incumbents would not impose any additional operational restrictions on the EA licensee.[266]

84. In addition, several commenters support incorporation of provisions affording incumbent licensees operational flexibility within a defined protected service area.[267] Many of these commenters believe that a fixed-radius protected service area of 30 kilometers would be appropriate.[268] Applied, Dru Jenkinson, *et al.*, and UTC endorse a fixed-radius protected service area of thirty kilometers for existing licensees.[269] Fisher, on the other hand, suggests a 70-mile fixed-radius protected service area for incumbent SMR systems in the 861-865 MHz spectrum block.[270] Lagorio contends that if the Commission adopts a 20-mile standard protected service area for incumbents, it should adopt a 30-mile standard protected service area for licensees having exclusive use of channels in Northern California.[271] AMTA, however, recommends against a fixed-radius definition for the protected service area, because such a standard bears little or no relevance to real-world system service or interference requirements. Instead, AMTA urges the Commission to permit licensees flexibility to deploy their authorized channels as long as they do not expand the 22 dBu contour of the original facility.[272] Other commenters support AMTA's suggested approach.[273]

85. Discussion. We conclude that allowing non-EA licensees to expand their systems at will after wide-area licensing has occurred is not feasible. Such an approach would render wide-area licenses of little value because it would create continuing uncertainty for wide-area applicants and licensees alike about the amount of spectrum available under the license. We believe that restricting incumbents' ability to expand is necessary to balance the interests of EA licensees in building viable systems while allowing the incumbents to continue their

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[266]AMI *Ex Parte* Comments at 3-4.

[267]AMTA Comments at 19; Dru Jenkinson, *et al.* Comments at 8; UTC Comments at 18; American Industrial Comments at 2; API Comments at 8; Applied Comments at 16; Dial Call Comments at 4, 11; Lagorio Comments at 23; Telecellular Comments at 7-8; Total Com Comments at 9; Fisher Reply Comments at 10; Russ Miller Reply Comments at 7.

[268]American Industrial Comments at 2; Applied Comments at 16; Dru Jenkinson, *et al.* Comments at 9; Telecellular Comments at 7-8; UTC Comments at 5; Fisher Reply Comments at 10.

[269]Applied Comments at 16; Dru Jenkinson, *et al.* Comments at 9; UTC Comments at 5.

[270]Fisher Reply Comments at 10.

[271]Lagorio Comments at 23.

[272]AMTA Comments at 20.

[273]ABC Comments at 4-5; B&C Comments at 4-5; Bis-man Comments at 4-5; Bolin Comments at 4-5; Dakota Comments at 5; Deck Comments at 4-5; Diamond "L" Comments at 5; E.T. Communications Comments at 4-5; Keller Comments at 4-5; Morris Comments at 3; Nielson Comments at 4-5; Nodak Comments at 4-5; RCC Comments at 4-5; Raserco Comments at 4-5; Rayfield Comments at 4-5; SMCI Comments at 4-5; Dial Call Comments at 8; Russ Miller Reply Comments at 7; Vantek Comments at 5.

existing operations in the upper 10 MHz block.

86. We nevertheless recognize, as noted by several commenters, that there may be circumstances in which an EA licensee should be required to permit incumbents to make minor alterations to their service areas to preserve the viability of their systems. We also believe that incumbent licensees should be provided with additional operational flexibility. Thus, as recommended by AMTA and a number of other commenters,[274] we will allow an incumbent licensee to make modifications within its current 22 dBu interference contour. Incumbent licensees will be able to add new transmitters in their existing service area, without prior notification to the Commission, *e.g.*, to fill in "dead spots" in coverage or to reconfigure their systems to increase capacity within their service area, so long as their 22 dBu interference contours are not expanded. We reject the suggestion to use a fixed-radius protected service area for existing systems, because we conclude that this measure does not correspond adequately to the market served by 800 MHz SMR providers. We elect to use a 22 dBu criterion, rather than a 40 dBu criterion, because we believe it will give incumbents more operational flexibility without adversely impacting the EA licensee's ability to build a viable wide-area system in the same market. We believe that given the significant incumbent presence in the 800 MHz SMR service, additional operational flexiblity is necessary. An incumbent must, however, still comply with our short-spacing criteria in Section 90.621(b), even if its modifications do not extend its 22 dBu interference contour.

87. Incumbent licensees will be required to notify the Commission of any changes in technical parameters or additional stations constructed, including agreements with an EA licensee to expand beyond their signal strength contour, through a minor modification of their license. These minor modification applications will not be subject to public notice and petition to deny requirements or mutually exclusive applications. We believe that generally restricting incumbents' ability to expand on wide-area spectrum blocks while providing incumbents with limited flexibility to modify their systems strikes a fair balance between the interests of incumbents and geographic area licensees.

88. In addition, similar to our approach in the 900 MHz SMR service, we will allow 800 MHz SMR incumbents who are not relocated to convert their current site-by-site licenses to a single license authorizing operations throughout the incumbents' contiguous and overlapping service area contours of its constructed multiple sites. This option will be granted upon the request of the incumbent after the 90 day period for notification of relocation has passed. Incumbents seeking such reissued licenses, however, must make a one-time filing of specific information for each of their external base station sites to assist the staff in updating the Commission's database after the close of the auction for the upper 10 MHz block of 800

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[274] *See e.g.* ABC Comments at 4-5; B&C Comments at 4-5; Bis-man Comments at 4-5; Bolin Comments at 4-5; Dakota Comments at 5; Deck Comments at 4-5; Diamond "L" Comments at 5; E.T. Communications Comments at 4-5; Keller Comments at 4-5; Morris Comments at 3; Nielson Comments at 4-5; Nodak Comments at 4-5; RCC Comments at 4-5; Raserco Comments at 4-5; Rayfield Comments at 4-5; SMCI Comments at 4-5; Dial Call Comments at 8; Russ Miller Reply Comments at 7; Vantek Comments at 5.

MHz SMR spectrum. We also will require evidence that such facilities are constructed and placed in operation and that, by operation of our rules, no other licensee would be able to use these channels within this geographic area. We note that facilities added or modified that do not extend the 22 dBu interference contour will not require prior approval or subsequent notification under this procedure. Such facilities 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.

5. Co-channel Interference Protection

a. Incumbent SMR Systems

89. Background. In the *CMRS Third Report and Order*, we concluded that, as a general matter, we would retain our existing co-channel protection rules for CMRS licensees. We concluded that geographic area licensees would continue to be subject to existing station-specific interference criteria with respect to all incumbent co-channel stations.[275] Under these rules, a wide-area licensee would be required to afford protection to incumbents, either by locating its stations at least 113 km (70 mi) from the facilities of any incumbent, or by complying with the co-channel separation standards set forth in our "short-spacing" rule if it seeks to operate stations located less than 113 km (70 mi) from an incumbent licensee's facilities.[276]

90. Comments. Numerous commenters support the Commission's proposal.[277] Dru Jenkinson, *et al.* believe that imposing such compliance on geographic area licensees would not unreasonably hamper their ability to fully construct their systems.[278] Genesee agrees to maintenance of 40 dBu protection.[279] Morris recommends that geographic area licensees should not be able to construct facilities within the 22 dBu contour of incumbent co-channel licensees. [280] OneComm believes that establishing co-channel interference requirements to apply at the perimeter of licensed service areas would encourage development of contiguous

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[275]*CMRS Third Report and Order*, 9 FCC Rcd at 8062, ¶ 145.

[276]47 C.F.R. § 90.621(b).

[277]AMI Comments at 5-6; API Comments at 8; DCL Associates Comments at 9-10; Dru Jenkinson, *et al.* Comments at 8; Motorola Comments at 20; Nextel Comments at 47-48; Pittencrief Comments at 9; Coalition Comments at 18; SBA Comments at 30-31; Qualicom Reply Comments at 2; Telecellular Reply Comments at 5-6.

[278]Dru Jenkinson, *et al.* Comments at 8.

[279]Genesee Comments at 3.

[280]Morris Comments at 3; *see also* AMTA *Ex Parte* Comments at 2, Supp.1; Centennial *Ex Parte* Comments at 5; Hawaiian *Ex Parte* Comments at 4-5; IC&E *Ex Parte* Comments at 3; Obex *Ex Parte* Comments at 8; Small Business SMR *Ex Parte* Comments at 8; Southern *Ex Parte* Comments at 13.

spectrum systems and would promote regulatory symmetry with competing CMRS systems.[281]

91. Several commenters contend that short-spacing of incumbents by geographic area licensees should not be allowed.[282] Some of these commenters believe that by allowing short-spacing, the Commission makes the provision of SMR service less financially feasible. They further believe that a more strict separation standard will make it less likely that competing systems will "lock in" co-channel licensees to existing sites.[283] Telecellular, on the other hand, believes that the Commission should maintain its existing short-spacing standards as solid protection for incumbents.[284] Fisher believes that the current co-channel separation rules are too generous.[285] Similarly, Lagorio suggests that the Commission take additional action to prevent the increase of harmful interference between co-channel stations.[286]

92. Discussion. We will require EA licensees to afford interference protection to incumbent SMR systems, as provided in Section 90.621 of the Commission's rules. As a result, an EA licensee must satisfy its co-channel protection obligations with respect to incumbents in one of three ways: (1) by locating its stations at least 113 km (70 miles) from any incumbent's facilities; (2) by complying with our short-spacing rule if it seeks to operate stations less than 113 km from an incumbent's facilities; or, (3) by negotiating an even shorter distance with the incumbent licensee. We conclude that these requirements will ensure adequate protection of incumbent operations, without hampering the ability of EA licensees to construct stations throughout their authorized service areas. We are not persuaded by commenters' suggestions to eliminate the short-spacing rule. We believe that the short-spacing rule offers a balance between increased spectrum efficiency, adequate co-channel protection, and administrative convenience. Moreover, we are not convinced that continued use of the short-spacing rule in the context of a wide-area licensing scheme would result in a plethora of interference disputes to be resolved by the Commission. Rather, we believe that the rule will afford maximum flexibility to EA licensees, allow incumbents to fill in "dead

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[281]OneComm Comments at 25-26.

[282]American Industrial Comments at 2; ABC Comments at 3; B&C Comments at 3; Bis-man Comments at 3; Bolin Comments at 3; Dakota Comments at 3; Deck Comments at 3; Diamond "L" Comments at 3; E.T. Communications Comments at 3; Keller Comments at 3; Nielson Comments at 3; Nodak Comments at 3; RCC Comments at 3; Raserco Comments at 3; Rayfield Comments at 3; SMCI Comments at 3; SMR WON Reply Comments at 11; Total Com Comments at 8; Vantek Comments at 3.

[283]ABC Comments at 3; B&C Comments at 3; Bis-man Comments at 3; Bolin Comments at 3; Dakota Comments at 3; Deck Comments at 3; Diamond "L" Comments at 3; E.T. Communications Comments at 3; Keller Comments at 3; Nielson Comments at 3; Nodak Comments at 3; RCC Comments at 3; Raserco Comments at 3; Rayfield Comments at 3; SMCI Comments at 3; Vantek Comments at 3.

[284]Telecellular Comments at 7.

[285]Fisher Reply Comments at 10.

[286]Lagorio Comments at 19.

spots," and protect incumbent licensees from actual interference.

b. Adjacent EA Licensees

93. Background. In the *CMRS Third Report and Order*, we concluded that the co-channel interference protection obligations of geographic area licensees with respect to other geographic area licensees would be similar to those imposed in the cellular and PCS services.[287] Cellular and PCS licensees are required to comply with interference protection criteria between Commission-defined service areas only at service area borders.[288] In the *Further Notice*, we tentatively concluded, therefore, that wide-area SMR licensees in the 800 MHz band should not be allowed to exceed a signal level of 22 dBuV/m at their service area boundaries (unless they negotiate a different signal strength limit with all potentially affected adjacent licensees).[289]

94. Comments. Genesee, Motorola, and Nextel endorse the Commission's tentative conclusion.[290] Nextel believes that adoption of the indicated standard would provide incentives for cooperation, such as frequency sharing, between neighboring geographic area licensees desiring to extend their service contours to the geographic boundaries of their service areas. Nextel also notes that such an approach is similar to that used in the cellular service, which has worked well.[291]

95. With respect to field strength level at the geographic area licensees' service area borders, Motorola argues that designating 22 dBuV/m at the service boundary will result in a gap in adequate coverage level at the edges of both adjacent service areas. Motorola contends that, as a practical matter, such a requirement will force adjacent geographic area licensees to negotiate different signal levels at their edges, as is done in the cellular service. Despite these concerns, Motorola believes that a 22 dBu contour for the EA license is a reasonable standard for minimization of interference.[292] SMR WON believes that there will be many site-specific licenses that overlap adjacent service areas until the spectrum is cleared. As a result, SMR WON proposes that new operations must not place a 40 dBu signal across a wide-area service border, and also must protect existing site-specific operations to their protected contour areas without using the short-spacing tables. SMR WON also believes that licensees in adjacent wide-area service areas must coordinate to eliminate interference, and work together as they

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[287] *CMRS Third Report and Order*, 9 FCC Rcd at 8062, ¶ 145.

[288] *CMRS Third Report and Order*, 9 FCC Rcd at 8057, ¶ 131.

[289] *Further Notice*, 10 FCC Rcd at 7994, ¶ 41.

[290] Genesee Comments at 3; Motorola Comments at 20; Nextel Comments at 47.

[291] Nextel Comments at 47.

[292] Motorola Comments at 20-21.

relocate incumbent licensees.[293]

96. Discussion. We agree with SMR WON that 40 dBuV/m is an appropriate measure for the desired signal level at the service area border. We will prohibit EA licensees from exceeding a signal level of 40 dBuV/m at their service area boundaries, unless all bordering EA licensees agree to a higher field strength. We also will require coordination of frequency use between co-channel adjacent EA licensees and all other affected parties. This approach provides EA licensees with a signal strength level sufficient to operate their systems up to the borders of their EAs, while also providing protection to adjacent operations. As an exception to this requirement, when a single entity obtains licenses for adjacent EAs on the same spectrum block, it will not be required to coordinate its operations in this manner.

6. Emission Masks

97. Background. To protect against adjacent channel interference, we have emission mask rules in most mobile radio services to restrict transmitter emissions on the spectrum adjacent to the licensee's assigned channel.[294] In the *CMRS Third Report and Order*, we affirmed our out-of-band emission rules for CMRS services. We also determined that out-of-band emission rules should apply only where emissions have the potential to affect other licensees' operations. With respect to licensees that have exclusive use of a block of contiguous channels, we concluded that out-of-band emission rules would be applied only to the extent necessary to protect operations outside of the licensee's authorized spectrum.[295]

98. Comments. Genesee believes that technology is changing so rapidly that our emission mask rules must take into account developing technologies such as frequency hopping and spread spectrum. In this regard, Genesee believes that the Commission needs to provide for high power digital systems on a narrow 5 kHz spacing, so that incumbent providers will have a possibility for expansion.[296] Motorola supports maintaining the existing emission mask rules on the basis that such requirement is necessary to protect incumbent operations adequately.[297] Pittencrief agrees with the Commission's proposal in concept, but notes that without mandatory relocation, incumbents will continue to use many channels in the interior of the wide-area system. As a result, Pittencrief believes that the Commission's rules should protect these interior co-channel users adequately.[298] SMCI believes that SMR

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[293]SMR WON Reply Comments at 11.

[294]*CMRS Third Report and Order*, 9 FCC Rcd at 8066, ¶ 158.

[295]*Id.* at 8067-68, ¶ 161.

[296]Genesee Reply Comments at 3.

[297]Motorola Comments at 21.

[298]Pittencrief Comments at 13.

equipment should meet emission mask rules on all channels, provided that such a requirement does not severely impact the cost of the equipment. SMCI fears that weakening the emission mask rules would encourage production of poorly designed equipment, which eventually would cause undue interference problems.[299]

99. Nextel believes that the Commission's proposal would require an out-of-band emission limitation more strict than that now in place at the end of the contiguous channel block band. Nextel further believes that an SMR station today is required to suppress its emissions by the proposed standard only in frequencies removed from the authorized frequency by more than 250 percent of the authorized bandwidth. As a result, Nextel proposes that the Commission retain its existing emission mask rule for systems using 25 kHz channels, and adopt the Commission's proposed emission mask limit for those systems using multiple 25 kHz channels in contiguous blocks. Nextel's rationale is that such an approach would result in a more flexible emission plan.[300]

100. Ericsson suggests that the Commission adopt a different emission mask, which combines the emission mask proposed in the *Further Notice* and the emission mask rule currently applicable to 800 MHz SMR licensees. Ericsson argues that, because the proposed emission mask is more strict than the current emission mask under Part 90 of our Rules, 800 MHz SMR equipment manufacturers may be required to make major modifications to existing equipment so that it can continue to be used for 800 MHz SMR services. Ericsson contends that its suggested emission mask rule will enable manufacturers to design equipment to be used by both existing Part 90 licensees and EA licensees. Motorola notes that Ericsson's proposal could fostor innovative digital technologies provided that adjacent channel interference protection levels are preserved. In this connection, Motorola recommends that if Ericsson's proposal is adopted, that EA licensees be required to utilize the entire "skirt" of the current emission mask under Part 90 of our rules in order to maintain the existing level of adjacent channel interference protection.[301]

101. Discussion. We conclude that out-of-band emission rules should apply only to the "outer" channels included in an EA license and to spectrum adjacent to interior channels used by incumbents. We believe that these channels alone have the potential to affect operations outside of the EA licensee's authorized bandwidth. We agree with Ericsson's suggested modification to the emission mask rule proposed in the *Further Notice*. We conclude that the emission mask rule suggested by Ericsson would protect other EA licensees adequately. Although Ericsson's proposed emission mask rule differs from that adopted for broadband PCS, we believe that such differences are warranted because they will smooth the

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[299]SMCI Comments at 5.

[300]Nextel Comments at 51.

[301]*See* Letter to William Caton, Acting Secretary, FCC from Michael A. Lewis, on behalf of Motorola, Inc., filed December 8, 1995.

transition from the existing regulatory scheme to the new wide-area licensing approach. We also believe that this requirement will facilitate dual mode SMR/cellular operation, similar to that in the PCS/cellular context, which ultimately will add capacity to the systems operated by the EA licensees. We also agree with Motorola's assertion that current adjacent channel interference protection requirements should be maintained. Thus, we adopt a modified version of Ericsson's proposed emission mask rule to include the additional requirement that existing level of adjacent channel interference protection be maintained. We believe that this emission mask rule will best accomodate the operations of both EA licensees and incumbents with the least disruption.

C. Construction Requirements

1. EA Licensees

102. Background. In the *CMRS Third Report and Order*, we determined that the record in the CMRS proceeding generally supported use of longer construction periods, combined with interim coverage requirements, to ensure that wide-area CMRS licensees provide service to portions of their service area before the construction period expires.[302] In the *Further Notice*, we noted that such an approach has been used for cellular service and recently was adopted for both broadband and narrowband PCS. We concluded in the CMRS docket that 800 MHz wide-area SMR systems should be subject to similar requirements, noting that we would need to tailor these requirements to reflect certain circumstances unique to the SMR service. In the *Further Notice*, we tentatively concluded that wide-area SMR licensees should have five years to construct their systems.[303]

103. Comments. AMTA, CellCall, and OneComm support a five-year construction period for wide-area 800 MHz SMR licensees.[304] AMTA believes that this period should be sufficient to construct facilities in any remaining "white space" in the geographic area, and to negotiate with incumbent operators.[305] CellCall believes that a five-year construction period is consistent with both existing wide-area SMR rules and cellular rules.[306] Although OneComm believes that a five-year construction period with interim coverage requirements will assist development of contiguous spectrum systems, it opines that, if voluntary relocation alone is adopted, a ten-year license and build-out requirement should be adopted because incumbents'

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[302] *CMRS Third Report and Order*, 9 FCC Rcd at 8076, ¶ 179.

[303] *Further Notice*, 10 FCC Rcd at 7996, ¶ 46.

[304] AMTA Comments at 14-15; CellCall Comments at 17; OneComm Comments at 26-27.

[305] AMTA Comments at 14-15.

[306] CellCall Comments at 17.

refusal to relocate will impede the geographic area licensees' construction efforts.[307]

104. Discussion. We conclude that EA licensees should have a five-year construction period. While this construction period is shorter than that imposed for PCS systems, we agree with the majority of commenters that it is the most appropriate time period for the 800 MHz SMR service. Notably, under our current rules, SMR licensees can request up to five years to construct a wide-area system in the 800 MHz band. In addition, given the substantial construction of 800 MHz SMR systems (including wide-area systems) to date, the ten-year construction period applicable to PCS appears excessive for the service. Although a five-year construction period may give some EA licensees more time to construct certain facilities than otherwise might have been allowed, we believe that EA licensees should have this flexibility. Moreover, we anticipate that geographic area licensees that have invested in existing systems will have an incentive to construct facilities and provide service promptly, to ensure a return on that investment. Furthermore, we believe that the use of competitive bidding to select geographic area licensees provides ample incentives for rapid system construction, since this permits license winners to recover their bidding expenses.

2. Extended Implementation Authority

105. Background. As we noted in the *Further Notice*, some existing SMR licensees have been granted extended implementation periods of up to five years to construct their systems, pursuant to either a waiver of our construction and loading rules[308] or Section 90.629 of our Rules.[309] Section 90.629 of our Rules outlines the circumstances under which a SMR licensee may be granted extended implementation authority. Specifically, any such authority is "conditioned upon the licensee constructing and placing its system in operation within the authorized implementation period and in accordance with an approved implementation plan of up to five years."[310] Our rules also require SMR licensees with extended implementation authority to submit annual certifications of compliance with their yearly station construction commitments. Moreover, if the Commission concludes, at any time, that the licensee has failed to meet such construction commitments, it may terminate extended implementation authority and give the licensee six months from the termination date to complete construction of the system.

106. In the *Further Notice*, we proposed to cease accepting requests for extended implementation authority on the lower 80 channels, in order to prevent underutilization of 800

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[307]OneComm Comments at 26-27.

[308]*See e.g.*, Fleet Call, Inc., *Memorandum Opinion and Order*, 6 FCC Rcd 1533, *recon dismissed*, 6 FCC Rcd 6989 (1991); Letter from Ralph A. Haller, Chief, Private Radio Bureau to David Weisman, DA 92-1734, 8 FCC Rcd 143 (1993).

[309]47 C.F.R. § 90.629. *See Further Notice*, 10 FCC Rcd at 7997, ¶ 47.

[310]*Id.*

MHz SMR channels for long periods. We also sought comment on whether existing licensees with extended implementation periods should be given the full period to construct their systems, or if they should be given some shorter period. Additionally, we asked commenters to discuss what would be a reasonable time-frame for completing such systems, given the technologies presently available in the SMR market.

107. Following our adoption of the *Further Notice*, some SMR licensees filed requests for extended implementation authority, which remain pending. With respect to two such requests filed by Chadmoore and PCC Management Corp., the Bureau released a Public Notice seeking comment on whether the requests should be granted.[311] In its extended implementation authority request, Chadmoore seeks three years to construct a non-contiguous "wide-area" SMR system that will extend from the southeastern United States through the upper Midwest and use new technology.[312] Chadmoore argues that grant of its extended implementation request is warranted on four grounds: (a) Chadmoore's principals have demonstrated expertise in SMR sales and service;[313] (b) Chadmoore previously has demonstrated its ability to acquire and construct those licenses granted to SMR "investors;"[314] (c) Chadmoore's proposal would assist those licensees "who have, as yet, not constructed" their stations, and who are in danger of losing their investment once their already extended deadline has expired;[315] and, (d) grant of Chadmoore's proposal will promote competition in the SMR equipment manufacturing market.[316] Similarly, PCC seeks a period of three years to construct a regional, and ultimately nationwide, network of SMR systems.[317] PCC's proposed system would include 2,181 channels, 849 conventional channels and 269 trunked

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[311]Public Notice, "Wireless Telecommunications Bureau Seeks Comment on Requests of Chadmoore Communications, Inc. and PCC Management Corp. for Extended Implementation Authority Under Section 90.629 of the Commission's Rules," DA 95-1613, July 19, 1995 (*Chadmoore/PCC Public Notice*).

[312]Request for Extended Implementation Authorization, filed June 16, 1995, by Chadmoore at 1, 11. In its initial submission, Chadmoore indicated that its proposed system would "cover" 27 states and include 3,516 channels. *Id.* at 14. In supplemental filings, Chadmoore modified its system proposal to include a total of 2,312 channels, consisting of 1,991 single-channel conventional SMR stations and 321 five-channel trunked SMR stations. Chadmoore Communications, Inc., Third Supplement at Exhibit 1 - Listing by Last Name (filed Sept. 11, 1995). According to Chadmoore, 2,061 SMR licenses would be included in this modified proposal.

[313]*Id.* at 2.

[314]*Id.*

[315]*Id.* Chadmoore notes that we previously granted a number of these licensees limited relief in the form of a four-month extension of time in which to construct their facilities. *See* Daniel R. Goodman, Receiver/Dr. Robert Chan, *Memorandum Opinion and Order*, FCC 95-211, 10 FCC Rcd 8537 (1995) (*Goodman/Chan Order*).

[316]*Id.* at 2-4.

[317]Request for Extended Implementation Authorization, filed January 12, 1995, by PCC at 2. It should be noted that PCC's and CCI's requests for extended implementation are completely independent of each other. PCC Reply Comments to *Chadmoore/PCC Public Notice* at 1, n.1.

channels, encompassing 1,118 licenses.[318] PCC argues that grant of its extended implementation request is warranted for the following reasons: (a) climatic conditions for the region(s) in which the SMR systems are located preclude construction during certain seasons of the year; (b) grant of PCC's proposal will assist licensees who have not yet constructed their authorized facilities; (c) PCC's implementation plan will result in a more cost-effective build-out for the stations included in its proposal; and (d) grant of PCC's proposal will facilitate the implementation of an integrated nationwide network.[319]

108. Comments. CellCall supports prohibiting future requests for extended implementation on the lower 80 channels.[320] Cumulous, on the other hand, opines that the Commission has failed to provide a reasoned basis for such a prohibition. Cumulous further argues that the Commission should reject such a restriction, in order to promote maximum competition and additional new services.[321] AMI, DCL, PCIA, Southern, and USIS argue that incumbent licensees with extended implementation authority should not have to rejustify their waiver requests, because they have relied on the grant of additional time to complete their systems.[322] Pittencrief opposes changing an incumbent's existing grant of extended implementation on the basis that implementation of a new licensing scheme should not affect the incumbent's ability to construct its wide-area system.[323]

109. All of the commenters responding to the *Chadmoore/PCC Public Notice* oppose grant of the Chadmoore and PCC extended implementation requests.[324] These commenters contend that the licensees which ultimately will benefit from grant of the extended implementation requests not only have had a sufficient time in which to construct their stations, but also, as a result of the *Goodman/Chan Order*, have been given additional time in

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[318]PCC Reply Comments to *Chadmoore/PCC Public Notice* at 2.

[319]Request for Extended Implementation Authorization, filed January 12, 1995, by PCC at 2-4.

[320]CellCall Comments at 14.

[321]Cumulous Comments at 9.

[322]AMI *Ex Parte* Comments at 7-8; DCL Associates *Ex Parte* Comments at 2-5; PCIA *Ex Parte* Comments at 12-13; Southern *Ex Parte* Comments at 12; USIS *Ex Parte* Comments at 1-2.

[323]Pittencrief *Ex Parte* Comments at 1-2.

[324]*See* AMTA *Chadmoore/PCC Public Notice* Comments; Decimal Datalink, Inc. *Chadmoore/PCC Public Notice* Comments (DDI); Nextel *Chadmoore/PCC Public Notice* Comments; PCIA *Chadmoore/PCC Public Notice* Comments; Rio Radio Supply, Inc. *Chadmoore/PCC Public Notice* Comments (RRS); Susan Jacobs Designs, Inc. *Chadmoore/PCC Public Notice* Comments (SJD).

which to complete construction of their facilities.[325] They also argue that the most efficient use of the spectrum would be achieved by recovering it and making it available to licensees who will construct expeditiously.[326] PCIA further argues that these extended implementation requests are different from others, because they do not involve licensees of fully-loaded and operational systems.[327] With respect to the specific proposals, AMTA, Nextel, and PCIA question Chadmoore's ability to fulfill its wide-area network proposal.[328] With respect to PCC, DDI argues that PCC's arguments in support of its request either are consequences flowing from the affected SMR licensees' independent business decisions or risks commonly assumed by all SMR applicants and licensees.[329] Finally, RRS and SJD question PCC's character qualifications on the basis of PCC's conduct regarding its wide-area system proposal and its business associations.[330]

110. Discussion. We initially established extended implementation authority for SMRs to facilitate construction of wide-area systems. We believe that the wide-area licensing plan we adopt today will accomplish this result in a more uniform and expeditious fashion. Consequently, we conclude that the availability of extended implementation authority in the 800 MHz SMR service is no longer necessary. In fact, we are concerned that both existing and future grants of extended implementation authority would be contrary to the underlying goals of this proceeding. Specifically, we believe that allowing licensees to retain extended implementation authority of up to five years after our adoption of the wide-area licensing approach detailed in this *First Report and Order* would impinge upon the construction requirements imposed on EA licensees. For example, within three years of license grant, EA licensees are required to fulfill their construction requirements, which are based on population coverage and channel usage, regardless of incumbent presence. If certain channels remain unconstructed but authorized to an another entity for this three-year period, the EA licensee is estopped not only from utilizing the channel(s) directly but also from acquiring it from the holder of the authorization due to our prohibition against the transfer of unconstructed facilities. As a result, we believe that it is necessary not only to cease acceptance of requests

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[325]AMTA *Chadmoore/PCC Public Notice* Comments at ¶ 8; DDI *Chadmoore/PCC Public Notice* Comments at 3-5; Nextel *Chadmoore/PCC Public Notice* Comments at 2-3, 5-6; PCIA *Chadmoore/PCC Public Notice* Comments at 2.

[326]AMTA *Chadmoore/PCC Public Notice* Comments at ¶¶ 8, 11; DDI *Chadmoore/PCC Public Notice* Comments at 8-10; Nextel *Chadmoore/PCC Public Notice* Comments at 6-7; PCIA *Chadmoore/PCC Public Notice* Comments at 2-3.

[327]PCIA *Chadmoore/PCC Public Notice* Comments at 3.

[328]AMTA *Chadmoore/PCC Public Notice* Comments at ¶¶ 12, 13; Nextel *Chadmoore/PCC Public Notice* Supplemental Comments at 2; PCIA *Chadmoore/PCC Public Notice* Comments at 4.

[329]DDI *Chadmoore/PCC Public Notice* Comments at 6-7.

[330]RRS *Chadmoore/PCC Public Notice* Comments at 1-4; SJD *Chadmoore/PCC Public Notice* Comments at 1-2.

for extended implementation authority but also to accelerate the termination date of existing implementation periods so that EA licensees will not be unnecessarily hampered in their efforts to comply with the construction requirements associated with their authorizations.

111. In addition, several licensees and commenters contend that such extended implementation grants have resulted in spectrum warehousing.[331] To address these spectrum warehousing concerns, we will require all incumbent 800 MHz SMR licensees who have received extended implementation authority to demonstrate that allowing them extended time to construct their facilities is warranted and furthers the public interest. Specifically, a licensee seeking to retain extended implementation authority must: (a) indicate the duration of its extended implementation period (including commencement and termination date); (b) provide a copy of its implementation plan, as originally submitted and approved by the Commission, and any Commission-approved modifications thereto; (c) demonstrate its compliance with Section 90.629 of our rules if authority was granted pursuant to that provision,[332] including confirmation that it has filed annual certifications regarding fulfillment of its implementation plan; and (d) certify that all facilities covered by the extended implementation authority proposed to be constructed as of the adoption date of this *First Report and Order* are fully constructed and that service to subscribers has commenced as defined in the *CMRS Third Report and Order*. These showings must be submitted within 90 days from the effective date of this *First Report and Order*. We note that all of the information to be included in the showing presently is required by Section 90.629 of our Rules. We hereby delegate to the Bureau the authority to review and take appropriate action upon such showings.

112. If a licensee's extended implementation authority showing is approved by the Bureau, such licensee will be afforded a construction period of two years or the remainder of its current extended implementation period, whichever is shorter. We recognize that some licensees were initially granted extended implementation periods which exceed this two-year period. In those instances where a licensee demonstrates that it has fully complied with the requirements of Section 90.629 of the Commission's rules and that its system cannot reasonably be completed within the two-year period, we will entertain requests for the minimum period of time necessary to complete implementation of the licensee's proposal provided that the licensee explains why the two-year period is an insufficient amount of time. We anticipate that such explanation would entail the same type of public interest showing

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[331] *See e.g.*, APCO Comments at 2 (contending that the availability of extended implementation authority is a factor that has contributed to the current speculative environment in the 800 MHz SMR service); PEC Mobile Communications Comments at 3 (contending that its expansion potential has been limited by the availability of extended implementation authority in the 800 MHz SMR service); *see also*, Total Com Comments at 6; Sierra Electronics *Ex Parte* Comments at 1.

[332] We recognize, however, that certain grants of extended implementation authority were made purusant to waiver. *See e.g.*, Fleet Call, Inc., *Memorandum Opinion and Order*, 6 FCC Rcd 1533, *recon dismissed*, 6 FCC Rcd 6989 (1991)

associated with a request for waiver of the Commission's rules under Section 1.3 of our rules.[333]

113. Upon the termination of this two-year period, authorizations for facilities that remain unconstructed will cancel automatically. If a licensee either fails to submit the showing described above within the designated time frame or submits an insufficient or incomplete showing, such licensee will have six months from the last day on which it could timely file such a showing or six months from the denial of its request to construct the remaining facilities covered under its implementation plan. After this six-month period, authorizations for facilities still unconstructed will cancel automatically.

114. With respect to requests for extended implementation authority currently pending before the Bureau, we hereby deny these requests. We conclude that grant of these requests would conflict with our goal of uniformly implementing wide-area licensing. Parties that remain interested in obtaining extended implementation authority are free to apply for an EA license under our new rules. In the case of the Chadmoore and PCC extended implementation requests, which involve several licensees that also were the subject of our decision in the *Goodman/Chan Order*, we granted such licensees limited relief from our construction requirements.[334] We decline to directly or indirectly broaden the scope of this relief based on the same circumstances that we previously have considered. To the extent that these entities desire additional time in which to construct, we believe that it is more appropriate for them to seek such a result within the wide-area licensing plan that we adopt today. We believe that this competitive bidding process will be the most expeditious and efficient mechanism to ensure that those entities that most value providing service to the public rapidly are able to acquire sufficient spectrum for their present and future operations.

3. Interim Coverage Requirements

115. Background. In the *CMRS Third Report and Order*, we concluded that 800 MHz wide-area SMR licensees should be subject to interim coverage requirements that are similar to those in the cellular and PCS rules.[335] In the *Further Notice*, we proposed that geographic area licensees be required to provide coverage to one-third of the population within their market area within three years of initial license grant, and to two-thirds of the population by the end of their five-year construction period. We also sought comment on whether compliance with these interim coverage requirements would be achieved by single channel or multi-channel coverage.[336]

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[333] *See* 47 C.F.R. § 1.3.

[334] *Goodman/Chan Order*, 10 FCC Rcd at 8545-8550, ¶¶ 20-28.

[335] *CMRS Third Report and Order*, 9 FCC Rcd at 8076, ¶ 179.

[336] *Further Notice*, 10 FCC Rcd at 7998, ¶ 48.

116. In the *CMRS Third Report and Order*, we noted that any interim coverage requirements for wide-area SMR systems must account for the fact that geographic area licensees may be required to provide co-channel protection to incumbent systems within their service area.[337] In the *Further Notice*, we indicated our belief that when a licensee acquires a wide-area license, it assumes the responsibility of obtaining the right to use sufficient spectrum to provide coverage if such spectrum is not already available. We further indicated our expectation that coverage be achieved directly by constructing facilities on available spectrum authorized to the wide-area licensee or acquiring such spectrum through buy-outs of incumbent licensees within its authorized spectrum block.[338] To the extent that the *Further Notice* could be read to propose that coverage could be met through use of resale or similar agreements, we clarify our intention that the wide-area licensee is free to engage in resale activities, but must satisfy our construction requirements through use of its facilities and not capacity acquired from others through resale.[339]

117. Comments. With respect to interim coverage requirements, the commenters generally supported the proposal presented in the *Further Notice*. AMTA supports the use of interim construction requirements to ensure that licensees provide service to at least part of their authorized service area on a timely basis. AMTA suggests that the Commission consider other criteria on which to base these requirements, such as geographic coverage. AMTA notes that these additional criteria could be implemented in addition to, or as a substitute for, the proposed population requirements.[340] Similarly, CellCall endorses adoption of a geographic coverage requirement in conjunction with, or as a replacement of, a population coverage requirement.[341] Russ Miller suggests requiring both geographic and population coverage in order to force coverage over the entire EA.[342] Dial Call supports coupling population requirements with a requirement that a minimum number of frequencies be constructed to serve the population.[343] Pittencrief argues that geographic area licensees should be able to satisfy their interim coverage requirements by building out a system covering the

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[337]*CMRS Third Report and Order*, 9 FCC Rcd at 8076, ¶ 180.

[338]*Further Notice*, 10 FCC Rcd at 7998, ¶ 49.

[339]*See* 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, *Third Order on Reconsideration*, FCC 95-159, released October 20, 1995.

[340]AMTA Comments at 15-16.

[341]CellCall Comments at 18.

[342]Russ Miller *Ex Parte* Comments at 2.

[343]Dial Call Comments at 7.

relevant percentage of either the population or geographic area.[344] Dial Call and OneComm support the Commission's proposal.[345] Southern contends that the proposed coverage requirements would encourage spectrum underutilization and warehousing, because many geographic area licensees already meet the proposed coverage requirements.[346]

118. Nextel recommends modifying the proposed interim coverage requirements to require geographic area licensees to demonstrate authority to encompass a per channel average of one-third of the population within the relevant geographic area after three years and a per channel average of two-thirds of the relevant geographic area after five years. Nextel suggests that the per channel average population would be the total per channel populations encompassed within the geographic area divided by the number of channels covered by the wide-area license.[347] Nextel believes that construction and coverage requirements should be accompanied by stricter channel use requirements to ensure spectrum efficiency and to prevent anti-competitive conduct and spectrum warehousing.[348] Therefore, Nextel recommends requiring auction winners to utilize at least fifty percent of their authorized channels in meeting the coverage requirements.[349] Southern recommends requiring that one-third of the service area plus 25 percent of the channels be constructed in three years and the remaining two-thirds and 75 percent be constructed within five years.[350]

119. Most commenters agree that failure to meet either of the interim coverage requirements should result in forfeiture of the wide-area license.[351] CellCall, however, opposes imposition of license forfeiture for failure to comply with coverage requirements. Instead, CellCall suggests that the Commission adopt provisions based on cellular unserved area rules that mirror the proposal to award unconstructed incumbent channels to the wide-area licensee. Thus, under CellCall's proposal, unconstructed channels would be available to those incumbents, excluding geographic area licensees who fail to meet the coverage

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[344]Pittencrief Comments at 14-15.

[345]Dial Call Comments at 4; OneComm Comments at 26.

[346]Southern Reply Comments at 17.

[347]Nextel Comments at 46; Nextel *Ex Parte* Comments at 8.

[348]Nextel *Ex Parte* Comments at 8.

[349]*Id.* at 9.

[350]Southern *Ex Parte* Comments at 12.

[351]ABC Comments at 5; B&C Comments at 5; Bis-man Comments at 5; Bolin Comments at 5; Dakota Comments at 5; Deck Comments at 5; Diamond "L" Comments at 5; E.T. Communications Comments at 5; Keller Comments at 5; Morris Comments at 4; Nielson Comments at 5; Nodak Comments at 5; RCC Comments at 5; Raserco Comments at 5; Rayfield Comments at 5; SMCI Comments at 5; Vantek Comments at 5; Dial Call Comments at 4; Pittencrief Comments at 14.

requirements, who need additional channels to expand their systems.

120. Discussion. We will require EA licensees to provide coverage to one-third of the population of their respective EAs within three years of initial license grant and to two-thirds by the end of their five-year construction period. This requirement is consistent with our 900 MHz SMR rules.[352] Unlike our approach in the 900 MHz SMR context, we are not adopting a "substantial service" benchmark for the upper 10 MHz block as an alternative to the population coverage criteria. Given the already extensive licensing in the upper 10 MHz block, we believe it is unlikely that an EA licensee could provide substantial service without buying incumbent systems or relocating incumbents. Similarly, we did not adopt a "substantial service" standard in the Multipoint Distribution Service (MDS) because of extensive incumbent presence in that spectrum.[353]

121. *Channel Use Requirement.* Given the extensive licensing of the upper 10 MHz block, we share the concern of several commenters that interim coverage requirements alone may not ensure efficient spectrum use unless a channel use requirement is added. Specifically, we are concerned that an EA licensee potentially could satisfy the interim coverage requirements by constructing only one channel in its spectrum block.[354] This would result in inefficient use of 800 MHz SMR spectrum, for which there is great demand. In addition, unlike the 900 MHz SMR service and other lightly encumbered auctionable services, the substantial incumbent presence in the 800 MHz SMR service presents the potential for a bidder who is incapable of building out a wide-area system to participate in the auction solely to restrict a competing incumbent licensee's ability to expand. Accordingly, in addition to the population coverage requirements described *supra*, we will require EA licensees to construct 50 percent of the total channels included in their spectrum blocks in at least one location in their respective EAs within three years of initial license grant. We are not adopting an additional channel use requirement at five years from license grant. EA licensees are expected and required to maintain their compliance with the channel use requirement from the third year after license grant throughout the remainder of the five-year construction period. This channel use requirement furthers the efficient spectrum use and public interest goals enunciated in the Communications Act. We believe that this additional component of the interim coverage requirements is both reasonable and attainable for 800 MHz SMR EA licensees. We conclude that additional protections are warranted for this particular service.

122. *Non-compliance with Interim Coverage Requirements.* We conclude that an EA

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[352]*See* 47 CFR § 90.665(c).

[353]Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, MM Docket No. 94-131, *Report and Order*, 10 FCC Rcd 9589, 9613, ¶ 43 (1995) (*MDS Report and Order*).

[354]Several commenters also express concern about this result. *See e.g.*, Dial Call Comments at 7; Nextel Comments at 46; Nextel *Ex Parte* Comments at 8; Southern *Ex Parte* Comments at 12.

licensee's failure to meet either the three-year or five-year coverage requirements or the channel usage requirement will result in forfeiture of the entire EA license. Forfeiture of the EA license, however, will not result in the loss of any constructed facilities authorized to the licensee prior to the auction. This sanction for failure to comply with construction requirements is consistent with the sanctions provided in our broadband PCS and 900 MHz SMR rules. In addition, such action will allow the spectrum to be made available to other qualified applicants.

D. EA License Application Issues

1. Initial Eligibility

123. Background. In the *CMRS Third Report and Order* and *Further Notice*, we tentatively concluded that the initial application process for wide-area SMR licenses should be open to any qualified applicant.[355] We also sought comment on whether it was necessary to restrict eligibility for EA licenses to incumbent licensees (or to restrict eligibility based on other criteria) if competitive bidding procedures are used in the upper 10 MHz block.[356]

124. Comments. While Genesee and Pittencrief support open eligibility for the wide-area 800 MHz SMR licenses, several commenters believe that initial eligibility for the licenses should be restricted.[357] These commenters contend that an initial eligibility restriction is necessary to deter speculation in 800 MHz SMR spectrum[358] and to provide incumbent licensees with a meaningful opportunity to participate in wide-area licensing.[359] These commenters argue that initial eligibility for EA licenses should be restricted to: (a) entities already operating an SMR system in the geographic area covered by the particular wide-area license;[360] and, (b) entities in compliance with Section 310(b) of the Communications Act.[361]

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[355]*CMRS Third Report and Order*, 9 FCC Rcd at 8140, ¶ 341.

[356]*Further Notice*, 10 FCC Rcd at 8001, ¶ 56.

[357]American Industrial Comments at 3; CellCall Comments at 9-11; DCL Associates Reply Comments at 5; Parkinson Electronics *et al.* Comments at 10; PCIA Comments at 17-18; Phipps Reply Comments at 3; Russ Miller Reply Comments at 3; Telecellular Comments at 12.

[358]American Industrial Comments at 2; Telecellular Comments at 13; Russ Miller Reply Comments at 3.

[359]Telecellular Comments at 12.

[360]CellCall Comments at 9-11; Total Com Comments at 10; Telecellular Comments at 12. *See also* American Industrial Comments at 3; Russ Miller Reply Comments at 3.

[361]Nextel Comments at 53. Section 310(b) of the Communications Act, 47 U.S.C. § 310(b), prohibits the grant of radio licenses, including licenses for common carrier service, to aliens and to corporations with specific levels of alien ownership and control.

125. With respect to an eligibility restriction based on existing operations, CellCall proposes that such eligibility be determined with a benchmark date of August 9, 1994, while Total Com proposes a January 1, 1995 date.[362] Ericsson contends that if an eligibility restriction is adopted, it should not result in only those already operating wide-area 800 MHz SMR systems being eligible for the EA licenses.[363] American SMR and CellCall contend that if initial eligibility is restricted, then entities with applications pending as of such date also should be eligible for EA licenses.[364] CellCall also argues that wireline telephone common carriers should have initial eligibility because they have been prevented by rule from holding SMR licenses, rather than by lack of interest in providing service.[365]

126. Discussion. We conclude that restrictions on eligibility for EA licenses are not warranted, except that, as discussed *infra*, EA applicants will be presumptively classified as CMRS, and therefore will be required to comply with the alien ownership requirements specified in Section 310 of the Act.[366] Aside from alien ownership restrictions, we are not persuaded by commenters' arguments that eligibility restrictions are needed to deter speculation. We have adopted specific provisions in the service rules for the upper 10 MHz block to address these concerns, *e.g.*, imposition of construction periods combined with interim coverage and channel use requirements. Moreover, we believe that the competitive bidding process itself will deter speculation by those not genuinely interested in providing service to the public. In addition, we believe that open eligibility for the EA licensees will be pro-competitive and potentially will result in a diverse group of entities providing wide-area SMR service in the upper 10 MHz block. This outcome furthers the objectives set forth in Section 309(j)(3)(B) of the Communications Act.[367]

127. With respect to foreign ownership, all applicants will be subject to Section 310(b) of the Communications Act, except to the extent they have received waiver of preexisting ownership interests. In the CMRS docket, we established specific procedures for private mobile services licensees reclassified as CMRS to file waiver petitions to retain existing foreign ownership interests.[368] The deadline for filing such waiver requires was

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[362]CellCall Comments at 28; Total Com Comments at 10.

[363]Ericsson Reply Comments at 3.

[364]American SMR Comments at 4; CellCall Reply at 28.

[365]CellCall Comments at 12.

[366]*CMRS Third Report and Order*, 9 FCC Rcd at 8125, ¶ 306.

[367]*See* 47 U.S.C. § 309(j)(3)(B).

[368]*See* 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 at 1056, 1058-1059, ¶¶ 12-15 (1994).

February 10, 1994.[369] Thus, any reclassified private mobile services licensees that have levels of alien ownership or control that would be prohibited when these licensees assume CMRS status must already have filed a petition seeking to have such interests grandfathered.

2. Regulatory Classification of EA Licensees

128. Background. In the *CMRS Second Report and Order*, we determined that SMR licensees would be classified as CMRS if they offered interconnected service and as PMRS if they did not offer such service.[370] In the *Further Notice*, we indicated our view that most, if not all, EA licensees will be classified as CMRS, because they are likely to provide interconnected service as part of their service offering.[371] As a result, we proposed to classify all EA licensees presumptively as CMRS providers. We also proposed that EA applicants or licensees who do not intend to provide CMRS service would be able to overcome this presumption by demonstrating that their service does not fall within the CMRS definition. We further proposed that the statutory grandfathering period also would apply with respect to the operation of this presumption.[372] As a result, entities licensed in the SMR service as of August 10, 1993, would not be subject to CMRS regulation, other than foreign ownership restrictions, until August 10, 1996.

129. Comments. Madera, Cumulous, Fresno, Pro-Tec, and Kay contend that it is not apparent that SMR services are substantially similar to cellular or PCS services.[373] CellCall argues that if wide-area SMR service is substantially similar to cellular, they should be subject to similar technical, operational and licensing rules.[374]

130. With respect to grandfathering of reclassified Part 90 licensees, McCaw argues that such licensees should not be permitted to enjoy the benefits of CMRS status prior to being subject to the regulatory obligations imposed upon CMRS licensees. In this connection, McCaw contends that grant of operational flexibility to wide-area SMR operators should not take effect until the earlier of August 10, 1996, the end of the transition period, or such time as a licensee voluntarily agrees to be treated as a CMRS provider for all purposes. McCaw further contends that allowing these operators to enjoy the benefits of CMRS status without

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[369] *Id.* at 1059, ¶ 15.

[370] *CMRS Second Report and Order,* 9 FCC Rcd at 1450-1451, 1510, ¶¶ 88-93, 269.

[371] *Further Notice*, 10 FCC Rcd at 8006, ¶ 70.

[372] *Id.*

[373] Madera Reply Comments at 2; Cumulous Reply Comments at 2; Fresno Reply Comments at 3-4; Pro-Tec Reply Comments at 5; Kay Reply Comments at 5-6.

[374] CellCall Reply Comments at 7-8.

the associated regulatory obligations would create a new and significant 18-month disparity (dating from our adoption of the *CMRS Third Report and Order*), which unjustifiably would confer an artificial marketplace advantage on SMR licensees that Congress neither desired or intended.[375]

131. Discussion. We reiterate our determination in the *CMRS Second Report and Order* that SMR providers that are either interconnected to the Public Switched Network or authorized for such interconnection will be classified as CMRS.[376] Because we expect most SMR providers to meet the definition, we also reiterate our conclusion that EA licensees will be classified presumptively as CMRS providers. We also conclude that EA applicants and licensees, like other CMRS providers (such as broadband PCS applicants and licensees), will be able to overcome this presumption if they demonstrate that their service does not fall within the definition of CMRS provided in Section 332(d)(1) of the Communications Act.[377] This approach is fully consistent with our action in the broadband PCS context. Although some commenters attempt to debate whether SMR is substantially similar to other CMRS, this issue does not address the fundamental issue of the appropriate regulatory classification for 800 MHz SMR EA licenses -- that is, whether they are CMRS or PMRS. The issue of whether SMR is substantially similar to cellular and PCS was analyzed in the *CMRS Third Report and Order*.[378] To the extent that this issue is raised by the pending petitions for reconsideration of the *CMRS Third Report and Order*, we will address it in a separate order. If this matter is not raised in such petitions, the commenters' request that we revisit this issue now is untimely and beyond the scope of this proceeding. We consider the implicit attempt by some commenters to debate whether SMR is substantially similar to other CMRS as, in effect, an untimely request for reconsideration of the *CMRS Second Report and Order*, which clearly is beyond the scope of this proceeding.

132. We do not agree with McCaw's assertions that SMR licensees should not have operational flexibility until they become subject to CMRS regulation. CMRS status does not determine whether our rules should allow operational flexibility -- in fact, we initiated our efforts to introduce wide-area licensing in this service long before it was contemplated that SMR would be reclassified as CMRS. Furthermore, we do not consider McCaw's example of operational flexibility to be an appropriate example of CMRS regulation, because this is one of the rights conveyed by the EA license, which also conveys certain obligations. Consequently, we are not persuaded by McCaw's argument that this is a situation in which a reclassified Part 90 licensee benefits unfairly from the absence of CMRS regulation.

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[375]McCaw Comments at 6.

[376]*CMRS Second Report and Order*, 9 FCC Rcd at 1434-1437, 1450-1451, ¶¶ 54-60, 88-93.

[377]47 U.S.C. § 332(d)(1).

[378]*See CMRS Third Report and Order*, 9 FCC Rcd at 8001-8036, 8042, ¶¶ 22-79, 94.

E. Redesignation of Other 800 MHz Spectrum -- General Category Channels and Inter-Category Sharing

133. Currently, 800 MHz SMR systems may be licensed on the General Category channels or licensed under our inter-category sharing rules on 100 channels in the Industrial/Land Transportation and Business Categories (collectively, "Pool Channels").[379] In the *Further Notice*, we indicated that although we believe that SMR licensees with existing operations on the General Category or Pool Channels should be allowed to operate on such channels, we also believed that some restriction on future SMR applications for General Category or Pool Channels might be appropriate.[380]

1. General Category Channels

134. Background. In the *Further Notice*, we asked commenters to address whether the entire General Category or some portion thereof should be designated for future licensing exclusively to SMR applicants.[381]

135. Comments. Several commenters argue that we should maintain our current eligibility rules for the General Category channels because: (1) they allow PMRS and SMR operators to meet their expanding mobile communications needs;[382] (2) the frequencies are heavily used by both PMRS and CMRS providers;[383] and, (3) they are a source of extra capacity for public safety licensees.[384] PCIA argues that the limited remaining vacant spectrum on the General Category channels should be available to private users.[385] API and UTC argue that future SMR eligibility on the General Category channels should be prohibited

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[379]*See* Inter-Category Sharing of Private Mobile Radio Frequencies in the 806-821/851-866 MHz bands, DA 95-741, *Order*, 10 FCC Rcd 7350, *reconsideration denied*, Inter-Category Sharing of Private Mobile Radio Frequencies in the 806-821/851-866 MHz bands, DA 95-1669, *Memorandum Opinion and Order*, 1995 WL 444261 (F.C.C.) (1995).

[380]*Further Notice*, 10 FCC Rcd at 7999, ¶ 52.

[381]*Id.* at 8000, ¶ 53.

[382]PCIA Comments at 17; Entergy Reply Comments at 6-7; Ericsson Reply Comments at 3; UTC Reply Comments; Anheuser-Busch Reply Comments at 3-4, 5; Russ Miller Reply Comments at 5; Joint Utilities *Ex Parte* Comments at 3-9; Louisville *Ex Parte* Comments at 5-6; Group of 66 *Ex Parte* Comments at 4, 16; Anheuser-Busch *Ex Parte* Comments at 4.

[383]PCIA Reply Comments at 23

[384]APCO Comments at 5.

[385]PCIA Comments at 15-16.

to preserve sufficient spectrum for the needs of PMRS providers.[386]

136. Numerous commenters, however, argue that the General Category channels should be set aside for SMR use.[387] Nextel contends that the relative demand for SMR service warrants such action.[388] Similarly, OneComm contends that the SMR waiting list and application backlog indicate that the demand for spectrum by SMR licensees is greater than non-SMR licensees.[389] OneComm further contends that redesignation of the General Category channels to exclusive SMR use would facilitate relocation in the upper 10 MHz block, because they most likely would be attractive to incumbents since they are contiguous.[390] AMI argues that redesignation of the General Category channels would promote efficient spectrum use, because it will ensure that the frequencies are available to the largest number of users.[391]

137. Discussion. A review of our licensing records indicates that the overwhelming majority of General Category channels are used for SMR as opposed to non-SMR service. In fact, our licensing records indicate that there are three times as many SMR licensees in the General Category channels as any other type of Part 90 licensee. As a result, we conclude that the demand for additional spectrum by SMR providers is significantly greater than the demand by non-SMR services. In addition, given the already extensive licensing on the upper 10 MHz block and the mandatory relocation we adopt today as part of our wide-area licensing for the 800 MHz SMR service, we expect that demand for additional SMR spectrum will increase, as EA licensees seek frequencies for relocation of incumbents. We recognize that PMRS providers are concerned about having sufficient spectrum to meet their telecommunications needs. We believe, however, that by prohibiting SMR eligibility on the Pool Channels we will relieve much of the pressure on such frequencies. Furthermore, our decision here is intended to ensure that the 800 MHz SMR spectrum is used most efficiently. Based on the record in this proceeding and our licensing records, we conclude that the most efficient use of the General Category channels is to redesignate them exclusively for SMR use.

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[386]API Comments at 5; UTC Comments at 4.

[387]Nextel Comments at 9; Russ Miller ex parte Comments at 3; AMI Comments at 3; AMTA Comments at 22; ABC Comments at 4; B&C Comments at 4; Bis-Man Comments at 4; Bolin Comments at 4; Dakota Comments at 5; Deck Comments at 5; Diamond "L" Comments at 5; E.T. Communications Co. Comments at 5; Keller Comments at 5; Morris Comments at 4; Nielson Comments at 5; Nodak Comments at 5; RCC Comments at 5; Raserco Comments at 5; Rayfield Comments at 5; Vantek Comments at 5; Gulf Coast Radiofone Comments at 2; OneComm Comments at 27-28.

[388]Nextel Comments at 9.

[389]OneComm Comments at 27-28.

[390]OneComm Comments at 28.

[391]AMI Comments at 3.

2. Inter-Category Sharing

138. Background. In the *Further Notice*, we noted that the Pool Channels are intended for non-commercial internal use by Business and Industrial/Land Transportation licensees, and their availability for SMR licensees was to be on a limited basis only.[392] We sought comment on whether the future eligibility of SMR licensees on the Pool Channels should be restricted.[393] We also sought comment on whether non-SMR licensees should be restricted from future eligibility on SMR channels.[394] After the release of the *Further Notice*, the Bureau placed a freeze on inter-category sharing.[395]

139. Comments. UTC strongly supports our proposal to revise the inter-category sharing rules, because it would provide a clear demarcation between SMR and non-SMR spectrum and would eliminate the risk of SMR encroachment on non-auctionable spectrum.[396] AMTA contends that the Pool Channels support significantly less SMR usage than the General Category channels and, thus, would serve as an appropriate demarcation between SMR and non-SMR spectrum.[397] APCO and AMI argue that future SMR licensing on Pool Channels should be prohibited in order to preserve availability of these channels in the future for PMRS uses.[398]

140. Pittencrief, Motorola, E.F. Johnson, and OneComm argue that SMR availability of inter-category sharing should not be limited.[399] Applied and Cumulous contend that the Pool Channels provide additional spectrum to meet the expansion demands of growing SMR operators.[400] Some commenters argue that inter-category sharing should be permissible in the border areas, because SMR channels are limited in those regions.[401] Telecellular argues that

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[392]*Further Notice*, 10 FCC Rcd at 7999, ¶ 52.

[393]*Id.* at 8000, ¶ 53.

[394]*Id.*, ¶ 54.

[395]Inter-Category Sharing of Private Mobile Radio Frequencies in the 806-821/851-866 MHz Bands, DA 95-741, *Order*, 10 FCC Rcd 7350 (1995).

[396]UTC Comments at 2.

[397]AMTA Comments at 24.

[398]APCO Comments at 5; AMI Comments at 5.

[399]Pittencrief Reply Comments at 12; Motorola Comments at 17; E.F. Johnson Reply Comments at 11; OneComm Reply Comments at 17-18.

[400]Applied Comments at 11; Cumulous Comments at 6.

[401]Pittencrief *Ex Parte* Comments; AMI Comments at 5.

if future SMR eligibility for the Pool Channels is limited, this restriction should be based on a loading demonstration that such channels actually are needed by the SMR licensee.[402]

141. Discussion. We are concerned that continuing to allow SMR applications for the Pool Channels could cause a scarcity of frequencies for PMRS uses. Specifically, if these channels remain available to SMR licensees, but are not subject to auctions, demand for the channels by SMR applicants seeking to avoid auctions may render them unavailable to other eligible Part 90 services. Thus, we are revising our current eligibility rules for inter-category sharing of the Pool Channels to eliminate the risk of SMR encroachment on spectrum allocated for PMRS purposes. We believe that this revision has the additional benefit of establishing a clear demarcation between our spectrum allocation for SMR and other Part 90 services and eliminates the risk of SMR encroachment on non-auctionable PMRS spectrum. With our redesignation of the General Category channels as SMR channels, we also believe that we have provided sufficient spectrum to address the current demand for SMR spectrum in the 800 MHz band. Therefore, SMR licensees no longer will be eligible to apply for Pool Channels on an inter-category sharing basis.

142. In light of our elimination of SMR eligibility for the Pool Channels, we conclude that non-SMR licensees no longer will be eligible for SMR channels, including the General Category channels. We believe that this additional restriction is appropriate not only for purposes of equity but also to ensure that SMR licensees are not required to compete with non-SMR providers for available channels. With respect to the upper 10 MHz block, we conclude that non-SMR incumbent licensees, like SMR incumbent licensees, will receive the operational rights and will be subject to the mandatory relocation mechanism described *supra*. With respect to the lower 4 MHz block of 800 MHz SMR spectrum and General Category channels, we are seeking comment in the *Second Further Notice of Proposed Rule Making* regarding the treatment of non-SMR incumbents.

V. EIGHTH REPORT AND ORDER

A. Auctionability of the Upper 10 MHz Block of 800 MHz SMR Spectrum

143. Background. Section 309(j) of the Communications Act, permits auctions only where: (1) mutually exclusive applications for initial licenses or construction permits are accepted for filing by the Commission; (2) the principal use of the spectrum will involve or is reasonably likely to involve the receipt by the licensee of compensation from subscribers in return for enabling those subscribers to receive or transmit communications signals; and, (3) the objectives set forth in Section 309(j)(3) would be promoted.[403] Section 309(j)(3) provides that the Commission use of competitive bidding should promote the following objectives:

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[402]Telecellular Comments at 12.

[403]47 U.S.C. § 309(j).