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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band	)	PR Docket No. 93-144 RM-8117, RM-8030 RM-8029
	)	
Implementation of Sections 3(n) and 322 of the Communications Act -- Regulatory Treatment of Mobile Services	)	GN Docket No. 93-252
	)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding	)	PP Docket No. 93-253

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: June 23, 1997 **Released: July 10, 1997**

By the Commission: Commissioner Chong issuing a statement.

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APPENDIX A: Petitions For Reconsideration, Oppositions & Replies

I. INTRODUCTION

1. In the *First Report and Order and Eighth Report and Order* in PR Docket No. 93-144, GN Docket No. 93-252, and PP Docket No. 93-253, we adopted final service and competitive bidding rules for the upper 200 channels of the 800 MHz Specialized Mobile Radio (SMR) band.[1] In the *Second Further Notice of Proposed Rulemaking,* we sought comment on additional service and competitive bidding rules for the remaining 800 MHz SMR spectrum and the General Category channels. We received twenty-two Petitions for Reconsideration, three Oppositions to Petitions for Reconsideration, and twelve Replies to Oppositions to Petitions for Reconsideration in response to the *800 MHz Report and Order.*[2] We address the Petitions for Reconsideration in this order.

II. BACKGROUND

2. In the *800 MHz Report and Order,* we restructured the licensing framework that governs the 800 MHz SMR service.[3] For the Upper 200 channels, we replaced site-and frequency-specific licensing with a geography-based system similar to those used in other Commercial Mobile Radio Services ("CMRS").[4] We designated the upper 200 channels of 800 MHz SMR spectrum for geographic licensing, and created 120-, 60- and 20-channel blocks within the U.S. Department of Commerce Bureau of Economic Analysis Economic Areas ("EAs").[5] We concluded that mutually exclusive applications for these licenses would be awarded through competitive bidding. Additionally, we granted EA licensees the right to relocate incumbent licensees out of the upper 200 channels to comparable facilities.[6] Finally, we reallocated the 150 contiguous 800 MHz General Category channels for exclusive SMR use.[7]

3. We also established competitive bidding rules for the upper 200 channels of 800 MHz SMR spectrum. Specifically, the order provided for the award of 525 EA licenses in the upper 200

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[1] *First Report and Order, Eighth Report and Order and Second Further Notice of Proposed Rulemaking;* FCC 95-510, 11 FCC Rcd 1463 (1995) (collectively, *800 MHz Report and Order).*

[2] Petitioners are listed in Appendix [A]. Parties making Ex Parte Presentations/Communications are listed in Appendix A to the Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *Second Report and Order* (released July 10, 1997) (*Second Report and Order*). Additionally, the Joint Appendix to the *Second Report and Order* includes the rule changes adopted in this order. Also, Appendix D to the *Second Report and Order* contains the Final Regulatory Flexibility Analysis, *see* 5 U.S.C. § 604, for the rules contained in Joint Appendix B.

[3] *800 MHz Report and Order*, 11 FCC Rcd at 1463-1537, ¶¶ 1-142.

[4] *Id.* at 1476-1480, ¶¶ 9-14.

[5] *Id.* at 1476-1497, ¶¶ 9-37.

[6] *Id.* at 1503-1510, ¶¶ 65-79.

[7] *Id.* at 1534-1535, ¶¶ 133-137.

channel block through a simultaneous multiple round auction.[8] Incumbents and new entrants may bid for all EA licenses, subject to the CMRS spectrum cap in Section 20.6 of the Commission's rules.[9] We also adopted a "tiered" approach to installment payments for small businesses in the upper 200 channel block, and allowed partitioning for rural telephone companies.[10]

III. EXECUTIVE SUMMARY

4. In this Memorandum Opinion and Order, we generally affirm the EA-based licensing procedures for the Upper 200 channels that were adopted in the *800 MHz Report and Order.* We also, however, reconsider two decisions made in the *800 MHz Report and Order*:

- We reverse our prior decision to redesignate the General Category for SMR-only service. We have determined that private users should continue to be eligible for General Category channels. However, we affirm our determination that General Category licenses should be geographically based and awarded through competitive bidding where mutually exclusive applications are filed.

- In the *800 MHz Report and Order*, we adopted a one-year period for voluntary relocations and a two-year mandatory relocation period. On reconsideration we have decided to reduce the mandatory negotiation period from two years to one year.

5. Finally, we also modify the competitive bidding rules we adopted in the *Eight Report and Order in three ways:*

- We will provide bidding credits for entities that qualify as small businesses or very small businesses under the definitions set forth in this Memorandum, Opinion and Order. Additionally, we decide not to make available installment payments, and we will modify our rules to delegate authority to the Bureau to set bid increments before or during the auction.

IV. DISCUSSION

A. Geographic Licensing in the 800 MHz SMR Band

1. Geographic Licensing in Contiguous Spectrum Blocks

6. Background. In the *CMRS Third Report and Order*, we found that licensing 800 MHz SMR spectrum in contiguous blocks would make SMR systems more competitive with other CMRS systems by maximizing technical flexibility so that, for example, it would be possible for SMR

[8] *Id.* at 1541-1543, ¶¶ 152-154.

[9] *Id.* at 1491-1494, ¶¶ 38-44.

[10] *Id.* at 1571-1576, ¶¶ 242-253.

licensees to deploy spread spectrum and other broadband technologies.[11] In the *800 MHz Report and Order,* we concluded that the entire upper 200-channel block should be licensed on a contiguous basis throughout a geographic area because the SMR geographic license would then be equivalent in size to the smallest block of spectrum now authorized for broadband PCS.[12]

7. Petitions. Fresno Mobile Radio, Inc. and Supreme Radio Communications, Inc. argue that we have not justified our decision to group the upper 200 channels of 800 MHz SMR spectrum into geographically licensed contiguous blocks.[13] Fresno charges that we have not adequately explained how the need for contiguous spectrum justifies disruption of established SMR operators. Fresno also argues that our rules impermissibly fail to mandate that contiguous blocks of spectrum be used to offer innovative or competitive services. Fresno would, for example, (1) mandate that EA licensees use contiguous spectrum, (2) condition Commission approval of assignments/transfers on a showing that the transfer will result in use of contiguous spectrum, and (3) require EA licenses to employ at least 50% of their total spectrum on a contiguous basis.[14]

8. Supreme and Fresno then argue that our decision should be reversed if it is based on reducing our administrative burden. Supreme Radio argues that scarcity of Commission resources cannot justify any changes in our rules.[15] Fresno argues that geographic licensing will in fact increase our administrative burden.[16] For example, Fresno contends that each frequency exchange between an EA licensee and an incumbent will require the filing of at least two applications, one by the licensee requesting a frequency change and one by the licensee that is the source of the relocation channels. Fresno also asserts that most incumbent licensees span all three EA frequency blocks. Thus, Fresno concludes that relocating most incumbents will require that at least four applications be filed, placed on public notice and processed by the Commission.[17] Fresno then claims that these burdens will be exacerbated by the burdens of site specific licensing because we have not eliminated current site-specific licenses.

9. Discussion: We reject Fresno's claim that we have failed to justify the need for licensing the upper 200 channels in contiguous blocks. In the *CMRS Third Report and Order*, we determined that, where feasible, assigning contiguous spectrum is likely to enhance the competitive potential of

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[11] Implementation of Sections 3 (n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, *Third Report and Order*, 9 FCC Rcd 7988,8046, ¶ 103 (1994) (*CMRS Third Report and Order*).

[12] *800 MHz Report and Order,* 11 FCC Rcd at 1479, ¶ 13.

[13] Fresno Petition at 2-5; Supreme Radio Petition at 2.

[14] Fresno Petition at 4-6.

[15] Supreme Radio Petition at 7.

[16] *Id.* at 10.

[17] *Id.*

CMRS geographic providers.[18] In the *800 MHz Report and Order,* in this proceeding, we determined that geographic licensing and contiguous spectrum are essential to the competitive viability of SMR service because they will permit use of spread spectrum and other broadband technologies and eliminate delays and transaction costs associated with site-by-site licensing.[19]

10. Moreover, we disagree with Fresno's claim that geographic licensing will have a negative impact on existing SMR operators. First, our rules continue to protect incumbent operators from interference. For example, in the upper 200 channels we are requiring EA licensees to comply with existing rules that require minimum separation from incumbents' facilities.[20] Thus, an EA licensee must either locate its station at least 113 km (70 miles) from any incumbent's facility, or if it seeks to operate stations less than 113 km from an incumbent's facility, it must comply with our short-spacing rule, unless it negotiates a shorter distance with the incumbent.[21] Additionally, incumbent SMRs on the upper 200 channels also have the operational flexibility to add transmitters in their existing coverage 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 exceeded.[22]

11. We also reject Fresno's proposal to require EA licensees to use contiguous spectrum technology. We cannot agree that competition and innovation will be increased by allocation of spectrum resources via a blanket regulatory prescription rather than through individual market participants' decisions. As we stated in the *800 Report and Order*, our goal is to provide regulatory symmetry and operational flexibility that will allow SMR providers to use new technologies and compete with other CMRS providers.[23] By thus giving licensees flexibility to use spectrum on either a contiguous or non-contiguous basis, we give SMR operators more ways to provide service and more ways to compete with other CMRS providers.

12. We also reject Fresno's claim that geographic licensing will increase our administrative burden. Under our site-specific licensing rules, we have received and processed approximately 6,000 applications for individual SMR licenses and modifications a year, and in some years as many as 20,000 applications. By contrast, geographic licensing of the upper 200 channels will be accomplished by issuing 525 EA licenses, and virtually eliminates the need for subsequent

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[18] *CMRS Third Report and Order*, 9 FCC Rcd at 8046, ¶ 103.

[19] *800 MHz Report and Order*, 11 FCC Rcd at 1476-1490, ¶¶ 19-37.

[20] *Id.* at 1516, ¶ 92. Additionally, in a separate order adopted today, we are requiring EA licensees to offer greater protection to incumbents on the lower 230 channels. *Second Report and Order* at ¶¶ 67-69.

[21] *Id.*

[22] *Id.* at 1514-15, ¶ ¶ 86-88. For lower 230 channel incumbents, we have adopted an 18 dBu standard which allows greater flexibility. *Second Report and Order* at ¶¶ 67-69.

[23] *See*, Using Market-Based Spectrum Policy to Promote the Public Interest, G. Rosston and J. Steinberg (Jan. 1997) (*Spectrum Policy Statement*).

modifications of any license unless it is transferred or partitioned.[24] Moreover, licensees will no longer be required to file an application for each base station; geographic licensees will be able to construct base-stations in pre-defined areas without our prior approval. These changes represent dramatic reductions in administrative burden for both licensees and the Commission. In this connection, we reject Supreme's claim that reducing our administrative costs is an invalid basis for adopting new rules. While our rule changes are driven by numerous considerations other than administrative cost, *e.g.*, promoting more efficient spectrum use and creating a regulatory framework that will allow 800 MHz SMR operators to compete more effectively with other CMRS providers, we consider improving our efficiency and reducing our costs to be valid public interest considerations.

2. Size of EA Spectrum Blocks

13. Background. In the *800 MHz Report and Order*, we concluded that dividing the upper 200 channel block into multiple licenses was both feasible and desirable.[25] We concluded that dividing the upper 200 channels into various-sized channel blocks would create opportunities for SMR providers with differing spectrum needs. We rejected proposals to assign the upper 200 channels in five- and/or ten-channel blocks, concluding instead that allocating one 120-channel block, one 60-channel block, and one 20-channel block for licensing on an EA basis would equitably balance the interests of all potential and existing licensees.[26]

14. Petitions. Fresno argues that the record does not support the Commission's decision to group currently allocated channels into contiguous blocks. It also contends that the aggregation of 20, 60, and 120 contiguous channels restricts the number of small business entities that can compete effectively at auction because relocation channels will either be unavailable or impracticably costly. It also argues that the cost of relocating 20 or more channels will be prohibitive for small business.[27]

15. Fresno claims that smaller channel blocks would require an EA applicant desiring adjacent channels to bid more aggressively, and thus the public would receive more value for the spectrum.[28] Fresno also argues that 5-channel geographic licenses would facilitate bidding for designated entities such as small businesses. Fresno also argues that in some markets no one would want 20-plus channels because relocation of incumbents would be impractical. Finally, Fresno argues that licensing in five-channel blocks will reduce the number of persons involved in relocation negotiations, thus speeding the provision of geographic service.

16. Discussion. We reject Fresno's argument that the public interest would be better served by five-channel spectrum blocks. As we stated in the *800 MHz Report and Order*, the use of such

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[24] We note, however, that licensees will still need to comply with the requirements of the *National Environmental Policy Act of 1969*. 47 C.F.R. § 1.1301 *et. seq.*.

[25] *Id.* at 1489, ¶ 36.

[26] *Id.* at 1489-90, ¶ 37.

[27] Fresno Petition at 12-15.

[28] *Id.*

small spectrum blocks makes it more difficult to obtain sufficient spectrum to establish a viable and competitive wide-area system, and to use broadband technologies such as CDMA and GSM.[29] We also reject Fresno's claim that the aggregation of 20, 60, and 120 channels will reduce opportunities for small businesses. Under our rules, for example, small businesses may form coalitions to raise needed capital and finance any desired relocations. In addition, we have adopted provisions in our auction rules enabling small businesses to receive bidding credits.[30]

17. We also reject Fresno's claim that five-channel blocks would increase spectrum valuation. Our geographic licensing system is not designed to maximize spectrum value. Rather, it is designed to enhance the competitive potential of the 800 MHz SMR operators. To accomplish this, we have tailored the channel blocks to the needs of various users by creating large, medium and small channel blocks and by placing these blocks to accommodate the spectrum needs of different-sized SMR providers. For example, as we recognized in the *800 MHz Report and Order*, placing the 120-channel block closest to the cellular spectrum allocation will assist operators in providing wide-area service by facilitating dual-mode operation.[31] Placing the 20-channel block in the portion of spectrum nearest to the lower 80 SMR channels will allow small to medium-sized operators to expand capacity while minimizing costs and disruption to existing customers.[32] Similarly, we expect that in many EA's medium-sized SMR operators or consortia of smaller SMR operators may find the 60-channel block suitable to their needs.

18. We similarly are not persuaded by Fresno's claim that allocating spectrum in five-channel blocks will reduce the burdens of, and number of entities involved in, relocation negotiations. To the contrary, our relocation mechanism provides for cost sharing and collective negotiations so that relocation can efficiently occur. Additionally, we note that in the lower 80 channels, where the current five-channel blocks are non-contiguous and interleaved with blocks of non-SMR channels, we are adopting our proposal to license in five-channel blocks.[33]

3. 800 MHz SMR Spectrum Aggregation Limit

19. Background. In the *CMRS Third Report and Order,* we adopted a 45 MHz limit on aggregation of broadband PCS, cellular, and SMR spectrum. We concluded that in light of the broadband CMRS spectrum cap, no separate limitation was necessary on aggregation of spectrum in

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[29] *800 MHz Report and Order,* 11 FCC Rcd at 1489-90, ¶ 37.

[30] *See, infra,* ¶¶ 127,128,131,132.

[31] *Id; cf.* Hawaiian Wireless Partners Request for Waiver of SMR Application Freeze and Additional Channel Policy for Thirty-Three Applications for New SMR Stations, WT File Nos. D016248 through D016280, DA 96-2057, *Order* (released Dec. 9, 1996).

[32] *Id.*

[33] *Second Report and Order*, at ¶16.

the upper 200 channel block.[34] In the *800 MHz Report and Order*, we reasoned that the 800 MHz SMR service is one of many competitive services within the CMRS marketplace, and that allowing unrestricted aggregation of SMR spectrum would not impede CMRS competition so long as 800 MHz SMR licensees were subject to the 45 MHz CMRS spectrum aggregation limit.

20. Petitions. Fresno argues that we have failed to consider that our actions will increase the current state of concentration in the SMR industry.[35] According to Fresno, we must limit EA licensees to something less than the entire 200 channels to ensure a wide variety of applicants.[36] Fresno suggests prohibiting any EA licensee from acquiring more than one third of the Upper 200 channels in any EA. It argues that this will provide adequate opportunities for designated entities while avoiding excessive concentration of licenses.[37]

21. Nextel supports our decision to permit a single licensee unlimited spectrum aggregation on the upper 200 SMR channels. Nextel argues that unlimited spectrum aggregation is critical to regulatory parity because an SMR operator aggregating all 200 channels in a market would still operate on only 10 MHz of spectrum, as compared to the 25 MHz for cellular and 30 MHz for A, B and C block PCS licensees.[38]

22. Discussion. We see no need to adopt a spectrum aggregation limit for the upper 200 channels beyond the CMRS spectrum aggregation limit set forth in 47 C.F.R. § 20.6. Market forces -- not regulation -- should shape the developing CMRS marketplace, and we are unpersuaded that further constraints on SMR providers' ability to acquire spectrum are necessary.[39] In fact, Fresno's proposed restriction could handicap all SMR providers -- including small businesses, rural telephone companies and women-owned and minority-owned businesses -- by limiting their ability to compete with cellular and broadband PCS. We are also unpersuaded by Fresno's objection that our decision will lead to a concentration of SMR licenses. Fresno has offered no economic data or evidence of any kind to support this position. Further, we have determined that the relevant market for examining

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[34] *CMRS Third Report and Order*, 9 FCC Rcd at 7999, ¶ 16; Amendments to Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Radio Service Spectrum Cap, Amendment of the Commission's Cellular /PCS Crossownership Rules, *Report and Order*, WT Docket 96-59, GN Docket No. 90-314, 11 FCC Rcd 7824, 7869 (1996), ¶¶ 94-107 (*Broadband PCS/CMRS Spectrum Cap Report & Order*).

[35] Fresno Petition at 18.

[36] *Id.* at 17.

[37] *Id.* at 18.

[38] Nextel Petition at 4-5.

[39] *See,* Applications of Dial Page, Inc. For Consent to Transfer Control of Dial Call, Inc. SMR and Business Radio Licenses to Nextel Communications,*DA, 95-2379, Order,* 1995 WL 693097, ¶24 (F.C.C.)(relevant product market is all terrestrial CMRS offerings)*; see also,* Applications of Motorola, Inc. for Consent to Assign 800 MHz Licensees to Nextel Communications, *Order* 10 FCC Rcd 7783 (1995); Applications of Nextel Communications, Inc. For Transfer and Control of Onecomm Corporation, N.A. and C-Call Corp., *Order,* 10 FCC Rcd 10,450.

concentration of SMR licenses is the CMRS market as a whole, not SMR only. Thus, even if one licensee were to acquire all 10 MHz of spectrum in an EA, this would not be sufficient to have an anti-competitive effect on the relevant market.[40]

4. Licensing in Mexican and Canadian Border Areas

23. Background: In the *800 MHz Report and Order* we determined that EA licenses would be made available without distinguishing border from non-border areas. Thus, we determined that EA licensees can use available border area channels within their spectrum blocks, subject to international assignment and coordination.[41] Although, reduced channel availability and operating restrictions may reduce values of border area EA licenses, we concluded that EA applicants would consider such factors when bidding on such licenses. We also noted that EA licensees could privately negotiate with other licensees to acquire additional SMR spectrum in border areas.

24. Petitions. Consumers and ITA seek clarification of our border area licensing plan. Consumers notes that in border areas some of the upper 200 channels are assigned to non-SMR categories such as the Business Radio and Industrial/Land Transportation services. It seeks clarification that these channels are not subject to EA licensing and that incumbent licensees are not subject to mandatory relocation. ITA notes that in many EAs adjacent to either the Canadian or Mexican borders, no frequencies are available for SMR use in the 120-channel, and 60-channel blocks, and few are available in the 20-channel block.[42] ITA expresses concern that bidders will be unaware of this and may overvalue the spectrum.

25. Discussion. In response to Consumers, we clarify that non-SMR channels in the border area are not subject to EA licensing and thus are unaffected by this rulemaking. We further clarify that non-SMR channels that have been allocated to SMR eligibles in border areas, but to non-SMR eligibles elsewhere in the country, have been allocated to the upper 200 channel EA licensees on a pro rata basis. Prospective bidders should be aware that these channels, which are not available to them anywhere else except in the border regions, will be assigned for their use in the Canadian and Mexican border regions. Most importantly, EA licensees must afford full interference protection to non-SMR licensees operating in adjacent areas on these channels.

26. In response to ITA, we note that our rules already specify which channels are available for EA licensing in the border regions.[43] We believe that license applicants are best situated to decide whether reduced channel availability in border areas affects the value of particular licenses. Nonetheless, to help alleviate ITA's concern about applicant awareness, we will also provide information regarding channel availability border area in the auction bidders package.

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[40] *CMRS Third Report and Order*, 9 FCC Rcd at 8113-8114, ¶ 275.

[41] *800 MHz Report and Order*, 11 FCC Rcd at 1496, ¶ 48.

[42] ITA Petition at 14.

[43] 47 C.F.R. § 90.619.

B. Rights and Obligations of EA Licensees

1. Spectrum Management Rights

27. Background. In the *800 MHz Report and Order* we determined that if an SMR incumbent fails to construct, discontinues operations, or otherwise has its license terminated by the Commission, the licensed spectrum automatically reverts to the EA licensee.[44] We thus eliminated all waiting lists for SMR category channels within the upper 200 channel block and terminated our finder's preference program for the 800 MHz SMR service. Finally, we created a presumption that permanent transfers and assignments between an EA licensee and incumbents operating within its spectrum block would serve the public interest. We reasoned that this would give EA licensees more flexibility to manage their spectrum, be more consistent with our cellular and PCS rules, and reduce regulatory burdens on both licensees and the Commission.[45]

28. Petitions. Southern claims that our approach to spectrum management violates Congressional intent and our goal of regulatory symmetry by disadvantaging non-EA winning SMR licensees vis-a-vis EA licensees.[46] Southern argues, for example, that incumbents are disadvantaged because they will be restricted from expanding on wide-area blocks. It also argues that our construction requirements favor EA licensees over incumbents.[47] Pro-Tec Mobile claims that we violated Section 553(b) of the Administrative Procedure Act by failing to give notice of the elimination of the finder's preference program.[48] Pro-Tec also argues that we should temporarily retain the finder's preference program so that all persons knowing of unconstructed or discontinued facilities can request a finder's preference, take the channels, and provide balance among those applying for the wide-area SMR frequency blocks.[49]

29. Discussion. We reject Southern's claim that we have violated Congressional intent by conferring spectrum management rights on EA licensees, including the right to recover spectrum lost by incumbents who cease operations or violate our rules. Southern's contention that these rules discriminate against incumbent licensees is without merit. First, incumbents retain all of the rights to operate that they held under their pre-existing licenses. Thus, incumbents who operate in compliance with our rules are not affected by the spectrum recovery rule, while incumbents who cease operations or violate our rules would lose their spectrum rights under either the old rules or the new rules. The only difference in our new rules is that we have provided for unused spectrum to revert to the EA licensee rather than to be relicensed by the Commission. This procedure does not discriminate against incumbents: any incumbent who seeks the "superior" spectrum management rights of an EA license

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[44] *800 MHz Report and Order,* 11 FCC Rcd at 1501, ¶ 59.

[45] *Id.*

[46] Southern Petition at 5-11.

[47] *Id.*

[48] Pro-Tec Mobile Petition at 10-11.

[49] *Id* at 13.

has the same opportunity to obtain it as any other applicant: by bidding for the EA license through the auction process.

30. We also reject Pro-Tec's claim that we gave no notice of the possible elimination of the finder's preference program. Such notice was inherent in our proposal that rights to unconstructed or non-operational channels would automatically revert to the EA licensee.[50] In fact, Southern objected to our EA licensing proposal on the grounds that it eliminated the need for finder's preferences.[51] The elimination of our finder's preference program was thus both necessarily implicit in and a logical outgrowth of, our proposals.[52]

31. Finally, we decline to retain the finders preference program, even on a temporary basis. Our move to geographic licensing makes the finders preference program unnecessary because EA licensees will have incentive to identify and make use of unused spectrum within their blocks. Additionally, the finder's preference program is inconsistent with our objective of assigning spectrum through geographic licensing because it would perpetuate unnecessary site-by-site licensing.[53]

2. Treatment of Incumbent Systems

a. Mandatory Relocation of Incumbents from the Upper 200 channels

32. Background. In the *800 MHz Report and Order*, we adopted a mandatory relocation mechanism for incumbents on the upper 200 channels. In order to minimize the impact on existing licensees, we adopted two key provisions: (1) if an EA licensee is unable or unwilling to provide an incumbent licensee with "comparable facilities," such an incumbent would not be subject to mandatory relocation; and, (2) any incumbent that is relocated from the upper 200 channels, either voluntarily or involuntarily, will not be required to relocate again if we adopt our geographic area licensing proposal for the lower 80 and General Category channels.[54]

33. Petitions. Several petitioners challenge our decision to authorize mandatory relocation of incumbent SMR licensees. Pro-Tec argues that our licensing framework does not require mandatory relocation, and that relocations should occur through private negotiations between EA licensees and

[50] Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *Further Notice of Proposed Rulemaking*, 9 FCC Rcd 7970,7989, ¶31 (1994) ("800 MHz SMR FNPRM").

[51] Southern's Comments in response to *800 MHz SMR FNPRM*, 9 FCC Rcd 7970.

[52] *See, generally*, Small Refiner Lead Phase-Down Task Force vs. EPA 705 F.2d 506, 546-47 (D.C. Cir. 1983).

[53] *See*, Amendment of Part 90 Concerning The Commission's Finder's Preference Rules,WT Docket No. 96-199, *Notice of Proposed Rulemaking* 11 FCC Rcd 13016 (1996).

[54] *800 MHz Report and Order*, 11 FCC Rcd at 1508, ¶ 74

incumbents.[55] Others petitioners object that there are no alternative channels on which to relocate incumbents.[56] They argue that relocation will only benefit a few licensees (particularly Nextel) who hold large amounts of spectrum on the lower channels.[57] Other commenters are concerned that mandatory relocation will reduce the amount of competitive service offered to the public and thus be harmful to end users and subscribers.[58] These petitioners argue that requiring relocation of an incumbent's entire system effectively excludes most bidders from the auction, including small businesses.[59] Southern adds that the public interest is not served by displacing existing SMRs so other SMRs can provide the same service.[60] Finally, Banks argues that we have behaved inconsistently with respect to 800 MHz and paging services, two comparably encumbered frequency bands, because we have concluded that "alternative" spectrum for relocation exists in the 800 MHz band but does not exist in the paging bands.[61]

34. Discussion. In the *800 MHz Report and Order*, we concluded that while voluntary negotiations are important and to be encouraged, mandatory relocation is necessary to achieve the transition to geographic area licensing and to enhance the flexibility of EA licensees on the upper 200 channels.[62] We reject Pro-Tec's contention that we could accomplish these goals by relying on voluntary negotiations alone. While we expect most relocation to occur through voluntary negotiations, we are concerned that EA licensees will be unable to realize the potential of their spectrum without some mandatory mechanism in the event voluntary negotiations prove unsuccessful. We reaffirm our conclusion that a narrowly tailored mandatory relocation mechanism is necessary to the achievement of the goals of this proceeding.

35. We also reject Southern's argument that relocation should not be required because EA licensees will provide the same service as incumbents who are relocated. We expect that EA licensees will use their spectrum to provide a wide variety of services. While some of these services may be of

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[55] Pro-Tec Petition at 13-14.

[56] Banks Petition at 8; Southern Petition at 17; Resource Benefits Petition at 3 (Arguing that the General Category and lower 80 channels are too congested to accommodate numbers of dislocated licensees).

[57] Banks Petition at 8. (Arguing that mandatory relocation would reward EA licensees who improperly warehoused unused General Category and lower 80 channels, or alternatively, that mandatory relocation will lead to a reduction in competitive service).

[58] Banks Petition at 2; Fresno Petition at 14-15.

[59] *Id.*

[60] Southern Petition at 18.

[61] Banks Petition at 9,15. Banks also complains that we have inadequately explained how adversely affected subscribers will be compensated for relocation costs such as the cost of replacing equipment made obsolete by relocation and/or lost revenue during the relocation period. *Id.* Other petitioner argue for specific types of pre-payment mechanisms and replacement spectrum. Pro-Tec Petition at 7; Duke Partial Opposition to Petitions at 6. We address these concerns in the *Second Report and Order*, at ¶ 92.

[62] *800 MHz Report and Order*, 11 FCC Rcd at 1507-1508 ¶ 73.

the same type provided by incumbents who are relocated, the ability to clear contiguous spectrum will give EA licensees operational flexibility to provide new and innovative services that were far more difficult to develop under site-by-site, channel-by-channel licensing rules. Thus, relocation will not merely replace one SMR licensee with an identical licensee, but will allow both parties to move towards more efficient use of the spectrum.

36. Many petitioners who challenge our adoption of mandatory relocation argue it will harm incumbent licensees, particularly small system operators. We disagree with this view. Our rules do not require any incumbent to relocate unless the EA licensee provides comparable facilities and a seamless transition. Moreover, the rules we are adopting for the lower 80 and General Category channels provide positive incentives for small businesses who relocate, including bidding credits. Bidding credits assist small business in obtaining licenses and thus, provide small business with an incentive to relocate to the lower channels. In addition, because we are allowing incumbents on the lower channels to operate within their 18 dBu contours, incumbents on these channels (including incumbents who relocate from the upper 200 channels) will have greater operational flexibility and protection from interference than incumbents on the upper 200 channels.[63]

37. Some petitioners argue that our mandatory relocation rules make relocation impractical for all but a few large SMR operators who have spectrum on the lower 80 and General Category channels that can be used for relocation. Even if this is so, we do not agree with petitioners that this is an argument against mandatory relocation: we consider it preferable to allow relocation where it is feasible rather than to prohibit it because it is not feasible in every instance. Moreover, we disagree with the premise that small businesses will be discouraged from participating in the upper 200 channel auction because of the practical difficulty of relocating incumbents. Many of those small businesses may themselves be incumbents who choose to bid (individually or in combination with other small incumbents) for the upper 200 channel blocks rather than relocate. In addition, small businesses may develop business strategies that do not depend on relocation, *e.g.*, entering into partitioning agreements with incumbents or providing niche services on available channels. We believe that market forces should be relied upon for these types of decisions.

38. Finally, we reject the claim that our decision conflicts with our decision not to adopt mandatory relocation in our recently completed paging rulemaking.[64] Our adoption of geographic licensing rules in paging did not require relocation because paging channels are technically identical to one another and paging technology is generally consistent and compatible regardless of the channel used. Thus, there is no advantage in spectrum efficiency to be gained from encouraging paging incumbents in a particular band to migrate to another band. In contrast, the 800 MHz SMR allocation is a mixture of contiguous and non-contiguous channels, which has led to the development of sometimes incompatible technologies. Relocation is therefore beneficial because it creates incentives for SMR providers to operate on the spectrum most suitable for their particular technologies.

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[63] *Second Report and Order,* at ¶ 67.

[64] Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems/Implementation of Section of 309(j) of the Communications Act -- Competitive Bidding, *Second Report and Order*, WT Docket No. 96-18, PP Docket No. 93-252, FCC 97-59 (rel. Feb. 24, 1997)(*"Paging Order"*).

b. Mandatory Relocation Implementation Issues

i. Pre-auction negotiations.

39. Background: In the *CMRS Third Report and Order,* we suspended acceptance of new 800 MHz applications pending adoption of new 800 MHz service and auction rules.[65] On October 4, 1995, the Wireless Bureau imposed a similar freeze on new applications for the General Category channels.[66] Under both of these freezes, assignment and transfer of control applications continued to be processed if the location of the licensed facilities remained unchanged.

40. In the *800 MHz Report and Order*, we partially lifted the freeze on new applications for SMR and General Category channel licenses.[67] Specifically, we allowed filing of new applications to permit assignments and transfers of control involving modifications to licensed facilities that were intended to accommodate market-driven, voluntary relocation arrangements between incumbents and potential EA applicants; and (1) would not change the 22 dBu service contour of the facilities relocated, (2) the assignment or transfers would relocate a licensee out of the upper 200 channels block, and (3) the potential EA applicant and relocating incumbent(s) were unaffiliated.[68] We took these actions to begin the relocation process and thus ease the transition to a wide-area licensing scheme for the upper 200 channels.[69]

41. Petitions. Nextel requests two modifications of our partial lifting of the application freeze. First, Nextel asks that we "clarify" that only incumbent 800 MHz SMR licensees be treated as "potential EA applicants."[70] Nextel argues that absent this restriction, anyone could negotiate with an incumbent and avoid the licensing freeze -- regardless of eligibility or intent to bid in the auctions.[71] PCIA supports Nextel's petition provided that a third party may "acquire" the incumbent's right to enter into pre-auction settlements through acquisition of the incumbent's system. PCIA believes that the ability to participate in pre-auction settlements should "travel with the license."[72]

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[65] *CMRS Third Report and Order*, 9 FCC Rcd at 8042, ¶ 94.

[66] *See Licensing of General Category Frequencies in the 806-809.750/851-854.750 MHz Bands*, DA 95-2119, *Order* (Oct. 4, 1995).

[67] *800 MHz Report and Order*, 11 FCC Rcd at 1509, ¶¶ 75-76. The freeze on the filing of applications for site-by-site General Category liceneses is still in effect.

[68] *Id.*

[69] *Id.*

[70] Nextel Petition at 9.

[71] *Id.* at 10.

[72] PCIA Partial Opposition to Petitions at 4-5.

42. Nextel also asks that prior to the auction we accept only those applications that facilitate relocation of incumbents off the upper 200 channels, as opposed to moves from one upper 200 channel to another.[73] Nextel argues that allowing incumbents to move within the upper 200 channels could be used by potential EA applicants for anti-competitive purposes. PCIA argues that such a limitation on pre-auction settlements would prejudice incumbent licensees without lower band channels to trade.[74] It argues that permitting incumbent licensees to negotiate movement within the upper 200 channels may reduce the number of auction participants for certain channels and satisfy Congressional intent that we use negotiations to avoid mutual exclusivity in application and licensing procedures.[75]

43. Discussion. Our goal in partially lifting the freeze was to facilitate the voluntary relocation of incumbents off of the upper 200 channels. In order to facilitate this goal, we believe that anyone who intends to bid in the upper 200 auction should be able to use this procedure to obtain spectrum that could be used for relocation of incumbents. While we anticipate that most bidders for EA licenses will themselves be incumbents, it is possible that non-incumbents will bid as well. Therefore, we decline to limit the filing of new applications to incumbent 800 MHz SMR licensees as requested by Nextel. We are concerned that such a restriction could arbitrarily limit the flexibility of participants in pre-auction negotiations, nor has Nextel substantiated its claim that parties who do not intend to bid for EA licenses will use this procedure to avoid the licensing freeze.

44. We agree with Nextel, however, that new applications should only be accepted if they facilitate relocation of incumbents off of the upper 200 channels. In order for the auction of the upper 200 channels to occur, bidders must have certainty regarding the channels that are currently licensed to incumbents. Continuing to accept applications for new authorizations on the upper 200 channels would deprive bidders of such certainty and delay the auction process. In addition, we see no relocation benefit to allowing licensees to acquire new spectrum on the upper 200 channels prior to the auction. Therefore, pre-auction applications will be accepted for relocation purposes only on the lower 230 channels, and only if they meet the conditions specified in the *800 MHz Report and Order*.[76] We note, however, that this policy only applies to initial applications for new spectrum, not to transfers and assignments of existing authorizations, which have never been subject to the 800 MHz licensing freeze. Therefore, incumbents may continue to transfer and assign existing authorizations on either the upper 200 channels or the lower 230 channels.

ii. Relocation Negotiations.

45. Background. To encourage negotiation between EA licensees and incumbents we adopted a multi-phase, post-auction relocation mechanism in the *800 MHz Report and Order*.[77] In the initial

[73] Nextel Petition at 9.

[74] PCIA Partial Opposition to Petition at 7.

[75] *Id.* at 7.

[76] *800 MHz Report and Order*, 11 FCC Rcd at 1509, ¶ 76.

[77] *Id.* at 1509, ¶ 77.

one-year voluntary period, the EA licensee and incumbents may negotiate any mutually agreeable relocation agreement. If no agreement is reached, the EA licensee may initiate a two-year mandatory negotiation period, during which the parties are required to negotiate in "good faith."[78] If the parties still fail to reach an agreement, the EA licensee may then initiate involuntary relocation of the incumbent's system. However, such relocation must be to comparable facilities and must be seamless, *i.e.*, without any significant disruption in the incumbent's operations.[79]

46. Petitions. Several commenters argue that the our phased negotiation plan does not serve the public interest and object to the one-year voluntary period and two year mandatory period.[80] ITA and CICS, for example, ask that we extend the voluntary period to two-years as in the PCS context.[81] ITA argues that we recently recognized the advantages of a two-year voluntary period and have no compelling reason to deviate from this precedent.[82] CICS argues that a two-year voluntary period gives incumbents the flexibility in timing their relocation and minimizes the adverse impact of relocation on existing SMR service subscribers.[83]

47. Nextel argues that we should reduce the mandatory negotiation period to one year, because the 800 MHz relocation process will be less complex than that faced by PCS licensees and 2 GHz microwave incumbents.[84] UTC claims Nextel's recommendation reflects an intent to force incumbents out of the spectrum. UTC and others support the adopted relocation process of one-year voluntary and two-year mandatory negotiation periods, although UTC wants relocation safeguards to apply to all incumbents, including non-SMR licensees.[85]

48. UTC complains that our rules do not require EA licensees to begin negotiations at any particular time and do not require an EA licensee to relocate incumbents during the initial year.[86] PCIA argues that EA licensees should be required to notify the incumbent that mandatory negotiations have begun, lest an EA licensee wait out the voluntary period and then declare later that mandatory negotiations have begun, leaving incumbents unprepared. Additionally, PCIA argues that the EA

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[78] *Id.* at 1510, ¶ 79.

[79] *Id.* In the *Second Report and Order* adopted today we provide additional guidance with respect to these requirements.

[80] ITA Petition at 11; Dow Petition at 10; Duke Reply at 5.

[81] ITA Petition at 11.

[82] *Id.*

[83] CICS at 5-6.

[84] Nextel Petition at 15; Nextel SFN Comments at 25.

[85] UTC SFN Reply 4-5; Dow SFN Reply at 10; Duke Partial Opposition to Petitions at 7; Duke SFN Comments at 7-8.

[86] UTC SFN Comments at 11-13.

licensee must show that it has made a bona fide attempt to negotiate during the voluntary period.[87]

49. Pro-Tec Mobile complains that we have not explained how disputes over whether negotiations have been conducted in "good faith" are to be adjudicated.[88] It requests that we resolve such disputes, arguing that these are essentially licensing questions and thus under our exclusive jurisdiction. Pro-Tec fears that state and federal courts will delay taking action until we rule and that non-judicial fora lack the necessary expertise. Finally, Pro-Tec argues that since the Communications Act authorizes us neither to reject or delegate our authority to resolve licensing disputes, we must either (1) expeditiously resolve these disputes or (2) reject mandatory frequency relocation and let the market determine whether frequency relocation will occur.[89]

50. Finally, Pro-Tec also asks that we allow incumbents to decide who will retune end-user equipment. Pro-Tec notes that hundreds of thousands of mobile units and control stations are included in incumbent SMR systems. Thus, it is concerned that our requirement that EA licensees build and test the new [relocated] system could be read to permit or require that EA licensees intervene in relations between an incumbent and its customers. Pro-Tec fears that an EA licensee dealing directly with Pro-Tec's established customers might divert Pro-Tec's customers to its system.

51. Discussion: We agree with commenters that we should limit the mandatory negotiations period to one year. We agree, for example, that such a reduction will serve the public interest by facilitating the clearing of incumbents from the EA blocks so that the EA licensees can implement their wide-area systems. Moreover, this reduction will minimize the period during which incumbents will experience uncertainty concerning relocation. Finally, we note that this approach is consistent with our recent decision in PCS to adopt a one-year voluntary period and a one-year mandatory period for the C, D, E, and F blocks.[90]

52. We reject ITA's and CICS' proposal that we extend voluntary negotiations to two years. A one-year voluntary period and a one-year mandatory period balances the desirability of giving parties flexibility to negotiate voluntarily with the need to ensure that relocation, where feasible, occurs expeditiously. We see no need to extend the voluntary period for an additional year. We find that petitioners have not supported their claims that another year of voluntary negotiations would "minimize the adverse impact" of relocation. In fact, although the voluntarily period has not yet commenced, incumbents and potential EA licensees can begin voluntary negotiations at any time, thus affording themselves more than a year to reach a voluntary agreement. We find that it would not serve the public interest to delay for another year. Finally, in response to ITA, we note that in recent decisions we have reduced voluntary negotiation periods to one year.[91]

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[87] PCIA Petition at 1.

[88] Pro-Tec Mobile Petition at 18-19.

[89] *Id.*

[90] Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, FCC 97-48 *Second Report and Order*, 62 Fed. Reg. 12752 at ¶¶ 19-21 (Mar. 18, 1997).

[91] *Id.*

53. In response to Pro-Tec's argument that we have not explained how disputes over good faith will be resolved, we note that in this case as in all others, licensees may bring infractions of the Commission's rules to our attention. Nevertheless, we strongly encourage parties to use expedited alternative dispute resolution procedures, such as binding arbitration, mediation or other alternative dispute techniques. Further, since relocation agreements are pursuant to private contracts, we anticipate that parties will pursue common law contract remedies in the court of competent jurisdiction if alternative dispute resolution is not successful.

54. Finally, we clarify that our relocation rules are not intended to require the mandatory disclosure of incumbents' proprietary information or customer lists. Incumbents must cooperate with the EA licensees and facilitate the testing of their relocated equipment, but incumbents need not disclose competitively sensitive information.

iii. Notice.

55. Background. In the *800 MHz Report and Order*, we recognized that incumbents need prompt information about the EA licensees' relocation plans.[92] As such, we required EA licensees within 90 days of the release of the Public Notice commencing the voluntary negotiation period to notify incumbents operating in their spectrum block of their intent to relocate such incumbents.[93] Moreover, if an incumbent does not receive timely notice of the EA licensees intent to relocate, the EA licensee can no longer require that incumbent to relocate.

56. Because such notice affects an EA licensee's relocation rights, we decided that the EA licensee must file a copy of the relocation notice and proof of the incumbent's receipt of the notice within ten days of such receipt, or we will presume that the incumbent was not notified of the intended relocation.[94] An incumbent licensee notified of intended relocation will be able to require joint negotiations with all notifying EA licensees. These requirements should ensure that possible relocation will be properly noticed and coordinated.[95]

57. Petitions. Nextel asks that we amend our notice rule to recognize proof of an attempt to notify at the address in our database as proper notice.[96] Nextel argues that if an incumbent licensee's address is not correct in the database, the EA licensee would be unable to provide timely notice. Nextel further asks that we clarify that any EA licensees relocation notice informs the incumbent that it could be relocated out of *any* EA license block on which its SMR system is operating -- even those not licensed to the EA licensee providing notice.[97] Nextel argues that otherwise any EA licensee's

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[92] *800 MHz Report and Order*, 11 FCC Rcd at 1510, ¶ 78.

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] Nextel Petition at 14.

[97] *Id.*

failure to provide notice could provide the incumbent a defense to the relocation of part of its system (and, thus, the entire system).[98]

58. Discussion. Our rules already require licensees to update our data base with their current address.[99] We thus agree with Nextel that proof of an attempt to notify at the address in our database constitutes sufficient evidence of notice. We also agree with Nextel that notice by an EA licensee shall constitute notice with respect to the incumbent's entire system, including portions of the system outside the EA licensees' own spectrum block.

c. Incumbent Operational Flexibility

59. Background. In the *800 MHz Report and Order,* we declined to allow non-EA licensees to expand their systems at will after geographic licensing has occurred because such expansion would devalue geographic licenses by creating continuing uncertainty about the amount of spectrum available under the EA license.[100] We recognized, however, that incumbents should be allowed to make minor alterations to their service areas to preserve the viability of their systems.[101] Thus, in the *800 MHz Report and Order*, we concluded that incumbent licensees on the upper 200 channels should be allowed to make modifications within their current 22 dBu interference contour without prior notice to the Commission.[102] We reasoned that this would increase incumbents' operational flexibility without significantly affecting the EA licensee's wide-area system in the same market. We stated, however, that incumbents must still comply with our short-spacing criteria even if the modifications do not extend their 22 dBu interference contours.[103] Finally, we also decided to 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 contiguous and overlapping service area contours of the incumbent's constructed multiple sites.[104]

60. Petitions. Nextel asks that we clarify that the rule allowing incumbents to modify their systems within existing 22 dBu contours does not apply to aggregate 22 dBu contours but must be applied on a channel-specific basis.[105] For example, if an incumbent is operating on more than one station within a geographic area, Nextel contends that the incumbent should not be allowed to use a channel licensed at one station at a site inside the 22 dBu contour of another station if that channel is

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[98] *Id.*

[99] *See generally*, 47 C.F.R. §1.1 *et. seq*, 90.1 *et seq.*.

[100] *800 MHz Report and Order*, 11 FCC Rcd at 1513-1514, ¶ 85.

[101] *Id.* at 1514, ¶ 86.

[102] *Id.*

[103] *Id.*

[104] *Id.* at 1514-1515, ¶ 88

[105] Nextel Petition at 15-16.

not licensed at both sites. Thus, an incumbent would be allowed to re-use a channel throughout the composite 22 dBu contour only of those stations on which that channel is licensed.[106]

61. Nextel supports our decision to permit incumbent licensees to convert their current site-by-site licenses to a single license, but argues that incumbent licensees might abuse the procedure by filing spurious requests that would enable unaffiliated systems to obtain a single geographic license. Nextel therefore proposes that we should allow affected EA licensees to oppose such requests.[107]

62. Discussion. We clarify that the rule allowing incumbents to modify their systems within their existing 22 dBu contours will be applied on a channel-specific basis. We are concerned that allowing incumbents to unilaterally redeploy channels to sites where they were not previously authorized would create continuous uncertainty for EA licensees as to which channels they could use at particular locations. Thus, an incumbent may use a channel within the 22 dBu contour of all facilities authorized on that channel, but may not redeploy the channel to another facility (or within the 22 dBu contour of such a facility) where that channel is not previously authorized, unless the EA licensee agrees to the change. We emphasize, however, that incumbents and EA licensees may negotiate alternative arrangements with respect to the deployment of channels for their respective systems.

63. We reject Nextel's request to allow EA licensees to formally oppose incumbent requests to convert multiple site-by site licenses to a single geographic license. We do not believe this process will be susceptible to abuse by incumbents, as Nextel contends. Converting site-by-site licenses to a geographic license will not in any way expand the spectrum rights of incumbents; it is simply an administrative vehicle for simplifying the licensing process. In addition, we are requiring incumbents seeking geographic licenses to show that their facilities are constructed and operational, and that no other licensee would be able to use the channels within the designated geographic area.[108] We believe that these provisions adequately address Nextel's concerns.

3. Co-channel Interference Protection

a. Incumbent SMR Systems

64. Background. In the *CMRS Third Report and Order*, we retained most of our existing co-channel protection rules for CMRS licensees, including our existing station-specific interference criteria for 800 MHz SMR co-channel stations.[109] Under these rules, a geographic area licensee must locate its stations at least 113 km (70 mi) from incumbent facilities or else comply with the co-channel separation standards of our "short-spacing" rule.[110]

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[106] *Id.*

[107] *Id.*

[108] *800 MHz Report and Order*, 11 FCC Rcd at 1514,1515 ¶ 88.

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

[110] 47 C.F.R. § 90.621(b).

65. In the *800 MHz Report and Order,* we concluded that EA licensees on the upper 200 channels must afford interference protection to incumbent SMR systems as provided in Section 90.621 of the Commission's rules.[111] As a result, an EA licensee must either (1) locate its stations at least 113 km (70 miles) from any incumbent's facilities; (2) comply with our short-spacing rule; or (3) negotiate with the incumbent licensee if it wishes to operate closer than these rules allow.[112] We concluded that these requirements will adequately protect incumbents while EA licensees to build stations in their authorized service areas. We believe that the short-spacing rule provides flexibility to EA licensees, allows incumbents to fill in "dead spots," and protects incumbent licensees from actual interference.[113]

66. Petitions. PCIA argues that the Commission's decision improperly gives geographic licensees more rights than incumbent licensees.[114] Banks believes that our proposal will preclude affected parties from equitably balancing one operator's desire to expand against another operator's desire to obtain full value for an existing investment.[115] Pro-Tec Mobile requests that we require EA licensees to file an application for each proposed station and serve a copy on any incumbent within 70 miles of the proposed station. It claims that some authorized wide-area licensees have violated our rules when selecting co-channel station locations.[116] Additionally, it argues that we should not proceed until we review our database of currently authorized wide-area stations, confirm those authorizations comply with our interference protection rules, and cancel any wide-area authorizations which were erroneously granted.[117]

67. Consumers and PCIA also request clarifications of certain aspects of the interference protection rules. Consumers asks us to clarify that the full primary co-channel protection standards of Section 90.621(b) must be afforded by non-border area EA auction winners to co-channel I/LT category licensees.[118] PCIA also asks that we clarify that EA licensees operating in California and the Pacific Northwest must comply with the unique co-channel interference protection rules applicable to certain transmitter sites in mountainous areas of California and Washington state.[119]

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[111] *800 MHz Report and Order*, 11 FCC Rcd at 1516, ¶ 92.

[112] *Id.*

[113] *Id.*

[114] PCIA Petition at 11-12. (noting that geographic licensees will have more flexible emission mask requirements, extended periods to construct their systems, more flexibility in locating transmitter sites and greater rights to recover or obtain incumbent's spectrum); *see also* Southern Petition at 1.

[115] Banks Petition at 5.

[116] Pro-Tec Mobile Petition at 6-7.

[117] *Id.*

[118] Consumers Petition at 8.

[119] PCIA Petition at 19-20.

68. Discussion. We disagree with PCIA that we must give incumbent and EA licensees identical co-channel protection rights. PCIA presupposes that incumbents cannot become geographic licensees. In other auctions, incumbents obtained the benefits of being geographic area providers by obtaining geographic area licenses. To protect incumbents who do not want to provide service in a pre-determined geographic area, we have maintained the technical co-channel interference standards under which such incumbents were originally licensed.[120] These measures give incumbents the flexibility provided in their original license. We also permit them to freely add sites within their existing 22 dBu interference contour.[121]

69. We also decline to adopt Pro-Tec's suggestion that we require EA licensees to file applications on a per-site basis. Such a procedure is counterproductive to our goal of providing EA licensees additional operational flexibility, and would reintroduce some of the administrative burdens associated with site-by-site licensing.

70. Finally, as requested by Consumers and PCIA we clarify that (1) full primary co-channel protection pursuant to the standards of Section 90.621(b)[122] must be afforded to co-channel I/LT category licensees by non-border area EA licensees and (2) the EA licensees must comply with co-channel separation rules in Section 90.621(b) for designated transmitter sites in California and Washington.[123]

b. Adjacent EA Licensees

71. Background. In the *CMRS Third Report and Order*, we concluded that the co-channel interference protection between geographic area licensees would be similar to those in the cellular and PCS services, which impose interference protection criteria for border areas in Commission-defined service areas.[124] In the *800 MHz Report and Order,* we determined that 40 dBuV/m is an appropriate measure for the desired signal level at the service border area. Thus, we prohibited EA licensees from

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[120] In the MDS and 900 SMR services incumbent licensees are protected from interference from the new geographic area licensees. 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 (1995); Amendments 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, *Second Order on Reconsideration and Seventh Report and Order,* 11 FCC Rcd 2639 (1995). Additionally, the Commission has adopted the same sort of protection for paging and 220 MHz licensees where geographic licensing will be replacing site-by-site licensing. *See*, Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, *Second Report and Order and Further Notice of Proposed Rulemaking*, FCC 97-59. (Feb. 24, 1997).

[121] See § 90.693(a), 47 C.F.R. § 90.693(a).

[122] 47 C.F.R. § 90.621(b).

[123] 47 C.F.R. §§ 90.621(b)(1), 90.621(b)(2) and 90.621(b)(3).

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

exceeding a signal level of 40 dBuV/m at their service area boundaries, unless the bordering EA licensee(s) agree to a higher field strength.[125]

72. Petitions. PCIA claims that we should replace the 40 dBuV/m signal level standard with a 22 dBu standard proposed by Motorola, PCIA claims that we should adopt a stricter protection standard because entities operating at a signal level of 40 dBuv/m at the same geographic boundary will interfere with one another.[126] PCIA further argues that under Motorola's proposal, resulting "dead spots" at borders could be resolved by negotiations between operators.[127] Even if negotiations are unsuccessful, PCIA argues, the 22 dBu standard would still prevent interference, whereas the 40 dBuV/m standard would lead to interference if the parties failed to resolve the issue through negotiations.[128]

73. Discussion. We reject PCIA's suggestion that we replace the 40 dBuV/m signal level standard with a 22 dBu standard. Our approach here is consistent with our approach in setting signal strength thresholds in PCS and cellular services.[129] In all three instances, we have used a threshold that allows the geographic area licensee to deliver a reliable signal throughout its licensing area. While PCIA is correct that this could lead to interference between adjacent licensees operating at full power at a common service area border, our experience has shown that actual interference is uncommon because not all licensees extend coverage to their licensing area borders. Moreover, we have found that in those instances where actual interference does occur, adjacent licensees can and do resolve these situations by mutual agreement. If we were to use the 22 dBu standard, on the other hand, an EA licensee seeking to provide reliable coverage at the border of its licensing area would require the consent of the adjacent EA licensee even if the adjacent licensee was not operating close enough to the border to suffer actual interference. We believe such a requirement would be unnecessarily restrictive.

4. Emission Masks

74. Background. In the *CMRS Third Report and Order*, we affirmed our out-of-band emission rules for CMRS services and decided that out-of-band emission rules should apply only if emissions could potentially affect other licensees' operations. Moreover, we decided to apply out-of-band emission rules to licensees having exclusive use of a block of contiguous channels only if needed to protect operations outside of the licensee's authorized spectrum. In the *800 MHz Report and Order*, we decided to apply out-of-band emission rules only to the "outer" channels included in an EA license and to spectrum adjacent to interior channels used by incumbents. We also adopted and modified Ericsson's proposed emission mask rule to maintain the existing level of adjacent channel interference protection.

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125 *800 MHz Report and Order*, 11 FCC Rcd at 1518, ¶ 96.

126 PCIA Petition at 18-19.

127 *Id.*

128 *Id.*

129 47 C.F.R. §§ 24.236.

75. Petitions. Ericsson supports the emission mask rule described in Section 90.691, but believes that it should also apply to any non-EA 800 MHz Part 90 CMRS system.[130] Erricson proposes to amend Section 90.210 of the Commission's rules by adding the following sentence to footnote 3: "Equipment used in this band by non-EA systems shall comply with this section or the emission mask provisions of Section 90.691."[131] Motorola supports Ericsson's proposed changes to our emission mask rule.[132]

76. Discussion. We agree with petitioners that our Section 90.691 emission mask rules should also apply to non-EA 800 MHz Part 90 CMRS systems, and thus we will adopt Ericsson's proposed change to Section 90.210 of the Commission's rules. By making this change, we will provide incumbent licensees who do not submit a winning bid in the auction process the opportunity to use the more flexible emission mask that we have adopted for EA licensees. Moreover, it will aid CMRS operators who are operating on non-SMR pool channels to have the same capabilities as those operating in the SMR category. Both Ericsson and Motorola concur in the belief that this relaxation will not cause any increase in the amount of interference that adjacent channel licensees will receive. Thus, we amend Section 90.210 by adding the sentence to footnote 3 suggested by Ericsson.

C. Construction Requirements

1. EA Licensees

77. Background. In the *800 MHz Report and Order*, we adopted a five year construction requirement for EA-based licensees beginning when the license issues and applying to all of the licensee's stations within the EA spectrum block, including any stations previously subject to an earlier construction deadline.[133] We recognized that we had adopted a ten-year period adopted for PCS systems, but concluded that the already-substantial construction of 800 MHz systems made a five-year period sufficient. Moreover, we recognized that geographic-area licensees that have invested in existing systems or that have incurred bidding costs must construct facilities and provide service promptly, to recover these costs.[134]

78. Petitions. Banks argues that EA licensees should not be able to obtain an additional five years to construct facilities previously subject to earlier construction deadlines. Banks argues that our approach rewards spectrum warehousing and is inconsistent with regulatory symmetry because prior construction deadlines were issued on a site-specific basis.[135] Southern and Pro-Tec agree with Banks' that our construction requirements discriminate between EA licensees and non-EA licensees. They

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130 Ericsson Petition at 2.

131 *Id.*

132 Motorola Reply Comments at 3-4.

133 *800 MHz Report and Order*, 11 FCC Rcd at 1521, ¶ 104.

134 *Id.*

135 *Id.*