all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny."[563] As a result of the *Adarand* decision, the constitutionality of 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.[564] In this connection, the Bureau issued a Public Notice requesting further comment on the effect of the decision in *Adarand* on the proposals made in the *Further Notice* in order to supplement our record in the 800 MHz SMR proceeding.[565] We received three comments in response to the *800 MHz SMR Further Comment Notice*.

### 2. Special Provisions for Designated Entities

242. Background. In instructing the Commission to ensure the opportunity for designated entities to participate in auctions and provision of spectrum-based services, Congress was well aware of the problems that designated entities would have in competing against large, well-capitalized companies in auctions and the difficulties these bidders encounter in accessing capital. For example, the legislative history accompanying Congress's 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."[566] 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."[567] 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."[568]

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[562] 115 S.Ct. 2097 (1995).

[563] *Adarand*, 115 S.Ct. at 2113. *Metro Broadcasting* held that Congressionally-mandated remedial provisions which made distinctions based on race were to be analyzed under an intermediate scrutiny test. *Metro Broadcasting*, 497 U.S. at 564-565.

[564] *Id.*

[565] Public Notice, "Request for Comment in 800 MHz SMR Proceeding," DA 95-1651, released July 25, 1995 (*800 MHz SMR Further Comment Notice*).

[566] House Report at 254.

[567] *Id.*

[568] *Id.* at 255.

243. Consistent with Congress's concern that auctions not operate to exclude small businesses, the provisions relating to installment payments clearly were 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, including those owned by members of minority groups and women."[569] 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."[570]

244. In addition, with regard to access to capital, Congress previously 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."[571] As a result of 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."[572]

245. In the 800 MHz SMR service, as in other auctionable services, we are committed to meeting the statutory objectives of promoting economic opportunity and competition, of avoiding excessive concentration of licenses, and of ensuring access to new and innovative technologies by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. Accordingly, in balancing the objectives set forth in the Communications Act, the *Further Notice* proposed bidding credits and a tax certificate program for businesses owned by women and minorities and installment payments for small businesses on all 800 MHz SMR channel blocks in each MTA.[573]

246. Comments. As a general matter, few commenters addressed our proposals for special provisions for designated entities presented in the *Further Notice*. With respect to our proposed special provisions for businesses owned by minorities and women, some commenters

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[569] *Id.*

[570] *Id.*

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

[572] *Id.* at § 331(b)(2),(3).

[573] In the *Further Notice*, we proposed a tax certificate program for minority- and women-owned businesses under 26 U.S.C. § 1071. *Further Notice*, 10 FCC Rcd at 8013, 8015, ¶¶ 90, 94. Congress subsequently repealed Section 1071. H.R. 831, 104th Cong. 1st Sess. § 2. As a result, we are compelled not to adopt such tax certificate program proposal as part of our 800 MHz SMR rules.

support providing these entities with bidding credits.[574] Their support for these special provisions is based primarily on the fact that they have been available in other CMRS services, *e.g.* broadband PCS.[575] Other commenters oppose providing special provisions to minority- and women-owned entities because: (a) there is too much uncertainty concerning the value of the EA licenses;[576] (b) SMR is a subset of the CMRS marketplace and it is sufficient that special opportunities have been provided for these entities in other CMRS;[577] (c) the constitutionality of such provisions is being challenged and would delay the dissemination of the EA licenses;[578] and, (d) there have been no demonstrated barriers to entry by minority- and women-owned companies in the SMR service.[579]

247. The commenters responding to the *800 MHz SMR Further Comment Notice*, AMTA, Motorola, and Nextel, agree that the Commission should not adopt separate special provisions for minority-owned and women-owned entities that are not small businesses as previously proposed in the *Further Notice*. AMTA indicates that it does not believe that the Commission has a sufficiently "compelling interest" to justify adoption of race- or gender-based measures applicable to the 800 MHz SMR service in light of *Adarand*.[580] AMTA further indicates that it has been unable to identify any evidence of particularized instances of discrimination in the service because 800 MHz licensing is and has been competitive with non-discriminatory access to system financing.[581] Motorola urges the Commission not to adopt special provisions for minority- and women-owned entities in order to avoid legal challenges based on the *Adarand* decision, because such challenges would serve only to delay the implementation of the Commission's wide-area licensing plan.[582] Motorola also echoes AMTA's statement about the absence of evidence of discrimination in the 800 MHz SMR service.[583] Similarly, Nextel states that there is no evidence of underrepresentation of women and minorities in the 800 SMR business or that women and minorities have experienced

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[574]Morris Comments at 4; Dru Jenkinson, *et al.* Comments at 11-12; Genesee Comments at 4.

[575]*See e.g.*, Dru Jenkinson, *et al.* Comments at 11.

[576]AMI Comments at 10.

[577]Motorola Reply Comments at 11-12; Nextel Comments at 54-55.

[578]AMTA Reply Comments at 32; Dial Call Reply Comments at 13.

[579]Eden Reply Comments at 5.

[580]AMTA Comments at 9-10.

[581]AMTA Comments at 10-14.

[582]Motorola Comments at 1-2.

[583]Motorola Comments at 4.

discrimination in obtaining SMR licenses.[584] As a result, Nextel asserts that the Commission's adoption of race- or gender-based special provisions for the 800 MHz SMR service would not be justifiable under a "strict scrutiny" standard of review.[585]

248. Discussion. We conclude that special provisions for small businesses are appropriate for the 800 MHz SMR service because build-out of an EA license may require a significant amount of capital. Although we believe that the 800 MHz SMR service is less capital intensive than PCS, we believe that it is more capital-intensive than the 900 MHz SMR service. We further believe that small entities may be disadvantaged in their efforts of acquiring 800 MHz SMR licenses if required to bid against existing large companies. For instance, if one or more of these big firms targets a market for strategic reasons, there is almost no likelihood that it could be outbid by a small business. We will address this potential outcome in two ways. First, for the upper 10 MHz block, we will adopt the same "tiered" installment payments approach adopted in the 900 MHz SMR service. Specifically, licensees who qualify for installment payments will be entitled to pay their winning bid amount in quarterly installments over the term of the license, with interest charges to be fixed at the time of licensing at a rate equal to the rate for ten-year U.S. Treasury obligations plus 2.5 percent. Small businesses with gross revenues less than $15 million will be required to pay interest only for the first two years of the license term at the same interest rate as set forth above. Interest will accrue at the Treasury note rate plus 2.5 percent. Small businesses with gross revenues less that $3 million will be able to make interest-only payments for five years. Interest will accrue at the Treasury note rate without the additional 2.5 percent. Timely payment of all quarterly installments will be a condition of the license grant, and failure to make such timely payment will be grounds for revocation of the license. As we have noted previously, allowing installment payments reduces the amount of private financing needed by prospective small business licensees and therefore mitigates the effect of limited access to capital by small businesses.[586] In determining eligibility for these installment payment plans, we will not attribute gross revenues of investors that hold less than a 20 percent interest in the applicant, but we will include the gross revenues of the applicant's affiliates and investors with ownership interests of 20 percent or more in the applicant. As has been the case in prior auctions where special provisions for small businesses have been made, it also is our expectation that a qualifying small business or principals of a qualifying small business will retain *de facto* and *de jure* control of the applicant. In determining attribution when 800 MHz SMR licensees are held indirectly through intervening corporate entities, we will use the same multiplier employed for the 900 MHz SMR service.

249. Second, we have proposed additional special provisions for small businesses seeking licenses for the lower 80 and General Category channels in the *Second Further Notice*

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[584]Nextel Comments at 8.

[585]Nextel Comments at 10.

[586]*Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2389, ¶¶ 231-232.

*of Proposed Rule Making*, because we believe that most, if not all, of the incumbent licensees relocated will qualify as small businesses under our proposed definition, and the lower 80 and General Category channels will be the spectrum to which they most likely will be relocated. This approach is consistent with our approach in the broadband PCS context in which we designated certain frequency blocks as "entrepreneurs' blocks" and restricted eligibility based on size limitations.[587] We also believe that the service areas and spectrum blocks for the upper 10 MHz block we adopted in the *First Report and Order* will permit operators of smaller SMR systems to participate in the upper 10 MHz block auction.

250. At this time we conclude that there is an insufficient record to support the adoption of special provisions solely benefitting minority- and women-owned businesses (regardless of size) for the upper 10 MHz block auction. We note, however, that in the *Second Further Notice of Proposed Rule Making*, we are seeking comment on this issue with respect to the lower 80 and General Category channels.[588] Moreover, we believe that most minority- and women-owned businesses will be able to take advantage of the installment plan described above. We expect that the vast majority of minority and women-owned businesses will be able to qualify as small businesses under any definition we adopt.[589]

### 3. Partitioning

251. Background. Congress directed the Commission to ensure that rural telephone companies have the opportunity to participate in spectrum-based services.[590] In the *Further Notice*, we did not propose any special provisions for rural telephone companies, on the basis that: (1) they, like other wireline carriers, then were ineligible to hold SMR licenses; (2) even if wireline entry into SMR was permitted, we questioned whether special bidding provisions would be necessary to ensure the participation of rural telephone companies in the provision of SMR service given the relatively modest build-out costs involved to serve rural areas; and (3) in view of the fact that rural telephone companies may use their existing infrastructure to support integrated 800 MHz SMR service in their rural service areas, we anticipated that they would have ample opportunity to participate in 800 MHz SMR.[591]

252. Comments. NTCA suggests that rural telephone companies that meet the "small business" definition applicable to the 800 MHz SMR service should benefit from the special

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[587] *See Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5585, ¶ 121.

[588] *See Second Further Notice of Proposed Rule Making*, ¶ 382, *infra*.

[589] *Id.*

[590] *See* 47 U.S.C. § 309(j)(4)(D).

[591] *Further Notice*, 10 FCC Rcd at 8017-8018, ¶¶ 100-101.

provisions afforded to other small businesses.[592] NTCA also contends that rural telephone companies should receive the right to partition.[593] OPASTCO argues that providing special benefits to rural telephone companies in the 800 MHz SMR spectrum auctions will help to ensure that rural communities receive wireless services.[594] Pittencrief, on the other hand, believes that the record does not support special treatment for rural telephone companies.[595]

253. Discussion. Since adoption of the *Further Notice*, rural telephone companies have gained eligibility to hold SMR licenses.[596] Thus, we conclude that rural telephone companies will be permitted to acquire partitioned EA licenses in either of two ways: (1) they may form bidding consortia to participate in auctions, and then partition the licenses won among consortia participants; and (2) they may acquire partitioned 800 MHz SMR licenses from other licensees through private negotiation and agreement either before or after the auction. Each member of a consortium will be required to file a long-form application, following the auction, for its respective mutually agreed-upon geographic area. Partitioned areas must conform to established geo-political boundaries (such as county lines), and each area must include all portions of the wireline service area of the rural telephone company applicant that lie within the EA service area. We also will use the definition for rural telephone companies used in our broadband PCS and 900 MHz SMR rules.[597] Thus, rural telephone companies will be defined as "local exchange carriers having 100,000 or fewer access lines, including all affiliates."[598] In the *Second Further Notice of Proposed Rule Making*, we seek comment on our proposal to extend the partitioning option to SMR licensees generally.

### 4. Set-Aside Spectrum

254. Background. In the *Further Notice* we expressed our concern, based on our experience with PCS, that designated entities may have difficulties competing for 800 MHz

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[592]NTCA Comments at 5.

[593]OPASTCO Comments at 7.

[594]Pittencrief Comments at 19-20.

[595]DCL Associates Comments at 8.

[596]In re *Eligibility for the Specialized Mobile Radio Services and Radio Services in the 220-222 MHz Land Mobile Band and Use of Radio Dispatch Communications, Report and Order,* GEN Docket No. 94-90, FCC 95-98 (March 7, 1995).

[597]*See, e.g., Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5615, ¶ 193.

[598]*Id.* Note that this definition has been modified from the *Competitive Bidding Second Report and Order* where rural telephone companies were defined as companies having no more than 50,000 access lines, including all affiliates. *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2397, ¶ 282.

SMR licenses against large firms with significant financial resources.[599] We tentatively concluded, however, that it would not be feasible to designate a wide-area spectrum block as an entrepreneurs' block because the large number of incumbents already licensed throughout the spectrum designated for wide-area licensing make it virtually impossible to identify a suitable block.[600]

255. Comments. Several commenters oppose establishment of an entrepreneurs' block in the 800 MHz SMR service.[601] CellCall and AMTA agree with the Commission's tentative conclusion that it would not be feasible to establish an entrepreneurs' block in the 800 MHz SMR service given the extensive licensing in the service.[602] Pittencrief contends that since local channels will continue to be used by small businesses, it would be unnecessary for the Commission to superimpose a preference structure on such spectrum for their benefit.[603] Other commenters, however, believe that an entrepreneurs' block should be established in the 800 MHz band.[604] SBA contends that only if the Commission, for technical reasons, is unable to develop an entrepreneurs' block in the upper 10 MHz block, should it nominate the lower 80 channels for designated entities.[605] Dru Jenkinson, *et al.* disagree with the Commission's tentative conclusion and argue that if the Commission does not establish an entrepreneurs block within the upper 10 MHz block of 800 MHz SMR spectrum, then all lower 80 channels should be established as an entrepreneurs' block.[606] Assuming that an entrepreneurs' block is established in the upper 10 MHz block, Dru Jenkinson, *et al.* and the SBA contend that it should consist of at least one 2.5 MHz block of spectrum.[607]

256. Discussion. We will not adopt an entrepreneurs' block in the upper 10 MHz block of 800 MHz SMR spectrum. We conclude that an entrepreneur's block in this portion of 800 MHz SMR spectrum is not feasible, given the substantial number of licensees already licensed on such spectrum. However, we are interested in ensuring that small businesses have

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[599] *Further Notice*, 10 FCC Rcd at 8018-8019, ¶ 104.

[600] *Id.*

[601] AMI Comments at 10; AMTA Reply Comments at 33; CellCall Comments at 29; Pittencrief Comments at 20.

[602] CellCall Comments at 29; AMTA Reply Comments at 33.

[603] Pittencrief Comments at 20.

[604] DCL Associates Comments at 7; Dru Jenkinson *et al.* Comments at 5; Gulf Coast Comments at 2; the SBA Comments at 15.

[605] SBA Comments at 15.

[606] Dru Jenkinson, *et al.* Comments at 5.

[607] Dru Jenkinson, *et al.* Comments at 4; SBA Comments at 13-14.

a meaningful opportunity to continue to participate in the provision of 800 MHz SMR service. Thus, in the *Second Further Notice of Proposed Rule Making* we seek additional comment on whether designation of an entrepreneurs' block for other 800 MHz spectrum would be feasible.

## VI. SECOND FURTHER NOTICE OF PROPOSED RULE MAKING

257. In this *Second Further Notice of Proposed Rule Making*, we seek comment on disaggregation of channel blocks and partitioning on the upper 200 channels of 800 MHz SMR spectrum, certain aspects of mandatory relocation as adopted in the *First Report and Order*, and eligibility of Basic Exchange Telecommunications Radio Service (BETRS) operators for certain upper 200 channels. With respect to our mandatory relocation plan, we propose to adopt a plan for sharing the costs of relocating systems licensed and operating on the upper 200 channels. Our proposal would establish a mechanism whereby EA licensees that incur costs to relocate incumbents would receive reimbursement for a portion of those costs from other EA licensees that also benefit from the resulting clearance of the spectrum. We seek comment on the desirability of establishing a cost-sharing mechanism for incumbent relocation and on the specifics of this proposal. We also seek comment on the definition of "comparable facilities" and "good faith negotiations," and the interrelation between the two concepts.

258. In addition, we propose to adopt service and competitive bidding rules for the lower 80 SMR channels and the General Category channels, which we have redesignated for exclusive SMR use. We seek comment on the specific proposals set forth herein.

### A. Disaggregation of Channel Blocks on the Upper 200 Channels of 800 MHz SMR Spectrum

259. Background. In the *Further Notice*, we asked commenters to address whether licensees should be allowed to sublicense portions of larger blocks instead of aggregating smaller blocks.[608]

260. Comments. Total Com, AMTA, AMI and Motorola contend that EA licensees should be permitted to sublicense portions of their spectrum blocks.[609] Motorola argues that allowing sublicensing on a spectrum basis would allow excess spectrum capacity to be made available for alternative uses and provide small SMR licensees with the opportunity to participate in the provision of wide-area service at levels commensurate with their business

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[608] *Further Notice*, 10 FCC Rcd at 7985, ¶ 22.

[609] Total Com Comments at 5; AMTA Reply comments at 32; Motorola Reply Comments at 10; AMI *Ex Parte* Comments at 3; PCIA *Ex Parte* Comments at 6.

and customer interests and their financial resources.[610] AMTA argues that such sublicensing should be permitted as long as construction and coverage requirements are satisfied, because such an approach would encourage development of bidding consortia of smaller operators, which otherwise might be incapable of participating in the competitive bidding process.[611] Parkinson, *et al.* express concern that, by allowing sublicensing, an incumbent's operations unfairly and unreasonably would be restricted by the EA licensee.[612]

261. Discussion. Given the extensive incumbent presence in the upper 10 MHz block of the 800 MHz SMR spectrum, we tentatively conclude that EA licensees should be permitted to disaggregate their spectrum blocks. We believe that this additional tool will enable EA licensees to manage their spectrum blocks more effectively and efficiently.[613] We further believe that disaggregation not only will facilitate the coexistence of EA licensees and incumbents in the upper 200 channels, but also will result in the most efficient use of the 800 MHz SMR spectrum. We seek comment on this tentative conclusion.

262. As a general matter, we believe that any disaggregation agreements must comply with the Commission's pro-competitive policies. We propose that spectrum covered by an EA license may be sublicensed in either of two ways: (1) a group of licensees or entities may form bidding consortia to participate in auctions, and then disaggregate or partition the EA license(s) won among consortia participants; and (2) an EA licensee, through private negotiation and agreement before or after the auction, may elect to disaggregate or partition its spectrum block. We seek comment on this proposal.

263. Although we are interested in affording EA licensees optimal flexibility for spectrum management, we nonetheless do not want to undermine our goal to facilitate an effective and efficient wide-area licensing scheme. We ask commenters to discuss the conditions under which EA licensees should be permitted to disaggregate their spectrum blocks. Should EA licensees be required to retain a specified portion of their spectrum block, and if so, what is an appropriate amount? In addition, should there be a minimum amount of spectrum that EA licensees must disaggregate in order to utilize this spectrum management tool? Should geographic area licensees be permitted to disaggregate only after they have satisfied applicable construction and coverage requirements? We also ask commenters to discuss any other type of considerations applicable to disaggregation.

### B. Partitioning on the Upper 200 Channels of 800 MHz SMR Spectrum

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[610]Motorola Reply Comments at 10.

[611]AMTA Reply Comments at 32.

[612]Parkinson, *et al.* Comments at 10.

[613]As discussed at ¶ 258, *infra*, we also seek comment on whether geographic area licensees should be afforded the additional spectrum management tool of partitioning, which is the equivalent of sublicensing on a geographic basis.

264. Background. In the *Eighth Report and Order*, *supra*, we adopt a partitioning option for rural telephone companies.

265. Comments. Nextel contends that smaller, local operators wishing to participate in wide-area service could become involved through arrangements with the EA licensee to partition its service area.[614]

266. Proposal. We tentatively conclude that partitioning should be an option not only for rural telephone companies but also for incumbents and eligible SMR licensees generally. We tentatively conclude that extending the partitioning option will further the goal of Section 309(j) in the dissemination of licenses to a variety of licensees because small businesses will have additional flexibility and opportunities to serve areas in which they already provide service, while the remainder of the service area could be served by other providers.

267. We propose that SMR licensees be permitted to acquire partitioned EA licenses in either of two ways: (1) they may form bidding consortia to participate in auctions, and then partition the licenses won among consortia participants; or (2) they may acquire partitioned 800 MHz SMR licenses from other licensees through private negotiation and agreement either before or after the auction. Each member of a consortium would be required to file a long-form application, following the auction, for its respective mutually agreed-upon geographic area. We propose that partitioned areas be required to conform to established geo-political boundaries (such as county lines). We further propose that these entities be subject to the same interim coverage and channel use requirements as EA licensees with respect to the geographic areas covered by their partitioned authorizations. We seek comment on our proposals and tentative conclusions and any alternatives.

268. As a general matter, we believe that any partitioning agreement must comply with the Commission's pro-competitive policies. We ask commenters to discuss the conditions under which EA licensees should be permitted to partition their service areas to other SMR licensees. Should EA licensees be required to retain a specified portion of their service area, and if so, what is an appropriate amount? Should geographic area licensees be permitted to partition only after they have satisfied applicable construction and coverage requirements? We also ask commenters to discuss any other type of considerations applicable to partitioning.

### C. Mandatory Relocation in the Upper 200 Channels

#### 1. Distributing Relocation Costs Among EA Licensees

269. In the *First Report and Order*, *supra*, we determined that EA licensees must notify incumbents operating on the upper 200 channels of their intention to relocate such incumbents within 90 days of the release of the Public Notice commencing the voluntary

[614]Nextel Comments at 22-23; *see also* AMI *Ex Parte* Comments at 3.

negotiation period. We also determined that any incumbent licensee who has been so notified may require all EA licensees in whose spectrum blocks it operates to negotiate collectively with the incumbent. Because an incumbent licensee can compel simultaneous negotiations with all affected EA licensees, we tentatively conclude that the elaborate cost-sharing plan proposed for broadband PCS is unnecessary for the 800 MHz SMR service. Therefore, we propose to require EA licensees to share the relocation costs on a pro rata basis (based on the actual number of the incumbent's channels located in the EA licensees' respective spectrum blocks), unless all such licensees agree to a different cost-sharing arrangement. We believe that this approach would enhance significantly the speed of relocation given that incumbent licensees most likely will elect to negotiate with EA licensees collectively rather than individually to accommodate system-wide relocation agreements. This would in turn result in faster delivery of wide-area SMR service to the public. We seek comment on our tentative conclusions and on the advantages and disadvantages of our cost-sharing proposal.

### 2. Relocation Costs

270. *Compensable Costs.* As we indicated in the *PCS Cost-Sharing Notice*, when relocation will benefit multiple licensees, the issue arises as to what relocation costs should be shared by the benefitting licensees. Relocation costs can be divided roughly into two categories: (1) the actual cost of relocating an incumbent licensee to comparable facilities, and (2) payments above the cost of providing comparable facilities, also referred to as "premium payments."

271. Comments. Louisville believes that relocation costs should include expenses for: engineering, equipment, labor, construction, testing, FCC application fees, local fees, additional recurring operating costs, pay for lost time, cost analysis, frequency coordination, and any other expenses incurred by the incumbent as long as the expenses were caused by the new facilities not being comparable with the old facilities and they occurred within one year after the incumbent took control of the new facilities.[615] Clarus argues that expenses paid by the EA licensee should include administrative costs and any loss of goodwill that the incumbent might suffer.[616] Nextel believes that all out-of-pocket costs associated with retuning should be borne by the auction winner, such costs include those covered by the Commission's Emerging Technologies relocation plan.[617]

272. Proposal. We tentatively conclude that premium payments should not be reimbursable, because such payments are likely to be paid by EA licensees to accelerate relocation so that they can be the first licensee in the market area to implement wide-area SMR service. Because other EA licensees have not received the corresponding advantage of

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[615]Louisville *Ex Parte* Comments at 12-13; *see also* US Sugar Comments at 7-8; Kay Reply Comments at 2.

[616]Clarus *Ex Parte* Comments at 2-3.

[617]Nextel Comments at 34-35.

being first to market and did not actively participate in the relocation negotiations, we do not believe that such licensees should be required to contribute to premium payments. We therefore propose to limit the calculation of reimbursable costs for the 800 MHz SMR service to actual relocation costs, unless the EA licensees involved mutually and expressly agree to share any premium payments. We tentatively conclude that "actual relocation costs" would include, but not be limited to: SMR equipment; towers and/or modifications; back-up power equipment; engineering costs; installation; system testing; FCC filing costs; site acquisition and civil works; zoning costs; training; disposal of old equipment; test equipment; spare equipment; project management; and site lease negotiation. We request comment on this proposal. We also ask commenters to address any additional costs they believe should be reimbursable and a supporting rationale for such treatment.

273. *Creation of Reimbursement Rights.* We tentatively conclude that an EA licensee who negotiates a relocation agreement that benefits one or more other EA licensees should obtain a right to reimbursement of a share of the relocation costs. We seek comment on how such rights should be created procedurally. We believe that some form of reimbursement rights should be conferred on EA licensees so that it will be possible to enforce the right to reimbursement and collect reimbursement from other EA licensees. We seek comment on these tentative conclusions and any alternatives.

274. *Payment.* We seek comment on when reimbursement payments should be due. Specifically, we ask commenters to address whether such payments should be due when the benefitting EA licensee begins to use the particular frequency or when the EA licensee commences testing of its wide-area system in the EA.

275. *Dispute Resolution Issues.* Comments. PCIA, AMI, and Motorola all argue that the Commission should establish a mediation mechanism to resolve disputes.[618] PCIA believes that the EA winner should pay for the mediation unless the mediator finds that the incumbent is not acting in good faith.[619] If mediation is not successful, Motorola and PCIA believe that the Commission should resolve the dispute.[620]

276. Proposal. We tentatively conclude that incumbents and EA licensees should attempt to resolve disputes arising over the amount of reimbursement required, in the first instance, amongst themselves. We encourage parties to use expedited alternative dispute resolution ("ADR") procedures, such as binding arbitration or mediation. We seek comment on this proposal and on any other mechanisms that would expedite resolution of these disputes should they arise.

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[618]PCIA *Ex Parte* Comments at 10; AMI *Ex Parte* Comments at 7; Motorola *Ex Parte* Comments at 4-5.

[619]PCIA *Ex Parte* Comments at 10.

[620]Motorola *Ex Parte* Comments at 5; PCIA *Ex Parte* Comments at 18-19.

277. Similarly, to the extent that disputes arise between incumbents and EA licensees over relocation negotiations (including disputes over the comparability of facilities and the requirement to negotiate in good faith), we also encourage parties to use alternative dispute resolution techniques.[621] We believe such techniques are an appropriate first step during both the voluntary and mandatory negotiation periods. We emphasize again that resolution of such disputes entirely by our adjudication processes would be time consuming and costly to all parties.

278. We also seek comment on whether either the industry trade associations or the FCC's Compliance and Information Bureau should be designated as arbiters for such disputes. We ask commenters to discuss the advantages and disadvantages of such designations as well as suggested dispute resolution procedures in the event that they were so designated. In addition, we seek comment on whether failure to comply with the relocation obligations or requirements should be taken into consideration by the Commission when deciding on renewal or transfer of control or assignment applications.

### 3. Comparable Facilities

279. Background. Under the mandatory relocation scheme we adopt in the *First Report and Order*, we require EA licensees to provide incumbents with "comparable facilities" as a condition for involuntary relocation. In the broadband PCS context, we also adopted a mandatory relocation scheme in which PCS licensees are required to provide microwave incumbents with comparable facilities as a condition for involuntary relocation.[622] Although we have not adopted a definition of comparable facilities in the broadband PCS context, we have indicated that we generally require that comparable facilities be equal to or superior to existing facilities.[623] We also indicated that we would consider, *inter alia*, system reliability, speed, bandwidth, throughput, overall efficiency, bands authorized for such services, and interference protection in making a determination regarding comparability.[624] In the *Further Notice*, we asked commenters to discuss the meaning of comparable facilities in the 800 MHz

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[621] *See* Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in which the Commission is a Party, *Initial Policy Statement and Order*, 6 FCC Rcd at 5669 (1991). Information regarding the use of alternative dispute resolution is available from the Commission's Designated ADR Specialist, ADR Program, Office of the General Counsel, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

[622] *See* 47 CFR § 94.59(c)(3).

[623] *See* Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, ET Docket No. 92-9, *Third Report and Order and Memorandum Opinion and Order*, 8 FCC Rcd 6589, 6603-04, ¶¶ 35-36 (1993) (*Emerging Technologies Third Report and Order*). *But see* Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, WT Docket No. 95-157, *Notice of Proposed Rule Making*, FCC 95-426, released October 13, 1995, (*PCS Cost-Sharing Notice*).

[624] *Emerging Technologies Third Report and Order*, 8 FCC Rcd at 6603-04, ¶¶ 35-36.

SMR context.[625]

280. Comments. Some commenters suggest, as a general matter, that a comparable system is one that is as good as or superior to the incumbent's existing system.[626] The majority of commenters attempt to define comparable facilities by specifying what would need to be provided to the incumbent being relocated. These commenters argue that comparable facilities would include: (1) the same number of channels as are currently held by the incumbent;[627] (2) the retuned frequencies being compatible in a multi-channel system at the incumbent's current location;[628] (3) the retuned frequencies not having any co-channel licensees within the EA;[629] (4) incumbents having 70-mile co-channel interference protection;[630] (5) base station equipment being modified to operate on the retuned frequencies;[631] (6) all user units and user control units being reprogrammed or recrystallized to the retuned frequencies (or, if modification of the incumbent's equipment is not possible, the EA licensee would be required to provide new equipment);[632] (7) the incumbent's "retuned" system providing the same, if not superior, performance as the incumbent's existing system[633] operating at the same antenna height,[634] and with the same power[635] and interference

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[625]*See Further Notice*, 10 FCC Rcd at 7992, ¶ 36.

[626]*See e.g.* PCIA *Ex Parte* Comments at 14; AMI *Ex Parte Comments* at 9-10; Motorola *Ex Parte* Comments at 3-4.

[627]AMTA Reply Comments at 22-23; PCIA *Ex Parte* Comments at 14; AMI *Ex Parte* Comments at 9-10; AMTA *Ex Parte* Comments at 3; Clarus *Ex Parte* Comments at 2-3; FedEx *Ex Parte* Comments at 2; Louisville Ex *Parte* Comments at 13; Motorola *Ex Parte* Comments at 3-4; Nextel *Ex Parte* Comments at 11-12; Southern *Ex Parte* Comments at 13.

[628]PCIA *Ex Parte* Comments at 14; Cumulous Comments at 12-13; AMI *Ex Parte* Comments at 9-10; Clarus *Ex Parte* Comments at 2-3; FedEx *Ex Parte* Comments at 2; Motorola *Ex Parte* Comments at 3-4.

[629]PCIA *Ex Parte* Comments at 14; AMI *Ex Parte* Comments at 9-10.

[630]PCIA *Ex Parte* Comments at 14; Dial Call Reply Comments at 8-9; E.F. Johnson Reply Comments at 8-9; Fisher Reply Comments at 8; Motorola Reply Comments at 18-22; Pittencrief at 8.

[631]PCIA *Ex Parte* Comments at 14; AMI *Ex Parte* Comments at 9-10; Louisville *Ex Parte* Comments at 12-13.

[632]Motorola Comments at 16; PCIA *Ex Parte* Comments at 14; AMI *Ex Parte* Comments at 9-10; Louisville *Ex Parte* Comments at 12-13; Motorola *Ex Parte* Comments at 3-4; Fresno *Ex Parte* Comments at 18.

[633]AMTA Reply Comments at 22-23; PCIA *Ex Parte* Comments at 14.

[634]*Id.*; Louisville *Ex Parte* Comments at 13; Mobex *Ex Parte* Comments at 5.

[635]PCIA *Ex Parte* Comments at 14.

protection;[636] and, (8) the same channel separation for the retuned frequencies.[637]

281. Some commenters define "comparable facilities" on the basis of operational characteristics. For example, commenters contend that comparable facilities mean that the incumbent's retuned system should have the same or superior coverage as its existing system.[638] Nextel argues that comparable facilities means having the same 40 dBu contour as the incumbent's current system.[639] Several commenters argue that only other 800 MHz SMR channels could constitute comparable frequencies.[640] In this connection, Spectrum believes that incumbents should be relocated elsewhere on the 800 MHz spectrum or to the 900 MHz spectrum, or the auction winner should buy-out the incumbent's system.[641]

282. PCIA, supported by other commenters, proposes that retuned incumbents receive the following rights and privileges associated with mandatory relocation: (1) the ability to obtain geographic area licenses on retuned channels;[642] (2) protection against being relocated more than once;[643] (3) the right to demand one unified retuning plan from all EA license holders in whose spectrum blocks their frequencies are located;[644] (4) a requirement of "seamless" transition, such that the EA holder would complete retuning before the incumbent

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[636]PCIA *Ex Parte* Comments at 14; Nextel *Ex Parte* Comments at 10-11.

[637]PCIA *Ex Parte* Comments at 14; AMI *Ex Parte* Comments at 9-10; AMTA *Ex Parte* Comments at 3; Hawaiian *Ex Parte* Comments at 2; Louisville *Ex Parte* Comments at 13; Obex *Ex Parte* Comments at 5; Motorola *Ex Parte* Comments at 3-4; Nextel *Ex Parte* Comments at 10-11; Small Business SMR *Ex Parte* Comments at 5.

[638]Motorola Comments at 16; AMTA *Ex Parte* Comments at 3; Centennial *Ex Parte* Comments at 4; Clarus *Ex Parte* Comments at 2-3; FedEx *Ex Parte* Comments at 2; Hawaiian *Ex Parte* Comments at 3; IC&E *Ex Parte* Comments at 4; Louisville *Ex Parte* Comments at 13; Motorola *Ex Parte* Comments at 3-4; Peacock's *Ex Parte* Comments at 3; Southern *Ex Parte* Comments at 13.

[639]Nextel *Ex Parte* Comments at 11-12.

[640]AMTA Reply Comments at 22-23; ABC *Ex Parte* Comments at 1; C & S *Ex Parte* Comments at 2; E.T. Communications *Ex Parte* Comments at 1; Jamestown *Ex Parte* Comments at 1; Lectro *Ex Parte* Comments at 1; Obex *Ex Parte* Comments at 5; Small Business SMR *Ex Parte* Comments at 5; Spectrum *Ex Parte* Comments at 1; *see also* Cumulous Comments at 12-13 (must be in 851-861 MHz bands).

[641]Spectrum Resources Comments at 6-8.

[642]PCIA *Ex Parte* Comments at 8; AMI *Ex Parte* Comments at 5-6; Jamestown *Ex Parte* Comments at 1; Obex *Ex Parte* Comments at 6-7; Small Business SMR *Ex Parte* Comments at 6-7.

[643]Dial Call Reply Comments at 10; PCIA *Ex Parte* Comments at 6; AMI *Ex Parte* Comments at 6; AMTA *Ex Parte* Comments at 3; Motorola *Ex Parte* Comments at 6.

[644]AMTA Reply Comments at 22-23; PCIA *Ex Parte* Comments at 9; AMI *Ex Parte* Comments at 6.

moves;[645] (5) no obligation to cease operations on the original channels unless alternative frequencies are identified and accepted;[646] and, (6) the right to timely notification by the EA licensee that incumbents will be moved.[647] PCIA also suggests that EA licensees be given one year in which to complete retuning, so that incumbents can make future business plans.[648] Several commenters argue that there should be no selective retuning of incumbent channels; rather, all of an incumbent's channels within an EA spectrum block should be retuned.[649] Moreover, several commenters argue that in terms of an EA licensee's relocation obligations, an incumbent system should be defined as all licenses issued to an entity or multiple entities participating in an integrated network.[650] Nextel, on the other hand, contends that selective retuning should be allowed, so long as the channels are "comparable."[651]

283. Proposal. Although we wish to provide parties with sufficient flexibility to negotiate mutually agreeable terms for determining comparability, based on our experience in the broadband PCS context, we tentatively conclude that comparable facilities, at a minimum, should provide the same level of service as the incumbents' existing facilities. We propose that by "comparable facilities," a relocated incumbent would: (a) receive the same number of channels with the same bandwidth; (b) have its entire system relocated, not just those frequencies desired by a particular EA licensee; and, (c) once relocated, have a 40 dBu service contour that encompasses all of the territory covered by the 40 dBu contour of its original system. We believe that this definition will ensure that incumbents' operations will not be adversely affected. We further believe that such definition would not preclude incumbents and EA licensees from negotiating to trade-off any of these system parameters for premium payments or other operational rights which are consistent with our rules. We believe that this flexibility in designing replacement facilities will expedite relocation, given the many variables involved with the system design of each individual system. We seek comment on our proposed definition of and tentative conclusions regarding "comparable

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[645]Dial Call Reply Comments at 9; PCIA *Ex Parte* Comments at 14; AMI *Ex Parte* Comments at 10; Louisville *Ex Parte* Comments at 10; Motorola *Ex Parte* Comments at 3-4; Spectrum *Ex Parte* Comments at 1; US Sugar *Ex Parte* Comments Attachment at 2; Total Com Comments at 8.

[646]PCIA *Ex Parte* Comments at 15; AMI *Ex Parte* Comments at 10; Motorola *Ex Parte* Comments at 5.

[647]AMTA Reply Comments at 21 (notification within six months); PCIA *Ex Parte* Comments at 15 (notification within one year); AMTA *Ex Parte* Comments at 3 (timely notification); CellCall *Ex Parte* Comments at 2 (timely notification); Clarus *Ex Parte* Comments at 2-3 (notification within two to three months).

[648]PCIA *Ex Parte* Comments at 8-9; AMI *Ex Parte* Comments at 5; CellCall *Ex Parte* Comments at 2.

[649]AMTA *Ex Parte* Comments at 3; CellCall *Ex Parte* Comments at 2; Centennial *Ex Parte* Comments at 4; Clarus *Ex Parte* Comments at 2; Hawaiian *Ex Parte* Comments at 3-4; IC&E *Ex Parte* Comments at 4-5; Peacock's *Ex Parte* Comments at 2-3.

[650]Centennial *Ex Parte* Comments at 4; Hawaiian *Ex Parte* Comments at 4; IC&E *Ex Parte* Comments at 4.

[651]Nextel *Ex Parte* Comments at 13.

facilities." We ask commenters to discuss whether the "comparable facilities" definition should include additional operational characteristics, if so, what characteristics should be specified.

284. With respect to old and new SMR equipment, we tentatively conclude that an EA licensee's relocation obligations to an incumbent will not require the EA licensee to replace existing analog equipment with digital equipment when there is an acceptable analog alternative that satisfies the comparable facilities definition. In the event that an incumbent still wishes to obtain digital equipment under these circumstances, we believe that the incumbent should be required to bear the additional costs associated with such an upgrade of its system. Consequently, we propose that under these circumstances, the cost obligation of the EA licensee would be the minimum cost the incumbent would incur if it sought to replace, but not upgrade, its system. However, if an analog alternative fails to meet any of the criteria included in the comparable facilities definition, the incumbent would not be required to accept such an alternative. In those instances in which an incumbent licensee is operating with digital equipment prior to relocation, we tentatively conclude that the incumbent's new system also must be digital, unless the EA licensee and incumbent mutually agree to different terms. We believe that the proposed definition of comparability would facilitate negotiations between incumbents and EA licensees during the voluntary period, because both parties would be better informed about the EA licensees' minimum obligation under our rules. We seek comment on our proposals and tentative conclusions and any alternatives.

### 4. Relocation Guidelines -- Good Faith Requirement During Mandatory Negotiations

285. In the *First Report and Order, supra*, we establish a mandatory relocation mechanism for the upper 10 MHz block. Under this mechanism, incumbents and EA licensees have a one-year voluntary negotiation period during which EA licensees are free to offer incumbents a variety of incentives to expedite relocation. If a relocation agreement is not reached during this period, the EA licensee may initiate a mandatory negotiation period during which the parties are required to negotiate in "good faith".

286. We believe that additional clarification of the term "good faith" will facilitate negotiations and help reduce the number of disputes that may arise over varying interpretations of what constitutes good faith. We tentatively conclude that, for purposes of the mandatory negotiation period, an offer by an EA licensee to replace an incumbent's system with comparable facilities constitutes a good faith offer. Likewise, an incumbent that accepts such an offer presumably would be acting in good faith; whereas, failure to accept an offer of comparable facilities would create a rebuttable presumption that the incumbent is not acting in good faith. Comparable facilities would be limited to actual costs associated with providing a replacement system and would exclude any expenses incurred by the incumbent without securing the approval, in advance, of the EA licensee. We believe that the time for expansive negotiation is during the voluntary negotiation period and that, by the time the