355. Upon our review of the short-form applications, we propose to issue a Public Notice listing all defective applications, and applicants with minor defects would be given an opportunity to cure errors and resubmit a corrected version. After reviewing the corrected applications, the Commission would release a second Public Notice announcing the names of all applicants whose applications have been accepted for filing. These applicants would be required to submit an upfront payment to the Commission, as discussed below, to the Commission's lock-box by the date specified in the Public Notice, which generally would be no later than 14 days before the scheduled auction. After the Commission receives from its lock-box bank the names of all applicants who have submitted timely upfront payments, the Commission would issue a third Public Notice announcing the names of all applicants that are determined qualified to bid. An applicant who fails to submit a sufficient upfront payment to qualify it to bid on any license being auctioned would not be identified on this Public Notice as a qualified bidder. Each applicant listed on this Public Notice would be issued a bidder identification number and further information and instructions regarding auction procedures. We seek comment on the proposals discussed above.

c. Upfront Payments

356. Background. In the *Competitive Bidding Second Report and Order*, we established a minimum upfront payment of $2,500 and stated that this amount could be modified on a service-specific basis.[761] In the *Further Notice*, we proposed to require 800 MHz SMR auction participants to tender in advance to the Commission a substantial upfront payment, $0.02 per activity unit for the largest combination of activity units a bidder anticipates bidding on in any round, as a condition of bidding in order to ensure that only serious, qualified bidders participate in auctions and to ensure payment of the penalty (discussed *infra*) in the event of bid withdrawal or default.[762] We also sought comment on the upfront payment formula and minimum upfront payment most appropriate for the 800 MHz SMR service.[763]

357. Proposals. As in the case of other auctionable services, we propose to require participants for the lower 80 and General Category auction to tender in advance to the Commission a substantial upfront payment as a condition of bidding, in order to ensure that only serious, qualified bidders participate in auctions and to ensure payment of the additional monetary assessments in the event of bid withdrawal or default. For services that are licensed by simultaneous multiple round auction, we have established a standard upfront payment formula of $0.02 per activity unit for the largest combination of activity units a bidder anticipates bidding on in any single round of bidding. We tentatively conclude that a minimum $2,500 upfront payment should be required, regardless of the bidding methodology

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[761] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2379, ¶ 180.

[762] *Further Notice*, 10 FCC Rcd at 8010, ¶ 81.

[763] *Id.*

we employ. We seek comment on our proposal regarding the appropriate minimum upfront payment for applications for the lower 80 or General Category channels. In particular, we seek comment on whether a minimum upfront payment of $2,500 is sufficient to discourage frivolous or speculative bidders in the auction process.

358. We tentatively conclude that upfront payments should be due no later than 14 days before a scheduled auction.[764] This period should be sufficient to allow the Commission to process upfront payment data and release a Public Notice listing all qualified bidders. The specific procedures to be followed in the tendering and processing of upfront payments are set forth in Section 1.2106 of the Commission's rules.[765]

d. Down Payment and Full Payment

359. Background. In the *Competitive Bidding Second Report and Order*, we generally required successful bidders to tender a 20 percent down payment on their bids to discourage default between the auction and licensing and to ensure payment of the penalty if such default occurs.[766] We concluded that this requirement was appropriate to ensure that auction winners have the necessary financial capabilities to complete payment for the license and to pay for the costs of constructing a system, while not being so onerous as to hinder growth or diminish access.[767] In the *Further Notice*, we proposed to require the winning bidders for 800 MHz SMR licenses to supplement their upfront payments with down payments sufficient to bring their total deposits up to 20 percent of their winning bid(s).[768]

360. Proposals. We propose to apply the 20 percent down payment requirement to winning bidders for lower 80 and General Category licenses.[769] Such a down payment would be due within five business days following the Public Notice announcing the winning bidders. We further propose that auction winners be required to pay the full balance of their winning bids within five business days following Public Notice that the Commission is prepared to award the license. We seek comment on this proposal.

361. To the extent that an auction winner is eligible to make payments through an installment plan (*i.e.*, small businesses, as proposed *infra* at ¶ 397), we propose to apply different down payment requirements. Such an entity would be required to bring its deposit

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[764] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2380, ¶ 188.

[765] 47 C.F.R. § 1.2106.

[766] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2381, ¶ 190.

[767] *Id.*

[768] *Further Notice*, 10 FCC Rcd at 8010, ¶ 82.

[769] A proposal for reduced down payments for small businesses is discussed in Section VI(G)(4)(b)(iii), *infra*.

with the Commission up to five percent of its winning bid after the bidding closes (this amount would include the upfront payment), and would have to pay an additional five percent of its winning bid to the Commission within five business days following Public Notice that the Commission is prepared to award the license. We seek comment on this proposal.

e. Bid Withdrawal, Default, and Disqualification

362. Background. In the *Further Notice*, we proposed to adopt bid withdrawal, default, and disqualification rules for the 800 MHz SMR service based on the procedures established in our general competitive bidding rules.[770] In the *Competitive Bidding Second Report and Order,* we noted that it is critically important to the success of our competitive bidding process that potential bidders understand that there will be a substantial penalty assessed if they withdraw a high bid, are found not to be qualified to hold licenses, or default on payment of a balance due.[771] If a bidder withdraws a high bid before the Commission closes bidding or defaults by failing to timely remit the required down payment, it would be required to reimburse the Commission for any differences between its high bid and the amount of the winning bid, if the winning bid is lower.[772] A defaulting auction winner also would be assessed three percent of either the subsequent winning bid or the amount of the defaulting bid, whichever is less.[773]

363. Proposal. We propose to adopt bid withdrawal, default, and disqualification rules for the lower 80 and General Category licenses based on the procedures in our general competitive bidding rules.[774] Under these procedures, any bidder who withdraws a high bid during an auction before the Commission declares bidding closed, or defaults by failing to remit the required down payment within the prescribed time, would be required to reimburse the Commission. The bidder would be required to pay the difference between its high bid and the amount of the winning bid the next time the license is offered by the Commission, if the subsequent winning bid is lower. A defaulting auction winner would be assessed an additional payment of three percent of the subsequent winning bid or three percent of the amount of the defaulting bid, whichever is less. The monetary assessment would be offset by the upfront payment. In the event that an auction winner defaults or is otherwise disqualified, we propose to re-auction the license either to existing or new applicants. The Commission would retain discretion, however, to offer the license to the next highest bidder at its final bid level if the default occurs within five business days of the close of bidding. We seek comment on these proposed procedures.

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[770] *Further Notice*, 10 FCC Rcd at 8011, ¶ 83.

[771] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2373, ¶ 151.

[772] *Id.*

[773] *Id.*

[774] 47 C.F.R. §§ 1.2104(g) and 1.2109.

f. Long-Form Applications

364. Background. In the *Competitive Bidding Second Report and Order*, we established rules that require a winning bidder to submit a long-form application.[775] The long-form application is required to be filed by a specific date, generally within ten business days after the close of the auction.[776] We stated that after we received the high bidder's down payment and the long-form application, we would review the long-form application to determine if it is acceptable for filing.[777] Once the long-form application is accepted for filing, we stated that we would release a Public Notice announcing this fact, triggering the filing window for petitions to deny.[778] We also stated that if, pursuant to Section 309(d), we deny or dismiss all petitions to deny, if any are filed, and we otherwise are satisfied that the applicant is qualified, we would grant the license(s) to the auction winner.[779] In the *Further Notice*, we proposed to use application procedures similar to those used for licensing PCS.[780] Consistent with our approach in PCS, we proposed to require only the winning bidder to file a long-form application (FCC Form 600).[781]

365. Proposal. If the winning bidder makes the down payment in a timely manner, we propose the following procedures: A long-form application filed on FCC Form 600 must be filed by a date specified by Public Notice, generally within ten (10) business days after the close of bidding. After the Commission receives the winning bidder's down payment and long-form application, we will review the long-form application to determine if it is acceptable for filing. In addition to the information required in the Form 600, designated entities will be required to submit evidence to support their claim to any special provision available for designated entities described in this Order. This information may be included in an exhibit to FCC Form 600. This information will enable the Commission, and other interested parties, to ensure the validity of the applicant's certification of eligibility for bidding credits, installment payment options, and other special provisions. Upon acceptance for filing of the long-form application, the Commission will issue a Public Notice announcing this fact, triggering the filing window for petitions to deny. If the Commission denies all petitions to deny, and is otherwise satisfied that the applicant is qualified, the license(s) will

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[775] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2383, ¶ 199.

[776] *Id.*

[777] *Id.*

[778] *Id.*

[779] *Id.*

[780] *Further Notice*, 10 FCC Rcd at 8001, ¶ 58.

[781] *Id.* at 8001, ¶ 59.

be granted to the auction winner.[782] We seek comment on this proposal.

g. Petitions to Deny and Limitations on Settlements

366. Background. We determined in the *Competitive Bidding Second Report and Order* that the procedures concerning petitions to deny found in Section 309(j)(2) of the Communications Act, should apply to competitive bidding.[783] We determined that we would adopt expedited procedures to resolve substantial and material issues of fact concerning qualifications.[784] We stated that we would entertain petitions to deny the application of the auction winner if the petitions to deny otherwise are provided for under the Communications Act or our rules.[785] We then determined that we would not conduct a hearing before denial if we determined that an applicant is not qualified and no substantial and material issue of fact exists concerning that determination.[786] We also stated that if we identified substantial and material issues of fact in need of resolution, Sections 309(j)(5) and 309(j)(2) of the Communications Act permit submission of all or part of evidence in written form, and also allow employees other than administrative law judges to preside at the taking of written evidence. Additionally, in the *Competitive Bidding Fourth Memorandum, Opinion and Order*, we stated that our anti-collusion and settlement procedures were designed to avoid the problem of entities filing applications solely for the purpose of demanding payment from other bidders in exchange for settlement or withdrawal.[787]

367. As we have determined, the petition to deny procedures in Section 90.163 of the Commission's rules, adopted in the *CMRS Third Report and Order*, will apply to the processing of applications for the 800 MHz SMR service.[788] Thus, a party filing a petition to deny against an application for the lower 80 and General Category channels will be required to demonstrate standing and meet all other applicable filing requirements. We also have adopted restrictions in Section 90.162 to prevent the filing of applications and pleading (or threats of the same) designed to extract money from SMR applicants. Thus, we will limit the consideration that an applicant or petitioner is permitted to receive for agreeing to withdraw an application or a petition to deny to the legitimate and prudent expenses of the withdrawing applicant or petitioner.

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[782] *See generally* 47 C.F.R. §§ 90.163-90.166.

[783] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2383, ¶ 200.

[784] *Id; see also*, 47 U.S.C. § 309(j)(5).

[785] *Id; see also* Section 309(b), (d)(1).

[786] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2383, ¶ 202.

[787] *Competitive Bidding Fourth Memorandum Opinion and Order*, 9 FCC Rcd at 6867, ¶ 50.

[788] *CMRS Third Report and Order*, 9 FCC Rcd at 8000, 8138, 8142, ¶¶ 21, 337, 347.

368. With respect to petitions to deny, the Commission need not conduct a hearing before denying an application, if it determines that an applicant is not qualified and no substantial issue of fact exists concerning that determination.[789] In the event the Commission identifies substantial and material issues of fact, Section 309(i)(2) of the Communications Act permits the submission of all or part of evidence in written form in any hearing and allows employees other than administrative law judges to preside over the taking of written evidence. We seek comment on these proposals.

h. Transfer Disclosure Requirements

369. In Section 309(j) 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."[790] In the *Competitive Bidding Second Report and Order*, the Commission adopted safeguards designed to ensure that the requirements of Section 309(j)(4)(E) are satisfied.[791] 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."[792] Therefore, we imposed a transfer disclosure requirement on licenses obtained through the competitive bidding process, whether by a designated entity or not.[793]

370. We tentatively conclude that the transfer disclosure requirements of Section 1.2111(a) should apply to all lower 80 and General Category licenses obtained through the competitive bidding process. Generally, licensees transferring their licenses within three years after the initial license grant would 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 license. As we indicated in the *Competitive Bidding Second Report and Order*, we would give particular scrutiny to auction winners who have not yet begun 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

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[789] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2328, ¶ 202.

[790] 47 U.S.C. § 309(j)(4)(E).

[791] *Competitive Bidding Second Report and Order*, 9 FCC Rcd. at 2384-88, ¶¶ 210-216, 258-265.

[792] *See* House Report at 257; *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2385, ¶ 214.

[793] *See* 47 C.F.R. § 1.2111(a).

relating to unjust enrichment have arisen outside the designated entity context.[794] We seek comment on these proposals.

i. Performance Requirements

371. Section 309(j)(4)(B) of the Communications Act requires the Commission to establish rules for auctionable services that "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."[795] In the *Competitive Bidding Second Report and Order*, we decided that in most auctionable services, existing construction and coverage requirements provided in our service rules would be sufficient to meet this standard, and that it was unnecessary to impose additional performance requirements. As discussed in Section IV(c)(3), *supra*, we have proposed service rules for SMR that would require market-area licensees to meet minimum population coverage requirements in their licensing areas. We tentatively conclude that these proposed coverage requirements are sufficient to meet the requirements of Section 309(j)(4)(B). As discussed *infra*, we propose that failure to meet these requirements would result in automatic license cancellation. Accordingly, we do not propose to adopt additional performance requirements for the lower 80 and General Category licenses. We seek comment on this proposal.

4. Treatment of Designated Entities

a. Overview and Objectives

372. Section 309(j)(3)(B) of the Communications Act provides that in establishing auction 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."[796] Section 309(j)(4)(A) provides that to promote the statute'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

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[794] *See Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2385, ¶ 214. We note that these transfer disclosure requirements are in addition to the unjust enrichment provisions discussed in this Order at ¶¶ 400-401, *infra*.

[795] 47 U.S.C. § 309(j)(4)(B).

[796] 47 U.S.C. § 309(j)(3)(B).

methods . . . and combinations of such schedules and methods."[797]

373. In the *Competitive Bidding Second Report and Order*, we established eligibility criteria and general rules regarding special measures for small businesses, rural telephone companies, and businesses owned by women and minorities (sometimes referred to collectively as "designated entities").[798] We also identified several measures, including installment payments, spectrum set-asides, and bidding credits, from which we could choose when establishing rules for auctionable services. We stated that we would decide whether and how to use these special provisions, or others, when we developed specific competitive bidding rules for particular services. In addition, we set forth rules designed to prevent unjust enrichment by designated entities who transfer ownership in licenses obtained through the use of these special measures or who otherwise lose their designated entity status.

374. When deciding which provisions to adopt to encourage designated entity participation in particular services, we have closely examined the specific characteristics of the service and determined whether any particular barriers to accessing capital have stood in the way of designated entity opportunities. In accordance with our statutory directive, we have adopted measures designed both to enhance the ability of designated entities to acquire licenses and to increase the likelihood that designated entity licensees will become strong competitors in the provision of wireless services. In narrowband PCS, for instance, we provided installment payments for small businesses and bidding credits for minority-owned and women-owned businesses.[799] In broadband PCS, we designated certain spectrum blocks as entrepreneurs' blocks, allowed entrepreneurs' block licensees to make installment payments, and provided bidding credits for designated entities.[800] In 900 MHz SMR, we

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[797]47 U.S.C. § 309(j)(4)(A).

[798]*See Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2388, ¶ 227, *et seq.*

[799]*Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2978, ¶ 87. Minority and women-owned businesses received a 25 percent bidding credit in the nationwide narrowband PCS auctions. *Id.* at ¶ 72. In the regional narrowband auctions, the bidding credit was increased to 40 percent. *See* Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Third Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, PP Docket No. 93-253, 10 FCC Rcd 175, 201 at ¶ 58.

[800]*Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5591, ¶ 133. *See also* Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Competitive Bidding Fifth Memorandum Opinion and Order*, PP Docket No. 93-253, 10 FCC Rcd 403 at 453, 459, ¶¶ 99, 103. Originally, small businesses applying for broadband PCS licenses in the entrepreneurs' blocks were eligible for a 10 percent bidding credit, businesses owned by minorities and/or women were to receive a 15 percent bidding credit, and small businesses owned by women and/or minorities were to receive an aggregated bidding credit of 25 percent. In light of the Supreme Court decision in *Adarand Contractors, Inc. v. Peña*, discussed *infra*, we have eliminated race and gender-based provisions in our C block rules in order to avoid further delay of the auction. *See generally Competitive Bidding Sixth Report and Order*.

adopted bidding credits and installment payments for small businesses.[801] In the 800 MHz SMR service, we did not adopt special provisions for designated entities, with respect to the upper 200 channels. We nonetheless indicated that such approach would meet the statutory objectives of promoting economic opportunity and competition, avoiding excessive concentration of licenses, and ensuring access to new and innovative technologies by designated entities. As discussed in greater detail below, we seek comment on the type of designated entity provisions that should be incorporated into our competitive bidding procedures for the lower 80 and General Category channels.

b. Eligibility for Designated Entity Provisions

i. Small Businesses

a) Special Provisions

375. Proposal. We tentatively conclude that it is appropriate to establish special provisions for small businesses in our competitive bidding rules for the lower 80 and General Category channels. We note that Congress specifically cited the needs of small businesses in enacting auction legislation. The House Report states that the statutory provisions related to installment payments were enacted to "ensure that all small businesses will be covered by the Commission's regulations, including those owned by members of minority groups and women."[802] 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 inadvertently does not favor incumbents with "deep pockets" over new companies or start-ups.[803]

376. In addition, Congress made specific findings with regard to access to capital 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."[804] 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."[805] For these reasons, and as discussed in greater detail below, we tentatively conclude that small

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[801] *900 MHz Second Report and Order,* 60 Fed. Reg. 21,987, ¶¶ 129, 133.

[802] *See* H.R. Rep. No. 111, 103d Cong., 1st Sess. (1993) at 255.

[803] *Id.*

[804] Small Business Credit and Business Opportunity Enhancement Act of 1992, Pub. L. No. 102-366, § 331(a)(3), 106 Stat. 1007.

[805] *Id.* at § 331(b)(2),(3).

businesses applying for these licenses should be entitled to some form of bidding credit and should be allowed to pay their bids in installments. This is consistent with our approach in the 900 MHz SMR service. We seek comment on this tentative conclusion.

b) Definition

377. Comments. DCL Associates and Dru Jenkinson, *et al.* suggest that we adopt the SBA definition of small business initially adopted in the *Competitive Bidding Second Report and Order.*[806] Under that definition, a "small business" is one which has a net worth not in excess of $6 million with average net income for the two preceding years not in excess of $2 million. Morris recommends using the small business definition utilized by the Internal Revenue Service. The SBA opines that a revenue test remains the best and least problematic guideline for determining whether a business is small.[807] AMTA suggests that the better approach for the 800 MHz SMR service would be to incorporate preferential provisions for existing operators.[808]

378. Several commenters offer other small business definitions. AMI suggests that small businesses be defined to have 30 channels licensed or managed and/or less than $540,000 in current system revenues.[809] Genesee suggests using the U.S. Chamber of Commerce standard for retail/service companies of less than $5.5 million annually.[810] Genesee and the SBA believe that the PCS small business definition, with a $40 million maximum would be inappropriate for the 800 MHz SMR service.[811] The SBA believes that a smaller revenue figure, such as $15 million, would be more appropriate.[812]

379. Proposal. We seek comment on the appropriate definition of "small business" to be applied for purposes of the bidding credits proposed above. In the *Competitive Bidding Second Memorandum Opinion and Order*, we stated that we would define eligibility requirements for small businesses on a service-specific basis, taking into account the capital requirements and other characteristics of each particular service in establishing the appropriate

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[806]DCL Associates Comments at 8; Dru Jenkinson *et al.* Comments at 12.

[807]SBA Comments at 18.

[808]AMTA Reply Comments at 32-33.

[809]AMI Comments at 10.

[810]Genesee Comments at 5.

[811]Genesee Comments at 5; SBA Comments at 19.

[812]Morris Comments at 5; NTCA Comments at 5.

threshold.[813] In broadband PCS and regional narrowband PCS, we defined small businesses based on a $40 million annual revenue threshold.[814] In the 220 MHz service, we have proposed two small business definitions: (1) for purposes of bidding on a nationwide or regional license, small businesses would be defined as entities with $15 million in average gross revenues for the preceding three years; and (2) for purposes of bidding on EA licenses, small businesses be would be defined as entities with $6 million in average gross revenues for the preceding three years.[815] After considering the record in the 900 MHz proceeding, we concluded that both $15 million and $3 million small business definitions were warranted, which would entitle applicants for MTA licenses to 10 percent and 15 percent bidding credits respectively.

380. In conjunction with our proposal to provide two levels of bidding credits, we propose to establish two small business definitions: to obtain the 10 percent bidding credit, an applicant would be limited to $15 million in average gross revenues for the previous three years; to obtain the 15 percent credit, the applicant would be limited to $3 million in gross revenues for the previous three years. In both cases, we would require the applicant to aggregate the gross and revenues of its affiliates and investors for the preceding three years for purposes of determining eligibility. These proposed thresholds are comparable to what we have adopted in 900 MHz SMR,[816] and they reflect our tentative view of the capital requirements and potential barriers to entry in the 800 MHz SMR service. We seek comment on whether these thresholds, and the proposed bidding credit amounts associated with them, are sufficient for the lower 80 and General Category Channels in light of the build-out costs associated with constructing an SMR system throughout a market area, or whether alternative definitions would be more suitable. We also seek comment on whether our proposed small business definitions are sufficiently restrictive to protect against businesses receiving bidding credits which in fact do not need them.

ii. Minority- and Women-Owned Businesses

381. Background. Prior to the Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*, we concluded that in the licensing of broadband and narrowband PCS, minority and women-owned businesses might have difficulty accessing sufficient capital to be viable auction participants or service providers, in the absence of special provisions in our auction

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[813] *Competitive Bidding Second Memorandum Opinion and Order*, 9 FCC Rcd at 7269, ¶ 145.

[814] *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5608, ¶ 175; *Competitive Bidding Third Memorandum Opinion and Order*, 10 FCC Rcd at 196, ¶ 46.

[815] *220 MHz Second Memorandum Opinion and Order*, 60 Fed. Reg. 46,564 at ¶ 171.

[816] *Id.*

rules.[817] We therefore adopted special provisions for minorities and women in these services. We further determined that such provisions were constitutional under the "intermediate scrutiny" standard used in *Metro Broadcasting, Inc. v. FCC*.[818]

382. In *Adarand*, however, the Supreme Court ruled that racial classifications imposed by the federal government are subject to strict scrutiny.[819] This holding will apply to any proposal to incorporate race-based measures into our rules; thus, it introduces an additional level of complexity to implementing Congress' mandate to ensure that businesses owned by minorities and women are provided "the opportunity to participate in the provisions of spectrum-based services."[820] We emphasize that we have not concluded that race or gender-based measures are unconstitutional or otherwise inappropriate for spectrum auctions we will hold in the future.[821] At a minimum, however, we believe that *Adarand* requires us to build a thorough factual record concerning the participation of minorities and women in spectrum-based services to support race- and gender-based measures.

383. Comments. DCL Associates and Dru Jenkinson, *et al.*, the only commenters addressing this specific issue, propose that the PCS definitions of minority- and/or female-controlled firms should be utilized in the 800 MHz SMR service.[822] Dru Jenkinson, *et al.* further suggest that there should be no difference in eligibility requirements for the wide-area and local licenses.[823]

384. Proposal. We propose to adopt special provisions in the lower 80 and General Category competitive bidding rules for small businesses. We believe that such provisions can be structured in a way that would increase the likelihood of participation by women- and minority-owned businesses. In adopting designated entity measures for PCS, for example, we noted that such targeted provisions might not be necessary in services that are less capital intensive.[824] We consider 800 MHz SMR to be significantly less capital-intensive than PCS

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[817]*See Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2391, ¶ 242; *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5572, ¶ 96.

[818]497 U.S. 547, 564-565 (1990). *See Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5571-80, ¶¶ 93-112.

[819]115 S. Ct. 2097 (1995).

[820]47 U.S.C. § 309(j)(4)(D).

[821]*See generally Competitive Bidding Sixth Report and Order*, 60 Fed. Reg. 37,786.

[822]DCL Associates Comments at 8; Dru Jenkinson, *et al.* Comments at 12.

[823]Dru Jenkinson, *et al.* Comments at 12.

[824]*See Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2391, ¶ 242; *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5572, ¶ 96.

and some other wireless services. In addition, we anticipate that our proposal to license each channel separately on an EA basis will mean lower entry costs for applicants. We also expect that the vast majority of minority and women-owned businesses will be able to qualify as small businesses under any definition we adopt. For example, U.S. Census Data shows that approximately 99 percent of all women-owned businesses and 99 percent of all minority-owned businesses generated net receipts of $1 million or less.[825] Finally, in light of the statute's instruction to "design and test multiple alternative methodologies"[826] we believe that it would be suitable to use more uniform measures for the lower 80 and General Category channels, because capital entry requirements are expected to be comparatively lower than other CMRS services. We seek comment on this proposal.

385. We also request comment on the possiblity that in addition to small business provisions, separate provisions for women- and minority-owned entities should be adopted for the lower 80 and General Category channels. To comply with the Supreme Court's ruling in *Adarand*, any race-based classification must be a narrowly tailored measure that furthers a compelling governmental interest.[827] We also believe that gender-based provisions, although not addressed in *Adarand*, should be subject to the broadest possible comment. We therefore ask that commenters discuss whether the capital requirements of the 800 MHz SMR service pose a barrier to entry by minorities and women, and whether assisting women and minorities to overcome such a barrier, if it exists, would constitute a compelling government interest. In particular, we seek comment on the actual costs associated with acquisition, construction, and operation of an 800 MHz SMR system with a service area based on a pre-defined geographic area and the proportion of existing 800 MHz SMR businesses that are owned by women and minorities. We also seek comment on the analytical framework for establishing a history of past discrimination in the 800 MHz SMR industry and urge parties to submit evidence (statistical, documentary, anecdotal or otherwise) about patterns or actual cases of discrimination in this and related communications services. Assuming that a compelling government interest is established, we seek comment on whether separate provisions for women and minorities are necessary to further this interest, and whether such provisions can be narrowly tailored to satisfy the strict scrutiny standard.

iii. Reduced Down Payment

386. Background. In the *Competitive Bidding Second Report and Order*, we noted that reduced upfront payments particularly may be appropriate for auctions of spectrum

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[825] *Women-Owned Businesses*, WB 87-1, 1987 Economic Census, p. 144, Table 8; *Survey of Minority-Owned Business Enterprises*, MB 87-4, 1987 Economic Census, pp 81-82, Table 8. For purposes of this data, these are entities that earned at least $500 and filed an IRS Form 1040, Schedule C, and in which at least 51 percent of the assets are owned by minorities or women.

[826] 47 U.S.C. § 309(j)(3).

[827] *See Adarand*, 155 S.Ct. 2097, 2113.

specifically set aside for designated entities as a means of encouraging participation in the auction, particularly by all eligible designated entities. For broadband PCS, we reduced the upfront payment requirement for designated entities in the entrepreneurs' blocks, observing that requiring full compliance with the upfront payment could discourage auction participation by designated entities.

387. Comments. Several commenters support offering a reduced upfront payment option to designated entities.[828] DCL Associates strongly supports availability of reduced upfront payments for minority- and/or women-owned businesses.[829] Dru Jenkinson, Inc., *et al.*, on the other hand, support offering the reduced upfront payment option to all designated entities.[830] To encourage the participation of designated entities in an auction for a geographic area licenses, Pittencrief does not oppose a reduced upfront payment.[831] Southern opines, however, that if the Commission imposes a higher than usual upfront payment, as other commenters suggest, then a reduced upfront payment option will not do much to facilitate participation by designated entities in the auctions for wide-area licenses.[832]

388. Proposal. We propose to adopt reduced upfront payments for small businesses for geographic licenses on the lower 80 and General Category channels. We believe that this special provision will encourage participation in the auction by eligible designated entities. We seek comment on this proposal and tentative conclusion.

c. Bidding Credits

389. Background. Bidding credits allow eligible designated entities to receive a payment discount (or credit) for their winning bid in an auction. In the *Competitive Bidding Second Report and Order*, we determined that competitive bidding rules applicable to individual services would specify the entities eligible for bidding credits and the bidding credit amounts for each particular service.[833] As a result, we have adopted a variety of bidding credit provisions for small businesses and other designated entities in auctionable services. In the nationwide narrowband PCS auction, for example, we established a 25 percent bidding credit for minority and women-controlled businesses, while a 40 percent credit was used in

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[828]DCL Associates Comments at 8; Dru Jenkinson, *et al.*, Comments at 11; Pittencrief Comments at 20.

[829]DCL Associates Comments at 8.

[830]Dru Jenkinson, *et al.* Comments at 11.

[831]Pittencrief Comments at 20.

[832]Southern Reply Comments at 34-35.

[833]*Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2391, ¶ 241.

the regional narrowband PCS auction.[834] In broadband PCS, our pre-*Adarand* entrepreneurs' block rules included a 10 percent bidding credit for small businesses, a 15 percent credit for businesses owned by minorities or women, and an aggregated 25 percent credit for small businesses owned by women and/or minorities.[835] In the *MDS Report and Order*, we allowed small businesses a 15 percent bidding credit.[836] In the 900 MHz SMR service, we adopted a 15 percent bidding credit for small businesses with gross revenues that are not more than $3 million for the preceding three years and a 10 percent bidding credit for small businesses with gross revenues that are more than $3 million but not more than $15 million for the preceding three years.[837] Finally, in the 220 MHz *Second Memorandum Opinion and Order*, we proposed a 40 percent small business bidding credit for nationwide and regional licenses and a 10 percent bidding credit for smaller EA licenses.[838]

390. Comments. Few commenters addressed whether special provisions should be provided for businesses owned by minorities and/or women in the 800 MHz SMR auctions. With respect to bidding credits, Morris, Pittencrief, DCL Associates, Dru Jenkinson *et al.* and the SBA support the Commission's proposal to provide bidding credits for such entities. DCL Associates, Dru Jenkinson, *et al.*, and the SBA support a forty percent bidding credit for minority- and women-owned entities for wide-area licenses.[839] The SBA further supports affording minority- and women-owned entities a twenty-five percent bidding credit for local SMR licenses.[840] Other commenters, however, oppose giving such entities any type of bidding credit.[841] AMI opines that a bidding credit would be inappropriate, based on the uncertainty of the value of wide-area licenses at auction.[842] Dial Call opposes bidding credits, contending the questionable constitutionality of such provisions only would serve to delay the

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[834]*Competitive Bidding Third Report and Order,* 9 FCC Rcd at 2970, ¶ 72; Implementation of Section 309(j) of the Communications Act - Competitive Bidding Narrowband PCS, PP Docket No. 93-314, *Competitive Bidding Third Memorandum Opinion and Order*, 10 FCC Rcd 175, 201, ¶ 58.

[835]*Competitive Bidding Sixth Report and Order*, 60 Fed. Reg. 37,786, ¶¶ 47-48.

[836]*MDS Report and Order*, 10 FCC Rcd at 9669, ¶ 188.

[837]900 *Reconsideration Order/7th Report and Order, supra* note 428, ¶ 164.

[838]*See 220 MHz Second Memorandum Opinion and Order,* 60 Fed. Reg. 46,564 at ¶ 162.

[839]Morris Comments at 4; Pittencrief Comments at 19; DCL Associates Comments at 8; Dru Jenkinson, *et al.* Comments at 11-12; SBA Comments at 12.

[840]SBA Comments at 12.

[841]AMI Comments at 10; AMTA Reply Comments at 32; Dial Call Reply Comments at 13.

[842]AMI Comments at 10.

ultimate resolution of the proceeding.[843]

391. Proposal. We seek comment on the appropriate level of bidding credit for the lower 80 and General Category channels, in comparison to the services discussed above. We also seek comment on the possibility of offering "tiered" bidding credits for different classes of small businesses. We note that small businesses may vary in their ability to raise capital, depending on their size and gross revenues. By offering levels of bidding credits which depend on the size of the small business, we could increase the likelihood that the full range of small businesses would be able to participate in an auction and potentially provide service. We therefore propose to establish two levels of bidding credits: a 10 percent bidding credit for all small businesses, and a 15 percent credit for small businesses that meet a more restrictive gross revenue threshold. We believe that tiered bidding credits can help achieve our statutory objective under Section 309(j)(3)(B), by providing varying sizes of small businesses with a meaningful opportunity to obtain SMR licenses. We seek comment on this proposal.

392. We also seek comment on the degree to which the revenues of affiliates and major investors should be considered in determining small business eligibility. For example, in determining whether a PCS applicant qualifies as a small business, we include the gross revenues of the applicant's affiliates and investors with ownership interests of twenty-five percent or more in the applicant, but we do not attribute the gross revenues of investors who hold less than a twenty-five percent interest in the applicant unless they are members of the applicant's control group.[844] We seek comment on what attribution standard should be applied to 800 MHz SMR applicants seeking to qualify as small businesses. Would a smaller attribution standard be more appropriate?

393. We propose to make the small business bidding credit available on all lower 80 and General Category Channels that are licensed on a market-area basis. We recognize that this would be a departure from our 900 MHz SMR rules, in which we offered bidding credits to small businesses on any available channel block. Our proposal is consistent, however, with our PCS rules in which bidding credits are available only on designated channels.[845] We seek comment on this proposal. We also seek comment on whether there is a reasonable basis for providing credits on some channels and not others.

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[843]Dial Call Reply Comments at 13.

[844]*See, e.g.*, § 24.720(j)(1); § 24.320(b)(2)(iv).

[845]In both narrowband PCS and broadband PCS we limited the channel blocks on which bidding credits were available to designated entities. *Competitive Bidding Third Report and Order*, 9 FCC Rcd 2941 at ¶ 72 (narrowband PCS); *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd 5532 at ¶ 131 (broadband PCS). In IVDS, we permitted the use of bidding credits on both available channels, but imposed a limit of one bidding credit per service area. *See* Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Fourth Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2330, 2337, ¶ 39 (1994).

d. Installment Payments

394. Background. In the *Competitive Bidding Reconsideration Order*, we indicated that in the future we would not necessarily limit the availability of installment payments to small businesses, but would consider offering the installment option (with varying rates and payment schedules) to other classes of designated entities.

395. Comments. AMI, CellCall, DCL Associates, Genesee, Pittencrief, and the SBA support the proposal that small businesses be eligible for installment payments.[846] AMI opines that the availability of installment payments may prove useful in facilitating the participation of small operators in the 800 MHz SMR auctions.[847] In addition, CellCall, DCL Associates, and Morris advocate that the Commission afford small businesses reduced upfront payments.[848] Telecellular believes that the Commission should maximize the opportunities for small businesses by granting them bidding credits. Telecellular suggests adoption of the bidding credits provided under the Commission's broadband PCS designated entity provisions.[849]

396. DCL Associates strongly supports the availability of installment payments for minority and/or women-owned businesses.[850] Pittencrief does not object to offering installment payments as a means to encourage participation of designated entities in the auctions for wide-area licenses.[851]

397. Proposal. We propose to adopt an installment payment option for small businesses that successfully bid for lower 80 and General Category licenses. As we noted in the *Competitive Bidding Second Report and Order*, 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.[852] Under this proposal, licensees who qualify for installment payments would be entitled to pay their winning bid amount in quarterly installments over the ten-year license term, 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

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[846]AMI Comments at 10; CellCall Comments at 30; DCL Associates Comments at 8; Genesee Comments at 5; Pittencrief Comments at 14; SBA Comments at 12.

[847]AMI Comments at 10.

[848]CellCall Comments at 30; DCL Associates Comments at 8; Morris Comments at 5.

[849]Telecellular Comments at 15.

[850]DCL Associates Comments at 7.

[851]Pittencrief Comments at 20.

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

plus 2.5 percent.[853] In addition, we propose to tailor installment payments to reflect the needs of different size entities. Under our proposal, small businesses with $3 million or less in gross revenues would make interest-only payments for the first five years of the license term, while small businesses with $15 million or less in gross revenues would make interest-only payments during the first two years. We believe that this installment payment structure, which is consistent with our approach in 900 MHz SMR and the upper 200 channels, will enable entities with less immediate access to capital to increase their chances of obtaining licenses. Timely payment of all installments would be a condition of the license grant and failure to make timely payment would be grounds for revocation of the license. We seek comment on this proposal.

e. Set-Aside Spectrum

398. Background. In the *Eighth Report and Order*, we determined that designation of an entrepreneur's block for the upper 200 channels was not feasible. In the *Further Notice*, we indicated that an entrepreneurs' block could be feasible for the lower 80 channels which we contemplated would be used primarily by smaller SMR operators.

399. Proposal. We tentatively conclude that the lower 80 and the General Category Channels should be designated as an entrepreneurs' block. Such a designation would ensure that smaller SMR operators would have opportunities to maintain competitive and viable systems and also to pursue wide-area licensing strategies should they desire to do so. In our broadband PCS rules where we have authorized entrepreneurs' block licenses, we have required entrepreneurs to comply with financial caps based on gross revenues and total assets over a certain period of time. Because the 800 MHz SMR service is less capital-intensive than PCS, we believe that the entrepreneurs' block financial caps in the 800 MHz SMR service should be set at a lower level than those in broadband PCS. We seek comment on the feasibility of designating the lower 80 and General Category channels as an entrepreneurs' block. We also ask commenters to discuss what would be appropriate financial caps for such entrepreneurs' block.

f. Unjust Enrichment Provisions

400. Background. In the *Competitive Bidding Second Report and Order,* we indicated that licensees that received bidding credits and installment payments and also chose to transfer their licenses to entities not eligible for these benefit, were required to repay the amount of the bidding credit on a graduated basis. No repayment would be required six years after the license grant.[854] In addition, the ineligible transferee would not have the benefit of installment

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[853] *See, e.g., Competitive Bidding Fifth Report and Order*, 9 FCC Rcd 5593-94, ¶ 139.

[854] *Id.* at 2384-2388, 2394-2395, ¶¶ 210-226, 258-265.

payments, and principal and accrued interest would come due.[855] For the 900 MHz SMR service, we adopted unjust enrichment provisions which required reimbursement of the benefit received by a small business through bidding credits and installment payments in the event that such small business transferred its license to an entity not qualifying as a small business. In the *Competitive Bidding Fifth Report and Order*, we adopted restrictions on the transfer or assignment of broadband PCS entrepreneurs' block licenses to ensure that designated entities do not take advantage of special provisions by immediately assigning or transferring control of their licenses.[856]

401. Proposal. Permitting an immediate transfer of a discounted license to an entity that is not a small business could undermine our basis for offering special provisions to small businesses, but we note that in services with no entrepreneurs' block, we have limited unjust enrichment to repayment of bidding credits or installment payments.[857] We therefore seek comment on whether we should use an approach similar to that adopted for the 900 MHz SMR service or that adopted for broadband PCS entrepreneurs' block licenses.

g. Partitioning

402. The Communications Act directs the Commission to ensure that rural telephone companies have the opportunity to participate in the provision of spectrum-based services.[858] Rural areas, because of their more dispersed populations, tend to be less profitable to serve than more densely populated urban areas. Rural telephone companies, however, are well positioned because of their existing infrastructure to serve these areas. In other services, such as broadband PCS and 900 MHz SMR, we have acknowledged this fact by allowing rural telephone companies to partition their licenses on a geographic basis, thereby increasing the likelihood of rapid introduction of service into rural areas.[859] We also afforded rural telephone companies this opportunity under our rules for the upper 200 channels of 800 MHz SMR spectrum. We seek comment on whether we should incorporate similar provisions into our rules for the lower 80 and General Category channels.

403. If we adopt geographic partitioning for rural telephone companies, geographic partitioning should be made available to them on the same basis as in PCS and the upper 200

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[855] *Id.*

[856] *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5588, ¶ 128.

[857] *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2975-2976, ¶ 80.

[858] 47 U.S.C. § 309(j).

[859] *See Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5598-5599,¶ 150; see also *900 MHz Second Report and Order*, 60 Fed. Reg. 21,987, ¶¶ 144-145.

channels.[860] Such a partitioning scheme would provide rural telephone companies with the flexibility to serve areas in which they already provide service, while the remainder of the service area could be served by other providers.[861] Under this proposal, rural telephone companies would be permitted to acquire partitioned SMR licenses in one of two ways: (1) by forming bidding consortia consisting entirely of rural telephone companies to participate in auctions, and then partitioning the licenses won among consortia participants, or (2) by acquiring partitioned paging licenses from other licensees through private negotiation and agreement either before or after the auction.[862] We also would require that partitioned areas conform to established geo-political boundaries, include all portions of the wireline service area of the rural telephone company applicant, and be reasonably related to the rural telephone company's wireline service area.[863] We also propose to use the definition for rural telephone companies implemented in the *Competitive Bidding Fifth Report and Order* for broadband PCS. Rural telephone companies would be defined as local exchange carriers having 100,000 or fewer access lines, including all affiliates.[864] We seek comment on this proposal. We also seek comment on whether we should extend partitioning options to entities other than rural telephone companies, as we did in MDS[865] and as we proposed for the upper 200 channels in this service.[866]

VII. CONCLUSION

404. We believe that the service and auction rules adopted in this *First Report and Order* and *Ninth Report and Order* will promote the public policy goals set forth by Congress. We believe that the service and auction proposals set forth in the *Second Further Notice of Proposed Rule Making* are additional efforts necessary to continue our implementation of a new licensing scheme for the 800 MHz SMR service. We further believe that the rules will facilitate the rapid implementation of wide-area licensing in the 800 MHz SMR service, thus advancing the public interest by fostering economic growth of competitive new services via efficient spectrum use. The rules also will allow the public to recover a portion of the value of the public spectrum and promote expeditious access to 800 MHz SMR services by

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[860] *Competitive Bidding Fifth Report and Order,* 9 FCC Rcd at 5597-5598, ¶ 150.

[861] *Id.*

[862] *Id.* at ¶ 151.

[863] *Id.* Note: A partitioned service area will be presumed to be reasonably related to the rural telephone company's wireline service area if the partitioned service area contains no more than twice the population overlap between the rural telephone company's wireline service area and the partitioned area.

[864] *Id.* at ¶ 193.

[865] *See MDS Report and Order*, 10 FCC Rcd at 9666, ¶ 180.

[866] *See* discussion at ¶ 251-53, *supra.*

consumers, and rapid deployment of 800 MHz SMR by existing licensees and potential new entrants. We also believe that the technical rules proposed and adopted herein strike the proper balance between the rights of incumbent licensees in the 800 MHz SMR spectrum and new EA licensees.

VIII. PROCEDURAL MATTERS

405. With respect to this *First Report and Order* and *Eighth Report and Order*, pursuant to the Regulatory Flexibility Act of 1980, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Further Notice of Proposed Rule Making* in PR Docket No. 93-144. Written comments on the IRFA were requested. The Commission's final analysis is as follows:

406. Need for and purpose of the action. This rule making proceeding has implemented Sections 332 and 3(n), respectively, of the Communications Act of 1934, as amended. The rules adopted herein will carry out Congress's intent to establish a consistent regulatory framework for all commercial mobile radio service (CMRS).

407. Issues raised in response to the IRFA. No comments were submitted in response to the IRFA.

408. Significant alternatives considered and rejected. All significant alternatives have been addressed in the *First Report and Order* in PR Docket No. 93-144, the *Third Report and Order* in GN Docket No. 93-252, and the *Ninth Report and Order* in PP Docket No. 93-253.

409. With respect to this *Second Further Notice of Proposed Rule Making*, an Initial Regulatory Flexibility Analysis is contained in Appendix B. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis of the expected impact on small entities of the proposals suggested in the document. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the remainder of the *Second Further Notice of Proposed Rule Making*, but they must have a separate and distinct heading designating them as responses to the IRFA. The Secretary shall send a copy of this *Second Further Notice of Proposed Rule Making*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981).

410. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 CFR §§ 1.1202, 1.1203, and 1.1206(a).

411. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415 and 1.419, interested parties may file comments on or

before January 16, 1996, and reply comments on or before January 25, 1996. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center of the Federal Communications Commission, Room 239, 1919 M Street, N.W., Washington D.C. 20554.

412. Authority for issuance of this *First Report and Order, Eighth Report and Order,* and *Second Further Notice of Proposed Rule Making,* is contained in Section 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309(j).

413. Accordingly, IT IS ORDERED that Part 90 of the Commission's Rules is amended as set forth in Appendix A.

414. IT IS FURTHER ORDERED that the rule changes made herein WILL BECOME EFFECTIVE 30 days after their publication in the Federal Register. This action is taken pursuant to Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309(j).

415. IT IS FURTHER ORDERED that the Regulatory Flexibility Analysis, as required by Section 604 of the Regulatory Flexibility Act, and as set forth in Appendix B is ADOPTED.

416. IT IS FURTHER ORDERED that upon the adoption of this *First Report and Order, Ninth Report and Order, and Second Further Notice of Proposed Rule Making*, the Commission will no longer accept finder's preference requests for frequencies in the 800 MHz SMR service. This action is procedural in nature and therefore is not subject to the notice and comment and effective date requirements of the Administrative Procedure Act (APA). *See Kessler v. FCC,* 326 F.2d 673 (D.C. Cir. 1963). Furthermore, good cause exists for noncompliance with these APA requirements. Adherence to the notice and comment and effective date requirements in this matter would be contrary to the public interest, because compliance would undercut the purposes of this action.

417. IT IS FURTHER ORDERED that upon the adoption of this *First Report and Order, Ninth Report and Order, and Second Further Notice of Proposed Rule Making*, the Commission will no longer accept BETRS applications for frequencies in the 800 MHz SMR service. This action is procedural in nature and therefore is not subject to the notice and comment and effective date requirements of the Administrative Procedure Act (APA). *See Kessler v. FCC,* 326 F.2d 673 (D.C. Cir. 1963). Furthermore, good cause exists for noncompliance with these APA requirements. Adherence to the notice and comment and effective date requirements in this matter would be contrary to the public interest, because

compliance would undercut the purposes of this action.

418. IT IS FURTHER ORDERED that all waiting lists for the upper 10 MHz block of 800 MHz SMR spectrum ARE ELIMINATED and all applications currently on waitings lists for such frequencies ARE DISMISSED, effective December 15, 1995.

419. IT IS FURTHER ORDERED that all requests for extended implementation authority for the 800 MHz SMR service filed pursuant to Section 90.629 of the Commission's rules and currently pending before the Commission ARE DENIED.

420. IT IS FURTHER ORDERED that the Secretary shall send a copy of this *First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making* to the Chief Counsel for Advocacy of the Small Business Administration.

421. For further information concerning this proceeding, contact D'wana R. Speight (Legal Branch, Commercial Wireless Division, Wireless Telecommunications Bureau) at (202) 418-0620.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Part 90 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 90 -- PRIVATE LAND MOBILE RADIO SERVICES

1. The authority citation for Part 90 revised to read as follows:

Authority: 47 U.S.C. §§ 154, 303, and 332, unless otherwise noted.

2. Section 90.7 is amended by adding the definitions for "EA license" and "Economic Areas (EA)" in alphabetical order to read as follows:

§ 90.7 Definitions.

* * * * *

EA-based or EA license. A license authorizing the right to use a specified block of SMR spectrum within one of the 175 Economic Areas (EAs) as defined by the Department of Commerce Bureau of Economic Analysis. The EA Listings and the EA Map are available for public inspection at the Wireless Telecommunications Bureau's public reference room, Room 5608, 2025 M St. NW Washington, DC 20554 and Office of Operations -- Gettysburg, 1270 Fairfield Road, Gettysburg, PA 17325.

Economic Areas (EAs). A total of 175 licensing regions based on the United States Department of Commerce Bureau of Economic Analysis Economic Areas (see 60 Fed. Reg. 13,114-18 (March 10, 1995)) defined as of February 1995, with the following exceptions:

(1) Guam and Northern Mariana Islands are licensed as a single EA-like area

(2) Puerto Rico and the U.S. Virgin Islands are licensed as a single EA-like area

(3) American Samoa is licensed as a single EA-like area

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3. Section 90.155 is amended by revising paragraph (a) to read as follows:

§ 90.155 Time in which station must be placed in operation.

(a) All stations authorized under this part, except as provided in paragraphs (b) and (d) of this section and in §§ 90.629, 90.631(f), 90.665, and 90.685, must be placed in operation within

eight (8) months from the date of grant or the authorization cancels automatically and must be returned to the Commission.

* * * * *

4. Section 90.173 is amended by revising paragraph (k) introductory text and adding a new paragraph (l) to read as follows:

§ 90.173 Policies governing the assignment of frequencies.

* * * * *

(k) Notwithstanding any other provisions of this part, any eligible person may seek a dispositive preference for a channel assignment on an exclusive basis in the 220-222 MHz, 470-512 MHz, and 800/900 MHz (except on frequencies designated exclusively for SMR service) bands by submitting information that leads to the recovery of channels in these bands. Recovery of such channels must result from information provided regarding the failure of existing licensees to comply with the provisions of §§ 90.155, 90.157, 90.629, 90.631 (e) or (f), or 90.633 (c) or (d). Any recovered channels in the 900 MHz SMR service will revert automatically to the MTA licensee.

* * * * *

(l) Any recovered channels in the 800 MHz SMR service will revert automatically to the holder of the EA license within which such channels are included. If there is no EA licensee for recovered channels, such channels will be retained by the Commission for future licensing.