channels.

229. Discussion. In previous proceedings, we concluded generally that we should use "competitive bidding procedures to select from among mutually exclusive CMRS applications where we have the authority to do so and where we find such processing to be in the public interest."[502] Upon consideration of the record in this proceeding, we conclude that auctioning the Lower 80 channels and the General Category channels meets the criteria set forth in Section 309(j) of the Communications Act and will further the public interest. Nextel, AMTA, and SMR Won generally support competitive bidding for these channels.[503]

230. Southern and ITA argue that the Commission lacks the authority to auction this spectrum on the ground that under Section 309(j) the Commission is obligated to use existing means (*i.e.* engineering solutions, negotiations, threshold qualifications) to avoid mutual exclusivity in application and license proceedings.[504] We note as an initial matter that the Communications Act only requires the Commission to use other such existing means when it is in the public interest.[505] After careful analysis of this spectrum, we conclude that the likelihood of mutually exclusive applications in the 800 MHz SMR band is considerable and that not all potential conflicts will be eliminated through negotiations or other existing means. We therefore conclude that the public interest will be served by using competitive bidding to license these channels.

231. Some commenters contend that the General Category and Lower 80 are not auctionable[506] because the channels are heavily licensed[507] leaving few or no channels or space available for new licensing.[508] Further, these commenters contend that those channels that are open will be used for mandatory relocation of incumbents from the upper 10 MHz channels.[509] These commenters also contend that there is little to be gained by adopting geographic licensing[510] because geographic areas that already

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[502] *CMRS Third Report and Order*, 9 FCC Rcd at 8135, ¶ 9.

[503] Nextel Comments at 4; AMTA Comments at 29; SMR Won Comments at 15-19.

[504] *See* 47 U.S.C. § 309(j)(6)(E); Southern Comments at 6-8; ITA Reply at 8.

[505] 47 U.S.C. § 309(j)(6)(E).

[506] Coral Gables Comments at 6 (General Category only); Entergy Comments at 8 (General Category only); SMR Won Comments at 15-16 (lower 80 only); Fresno Comments at 23; ITA Comments at 3 (General Category); Keller Comments at 2 (General Category); Sierra Comments at 2; Southern Comments at 6-8; UTC Comments at 2 (General Category); Entergy Reply at 6; ITA Reply at 3; PCIA Reply at 3; Skyline Reply at 5; Florence Comments at 2; Esther Miller Comments at 1.

[507] Coral Gables Comments at 6; Entergy Comments at 9,11; SMR Won Comments at 16; PCIA Reply at 3.

[508] Coral Gables Comments at 6; Entergy Comments at 9; PCIA at 18; SMR Won Comments at 5; Fresno Comments at 21 (lower 80 channels); Southern Comments at 7, 11; Entergy Reply at 6; ITA Reply at 7.

[509] Coral Gables Comments at 6; Entergy Reply at 6; SMR Won Comments at 7.

[510] Coral Gables Comments at 6; Entergy Comments at 10, Fresno Comments at 23; Entergy Reply at 6.

have any value are licensed and there will be no increase in spectrum efficiency.[511] Further, commenters argue that because there is little open space and no mandatory relocation proposal from the Lower 80 or General Category channels, EA licensees will not be able to expand[512] and these licensees could be further frustrated by relocatees from the upper 200 channels.[513]

232. We reject those arguments for several reasons. We do not believe the purported dearth of channels in some areas or the potential risk of relocatees from the upper 200 channels render the competitive bidding process inapplicable. In this Order, we include provisions for licensees to aggregate licenses within a geographic area, which will enable them to expand the geographic coverage of their systems and potentially enhance the commercial viability of these licenses, as well as use this spectrum efficiently. As noted above, there is a high likelihood that mutually exclusive applications will be filed for these channels.[514] The resolution of these applications by comparative hearings or other means will unnecessarily delay the processing of these applications, contrary to the public interest and to the Congressional objectives under Section 309(j)(3). Under the licensing scheme for these channels, *i.e.*, on a geographic area basis (as with the upper 200 channels, EAs will be used for the lower 80 channels), there will be competitive opportunities to provide SMR service in this frequency band and the application process for these channels will be open to any qualified applicant. Furthermore, the use of competitive bidding to select among these applicants will ensure that the qualified applicants who place the highest value on the available spectrum will prevail in the selection process.[515] Additionally, as we concluded in the *First Report and Order*, by using the same service area definition for the lower 80 and General Category channels as we used for the upper 200 channels, we will realize greater administrative efficiency in the licensing of these channels.[516]

233. A few commenters contend that they cannot afford to participate in the auction.[517] Some commenters believe that the auction procedure heavily favors large entities over smaller ones,[518] that these larger entities will hurt competition[519] and delay provision of services while the auction takes place.[520] As

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[511] Coral Gables Comments at 6; PCIA at 18; Fresno Comments at 22 (General Category); Keller Comments at 2; Southern Comments at 7, 12; Entergy Reply at 7.

[512] Entergy Comments at 8.

[513] Southern Comments at 13.

[514] In the *Memorandum Opinion and Order* adopted today, we determine that non-SMRs as well as SMRs will be eligible to obtain EA licenses on the 150 General Category channels. *Memorandum Opinion and Order* at ¶¶ 100 - 102. This should increase the likelihood that we will receive mutually exclusive applications for these channels.

[515] *CMRS Third Report and Order*, 9 FCC Rcd at 8140.

[516] *Second Further Notice*, 11 FCC Rcd at 1591, ¶ 297.

[517] Wiztronics Comments at 1; Sierra Comments at 2; UTC Comments at 13-14.

[518] Wiztronics Comments at 2-3; Keller Comments at 2-3.

[519] Wiztronics Comments at 2-4; Keller Comments at 3; Southern Comments at 14-15.

[520] Entergy Comments at 10.

noted below, to ensure small business participation in the Lower 80 and General Category channel auctions, the Commission has adopted bidding credits. Furthermore, contrary to claims that auctions will delay the deployment of services, we believe that the use of competitive bidding will enhance competition and serve to streamline the administrative process, thereby allowing licenses to provide service more quickly than alternative licensing procedures.

234. Several commenters argue that the government should be concerned with the safety and welfare of citizens[521] even when such concerns prevent it from raising revenues.[522] Some commenters believe that this spectrum should be reserved for public safety entities[523] and that PMRS licensees need access to additional spectrum.[524] Motorola believes that PMRS providers play an important role in public safety and private industry and that PMRS's concerns should be taken into account. We addressed these concerns fully in the *Second Further Notice*.[525] We stated that existing licensees will not be required to relocate their public safety radio systems and geographic licensees will be required to provide protection to all co-channel systems that are constructed and operating within their service area. In addition, an advisory committee has been established to address the concerns of public safety users. Therefore, the Commission's rules will allow both the efficient use of the spectrum and the preservation of public safety.[526]

2. Competitive Bidding Design

a. Bidding Methodology

235. Background. In the *Second Further Notice*, we proposed to use simultaneous multiple round auctions as the competitive bidding methodology for the Lower 80 and General Category channels.[527] We stated that a simultaneous multiple round auction is the preferred method where licenses have strong value interdependencies. We noted, however, that there is less interdependency between licenses for the Lower 80 and General Category channels, both because channel aggregation is not required to provide SMR service and because channel selection may be largely dictated by which channels currently are licensed

[521] Association of Public-Safety Communications Officials-International, Inc., Texas Chapter ("APCO TX") at 1; Gainesville Comments at 2; Richardson Comments at 2; ITA Reply at 8; Florence Comments at 1; HSMM Comments at 1-2.

[522] APCO TX Comments at 1; Richardson Comments at 1; ITA Reply at 8.

[523] APCO TX Comments at 1; Florida Corrections Comments at 2; Florence Comments at 1; HSSM Comments at 1-2; Gainesville Comments at 2; Richardson Comments at 2.

[524] UTC Reply at 2, 3-4; Florence Comments at 1.

[525] *Second Further Notice*, 11 FCC Rcd at 1599-1600, ¶¶ 320-322.

[526] *See* The Development of Operational, Technical, and Spectrum Requirements for Meeting Federal, State, and Local Public Safety Agency Communication Requirements Through the Year 2010, *Notice of Proposed Rule Making*, WT Docket 96-86, FCC 96-155, (released April 10, 1996). The *Notice* in that proceeding seeks public comment on, among other things, how best to meet the future spectrum needs of the public safety community.

[527] *Second Further Notice*, 11 FCC Rcd at 1603, ¶ 327.

to incumbents in each license area.[528] Thus, while we proposed that both the Lower 80 and General Category channels be auctioned using a simultaneous multiple round auction methodology, we sought comment on alternatives to simultaneous multiple round bidding and specifically whether we should auction the licenses in a sequential multiple round auction.

236. Discussion. Based on the record in this proceeding and our successful experience conducting simultaneous multiple round auctions for other services, we believe a simultaneous multiple round auction design is the preferred competitive bidding design for these channels. Commenters generally support the use of this methodology, on the grounds that there is interdependency among the licenses.[529] No commenter advocated the use of sequential multiple round auctions. We also note, as discussed below, that we will adopt regional groupings for the Lower 80 and General Category EA licenses. The aggregation of licenses into these regional groupings creates stronger interdependencies between the licenses, further warranting the use of this auction methodology.

b. License Grouping

237. Background. As discussed earlier in this document, we believe that the appropriate grouping of the Lower 80 licenses is one of 16 blocks of 5 channels per block.[530] For the 150 General Category channels, we adopt the plan set forth in the Industry Coalition Proposal and, therefore, will divide the 150 channels into three contiguous 50-channel blocks.[531]

238. Discussion. To expedite the process of auctioning the Lower 80 and General Category EA licenses, we will auction these licenses using the five regional groups that were used for the regional narrowband PCS auction: Northeast, South, Midwest, Central, and West.[532] We believe that by grouping the licenses and auctioning them regionally, we reduce the burden on small businesses which choose to participate in the auction process. Each entity will need to participate only in those regional auctions in which it is interested in winning licenses. Additionally, by holding regional auctions and thereby limiting the number of licenses available, we will decrease the administrative burden of the auction on the participants, and further enable the auction to conclude at an earlier time. Finally, we believe that this grouping will make it easier for incumbents to secure spectrum that complements the licenses they currently hold while allowing them to expand their systems.

c. Bidding Procedures

i. Bid Increments

239. Background. The *Second Further Notice* proposed a minimum bid increment of the greater of $.01 per MHz-pop, or 5 percent of the high bid from the previous round.[533]

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[528] *Id.*

[529] PCI Comments at 11; Genesee Comments at 6.

[530] *See* discussion at Sec. IV(A)(3)(a), *infra*.

[531] *Id.* at Sec. IV(A)(3)(b).

[532] *See* 47 C.F.R. § 24.102 (describing the states and territories included in each region).

[533] *Second Further Notice*, 11 FCC Rcd at 1605, ¶ 337.

240. Discussion. We will adopt our minimum bid increment proposal, but delegate authority to the Bureau to vary the minimum bid increment. While we believe our proposal is appropriate, our experience with other auctions indicates that flexibility is necessary to set appropriate bidding levels to account for the pace of the auction, the needs of the bidders, and the value of the spectrum. Commenters generally support a minimum bid increment based upon a percentage of the bid from the previous round.[534] E.F. Johnson, on the other hand, argues that minimum bid increments should be reduced or eliminated to facilitate small business participation in the auction.[535] There is no evidence that a minimum bid increment will deter small business participation in the auction. Rather, as we previously noted, an appropriate minimum bid increment is important to the functioning of the auction as it speeds the process of the auction and helps to ensure that it comes to closure within a reasonable period of time.[536] Moreover, as noted below, we have adopted provisions to encourage small business participation.[537] We will follow the practice that we have used for other auctions and, consistent with Section 1.2104 of the Commission's Rules, announce by Public Notice prior to the auction the general guidelines for bid increments.[538]

ii. Stopping Rules

241. Background. In the *Second Further Notice*, we requested comment on our tentative conclusion that a market-by-market stopping rule may be the most appropriate for the Lower 80 channels, in view of our belief that these licenses were not highly interdependent. We also tentatively concluded that, because the General Category did involve interdependencies, a simultaneous stopping rule was the most appropriate for those licenses.

242. Discussion. In view of our decision to aggregate licenses on a regional basis, we believe that a simultaneous stopping rule is appropriate for both the Lower 80 and the General Category licenses. Thus, bidding will remain open on all licenses in an auction until bidding stops on every license. Based on the success of our prior broadband PCS and 900 MHz SMR auctions, Nextel agrees that there should be a simultaneous stopping rule.[539] AMTA and Nextel also claim that this rule is appropriate because of

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[534] *See e.g.,* Nextel Comments at 15, AMTA Comments at 30-31.

[535] E.F. Johnson Comments at 9.

[536] Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-252, *Second Report and Order*, 9 FCC Rcd 2348, 2369 (1994) (*Competitive Bidding Second Report and Order*).

[537] *See* discussion at Section IV-F-3, Treatment of Designated Entities, *infra.*

[538] 47 C.F.R. § 1.2104. Our past auction experience indicates the importance of maintaining flexibility in setting minimum bid increments to allow for flexibility to deal with various situations. *See* "FCC Announces Winning Bidders in the Auction of 493 Licenses to Provide Broadband PCS In Basic Trading Areas," *Public Notice*, DA 96-716 (rel. May 8, 1996); "Winning Bidders in the Auction of Authorizations to provide Multipoint Distribution Service in 493 Basic Trading Areas," *Public Notice*, No. 62216 (rel. March 29, 1996); "FCC Announces Winning Bidders in the Auction of 1,020 Licenses to Provide 900 MHz SMR in Major Trading Areas," *Public Notice*, DA 96-586 (rel. April 15, 1996). *See also* Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, WT Docket No. 97-62, FCC 97-60, 62 Fed. Reg. 13,540 (rel. Feb. 28, 1997) (*Part One NPRM*).

[539] Nextel Comments at 15.

the interdependencies between the markets.[540] SMR Won supports the market-by-market stopping rule, s u g g e s t i n g that it will deter speculators and reduce artificial inflation of auction prices.[541] We conclude that bidding should remain open on all licenses in an auction until bidding stops on every license. We believe that allowing simultaneous closing for all licenses will afford bidders the flexibility to pursue back-up strategies without the risk that bidders will refrain from bidding until the final rounds. In any event, we will retain the discretion to change the stopping rules during the course of the auction,[542] and delegate authority to the Bureau to exercise that discretion.

iii. Activity Rules

243. Background. In the *Second Further Notice*, we proposed to employ the Milgrom-Wilson activity rule for the General Category licenses.[543] The Milgrom-Wilson approach encourages bidders to be active in the early rounds of the auction by limiting their maximum participation to some multiple of their minimum participation level.[544] For the Lower 80, we did not propose an activity rule because of our proposal to employ a market-by-market stopping rule. We stated our belief that an activity rule is less important when markets close one-by-one because failure to participate in any given round may result in losing the opportunity to bid at all if that round turns out to be the last round.[545]

244. Discussion. In accordance with Section 1.2104 of the Commission's Rules and the guidelines we adopted in the *Competitive Bidding Second Report and Order*, we will employ the Milgrom-Wilson activity rule for both the Lower 80 and General Category auctions.[546] As we noted in the *Competitive Bidding Second Report and Order*, the Milgrom-Wilson activity rule is the preferred activity rule where a simultaneous stopping rule is used.[547] We believe that the Milgrom-Wilson approach best achieves the Commission's goal of affording bidders flexibility to pursue backup strategies, while at the same time ensuring that simultaneous auctions are concluded within a reasonable period of time.[548] Specifically, under the Milgrom-Wilson rules, the auction is divided into three stages and the minimum required activity level, measured as a fraction of the bidder's eligibility in the current round, will increase during the course of the auction. For purposes of this auction, we will adopt the minimum required

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[540] AMTA Comments at 30-31; Nextel Comments at 15.

[541] SMR Won Comments at 28.

[542] 47 C.F.R. § 1.2104.

[543] *Second Further Notice*, 11 FCC Rcd at 1607, ¶ 340.

[544] *Id.* at 1604-8, ¶ 340.

[545] *Id.* at 1606, ¶ 339.

[546] 47 C.F.R. § 1.2104.

[547] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2371-3.

[548] *Id.*

activity levels at each stage that recently were adopted for the D, E, and F Broadband PCS auction.[549]

245. As in previous auctions, we reserve the discretion to set and, by announcement before or during the auction, vary the level of the requisite minimum activity levels (and associated eligibility calculations) for each auction stage.[550] We believe that retaining this flexibility will improve the Commission's ability to control the pace of the auction and help ensure that the auction is completed within a reasonable period of time. We delegate to the Bureau the authority to set or vary the minimum activity levels if circumstances warrant a modification. The Bureau will announce any such modification by Public Notice. For the purposes of this auction, we also will use the general transition guidelines that were used for the D, E, and F Broadband PCS auctions.[551] The auction will start in Stage One and move to Stage Two when the auction activity level is below ten percent for three consecutive rounds in Stage One. The auction will move from Stage Two to Stage Three when the auction activity level is below ten percent for three consecutive rounds in Stage Two. Under no circumstances can the auction revert to an earlier stage. However, the Bureau will retain the discretion to determine and announce during the course of an auction when, and if, to move from one auction stage to the next.

246. To avoid the consequences of clerical errors and to compensate for unusual circumstances that might delay a bidder's bid preparation or submission in a particular round, we will provide bidders with five activity rule waivers that may be used in any round during the course of the auction. The Bureau will retain the discretion to issue additional waivers during the course of an auction for circumstances beyond a bidder's control, and also retain the flexibility to adjust, by Public Notice prior to an auction, the number of waivers permitted, or to institute a rule that allows one waiver during a specified number of bidding rounds or during specified stages of the auction.[552]

iv. Duration of Bidding Rounds

247. Background. In the *Second Further Notice*, we proposed to retain the discretion to vary the duration of bidding rounds or the intervals at which bids are accepted in order to close the auction more quickly.[553]

248. Discussion. We will retain the discretion to vary the duration of bidding rounds and the intervals at which bids are accepted. In simultaneous multiple round auctions, bidders may need a significant amount of time to evaluate back-up strategies. AMTA requests that we allow only one round of an auction per day because many of its members who will participate in the auction do not have

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[549] *See* "Auction of Broadband Personal Communications Services (D, E, and F Blocks)," *Public Notice*, DA 96-1400, (rel. Aug. 20, 1996).

[550] *Id. See also* "Auction of Broadband Personal Communications Services (D E and F Blocks)," *Public Notice,* DA 96-1026 (rel. June 26, 1996); "FCC Issues New Procedures, Terms and Conditions for Broadband PCS C Block Auction," *Public Notice* (rel. Oct. 6, 1995).

[551] *See* "Auction of Broadband Personal Communications Services (D, E, and F Blocks)," *Public Notice*, DA 96-1400, (rel. Aug. 20, 1996).

[552] *See Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2373.

[553] *See Second Further Notice*, 11 FCC Rcd at 1608, ¶ 342.

sufficient staff to monitor the auction if there is more than one round per day.[554] Genesee requests that for the first five rounds of the auction only one round of bids per day be allowed.[555] Genesee does not provide any rationale for its proposal. We do not believe these proposed limitations are necessary. We note that we have adopted regional license groupings that are intended to minimize for small entity participants these burdens in participating and monitoring the auctions. Therefore, we delegate authority to the Bureau to vary the bidding rounds or the interval at which bids are accepted in order to move the auction toward closure more quickly or as circumstances warrant. The Bureau will announce any changes to the duration of and intervals between bidding rounds, whether by Public Notice prior to the auction or by announcement during the auction.

d. Rules Prohibiting Collusion

249. Background. In the *Second Further Notice*, we tentatively concluded that we should subject the Lower 80 and the General Category channels to the reporting requirements and rules prohibiting collusion as set forth in the Commission's Rules.[556] We indicated that our goal is to prevent parties, especially large entities, from agreeing in advance to bidding strategies that divide markets according to their strategic interests and/or disadvantage other bidders.

250. Discussion. We adopt the rules prohibiting collusive conduct for use in the Lower 80 and General Category auctions.[557] These requirements, as set forth in Sections 1.2105 and 1.2107 of our Rules, operate along with existing antitrust laws as a safeguard to prevent collusion in the competitive bidding process.[558] In addition, where specific instances of collusion in the competitive bidding process are alleged during the petition to deny process, we may conduct an investigation or refer such complaints to the U.S. Department of Justice for investigation. Bidders who are found to have violated the antitrust laws or the Commission's rules in connection with their participation in the auction process may be subject to a variety of sanctions, including the forfeiture of their down payment or their full bid amount, revocation of their licenses, and possible prohibition from participation in the auctions.[559] Genesee supports our proposal on the grounds that these same rules were effective in the 900 MHz SMR auctions.[560] Coral Gables, in contrast, requests that public safety radio service providers under Part 90, or those proposing to provide such services, should be exempt from the collusion rules when they are negotiating with other public safety service providers.[561] We reject Coral Gable's position. First, the specific needs of public safety entities are the subject of, and will be addressed in, a separate Commission

[554] AMTA Comments at 31.

[555] Genesee Comments at 6.

[556] *Second Further Notice,* 11 FCC Rcd at 1608-9, ¶¶ 343-344.

[557] *Id.*

[558] 47 C.F.R. §§ 1.2105 and 1.2107. *See Part One NPRM*, ¶¶ 98-101.

[559] *See Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2388.

[560] Genesee Comments at 7.

[561] Coral Gables Comments at 10.

proceeding.[562] In addition, we believe that continued negotiation past the short-form filing date by any segment of bidders may impact the valuation of the licenses and jeopardize the integrity of the auction process.[563]

e. Procedural and Payment Issues

i. Pre-Auction Application Procedures

251. Background. In the *Competitive Bidding Second Report and Order*, as modified by the *Competitive Bidding Second Memorandum Opinion and Order*, the Commission established general procedural and payment rules for auctions, but also stated that such rules may be modified on a service specific basis.[564] We generally will follow the procedural and payment rules established in Subpart Q of Part 1, unless otherwise indicated.[565]

252. Discussion. We will generally use the applications and payment procedures set forth in Part 1 of our rules, with certain modifications for the 800 MHz SMR service. A Public Notice announcing the auction will specify the licenses to be auctioned and the time and place of the auction in the event that mutually exclusive applications are filed. The Public Notice will also specify the method of competitive bidding to be used, applicable bid submission procedures, stopping rules, activity rules, the short-form filing deadline, and the upfront payment amounts.

253. Prior to the auction, the Wireless Telecommunications Bureau will also provide information about incumbent licensees for applicants planning to participate in the auction. We encourage all potential bidders to examine these records carefully and do their own independent investigation regarding existing licensees' operations in each license area on which they intend to bid in order to maximize their success in the auction.

254. Section 309(j)(5) provides that no party may participate in an auction "unless such bidder submits such information and assurances as the Commission may require to demonstrate that such bidder's application is acceptable for filing."[566] We adopt our proposal to require all applicants for 800 MHz SMR licenses to submit FCC Form 175 in order to participate in the auction. As we indicated in the *Competitive Bidding Second Report and Order*, if we receive only one application that is acceptable for filing for a particular license, and thus there is no mutual exclusivity, we will issue a Public Notice

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[562] *See* The Development of Operational, Technical, and Spectrum Requirements for Meeting Federal, State, and Local Public Safety Agency Communication Requirements Through the Year 2010, WT Docket 96-86, FCC 96-155, *Notice of Proposed Rule Making,* 11 FCC Rcd 12460 (released April 10, 1996).

[563] We note that prior to the short-form filing date, public safety radio service providers, like other auction participants, are free to negotiate with each other to the extent permitted by the antitrust laws. *See* 15 U.S.C. §§ 1 *et. seq.*

[564] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2375-77; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Second Memorandum Opinion and Order*, 9 FCC Rcd 7245, 7255 (1994).

[565] 47 C.F.R. § 1.2105

[566] 47 U.S.C. § 309(j)(5). *See Part One NPRM*, ¶¶ 44-55.

cancelling the auction for that license and establish a date for the filing of a long-form application.[567]

ii. Amendments and Modifications

255. Background. In the *Second Further Notice*, we proposed to provide applicants with an opportunity to correct minor defects in their short-form applications.[568] Applicants whose short-form applications are substantially complete, but contain minor errors or defects, would be provided the opportunity to correct minor defects prior to the auction.[569]

256. Discussion. We will apply the provisions set forth in Part 1 of our rules governing amendments to and modifications of short-form application to the 800 MHz SMR service.[570] The only commenter on this issue, Genesee, supports the Commission's proposal.[571] Upon reviewing the short-form applications, we will issue a Public Notice listing all defective applications. Applicants with minor defects in their applications will be given an opportunity to cure them and resubmit a corrected version.

iii. Upfront Payments

257. Background. To ensure that only serious, qualified bidders participate in our auctions, in the *Second Further Notice* we proposed to require all auction participants for the Lower 80 and General Category auctions to tender a substantial upfront payment as a condition of bidding, *i.e.*, a minimum upfront payment of $2,500 and a general formula of $.02 per MHz-pop for the largest combination of bidding units a bidder anticipates bidding on in any single round of bidding.[572]

258. Discussion. We will adopt our upfront payment proposal, particularly because the majority of commenters support it.[573] Fresno states that the upfront payment should be high enough to discourage frivolous bidders but flexible enough to reflect the lower value of the channels.[574] As we previously noted, a substantial upfront payment requirement is necessary to ensure that only serious qualified bidders participate in auctions, thereby ensuring that sufficient funds are available to satisfy any bid withdrawal or default payments that may be incurred.[575] We thus reject Coral Gables' claim that bidders that provide public safety radio services under Part 90 of the Commission's Rules should not be required to make an

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[567] *Id.* at 2376.

[568] *Second Further Notice*, 11 FCC Rcd at 1612, ¶¶ 353-355.

[569] *Id.*

[570] 47 C.F.R. §§ 1.2105(b), Part 22, and Part 90. *See also Part One NPRM*, ¶¶ 47-8.

[571] Genesee Comments at 7.

[572] *Second Further Notice*, 11 FCC Rcd at 1613, ¶ 357.

[573] Genesee Comments at 7; Fresno Mobile Comments at 32.

[574] Fresno Comments at 31-32; Genesee Comments at 7.

[575] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2377-81.

upfront payment or, alternatively, that they should have a reduced upfront payment.[576] We believe that making these exceptions to the upfront payment requirement would jeopardize the integrity of the auction process.[577] As Fresno suggests, we recognize the standard upfront payment formula may yield too high a payment as compared to the value of these licenses. Accordingly, we delegate authority to the Bureau to vary the minimum upfront payment when it determines the general formula of $0.02 per MHz-pop is an unreasonably high upfront payment. The Bureau will announce any such modification by Public Notice.

iv. Down Payment and Full Payment

259. Background. Consistent with Section 1.2107(b) of the Commission's Rules, in the *Second Further Notice* we proposed to require a 20 percent down payment for the Lower 80 and General Category licenses and that auction winners pay the full balance of their winning bids within 5 business days following the Public Notice that announces the Commission is prepared to award the license.[578] For auction winners eligible to make payment through an installment plan, we proposed to apply different down payment requirements.

260. Discussion. We conclude that we should require all winning bidders to supplement their upfront payments with down payments sufficient to bring their total deposits up to 20 percent of the winning bid(s). Genesee, the sole commenter to address this issue, supports our proposal. If the upfront payment already tendered by a winning bidder, after deducting any bid withdrawal and default payments due, amounts to 20 percent of its winning bids, no additional deposit will be required. If the upfront payment amount on deposit is greater than 20 percent of the winning bid amount after deducting any bid withdrawal and default payments due, the additional monies will be refunded.

261. We will require winning bidders to submit the required down payment to our lock-box bank within ten business days following release of a Public Notice announcing the close of bidding. All auction winners will be required to make full payment of the balance of their winning bids within ten business days following Public Notice that the Commission is prepared to award the license.[579] The Commission generally will grant uncontested licenses within ten business days after receiving full payment.

262. We believe that small businesses should also be subject to a 20 percent down payment requirement. We believe that such a requirement is consistent with ensuring that winning bidders have the financial capability of building out their systems and will provide us a strong assurance against default. Increasing the amount of the bidder's funds at risk in the event of default discourages insincere bidding and therefore increases the likelihood that licenses are awarded to parties who are best able to serve the public. We also believe that a 20 percent down payment should cover the required payments in the unlikely event of default. In view of our decision to defer the issue of installment payments to the Part 1 proceeding,[580] we will also defer our decision as to when small businesses must make their down payment to the Part 1 proceeding.

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[576] Coral Gables Comments at 9.

[577] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2377-81.

[578] *Second Further Notice*, 11 FCC Rcd at 1614-1615, ¶¶ 360-361.

[579] *See Part One NPRM*, ¶ 59.

[580] *See* discussion at Sec. IV(F)(3)(b)(iii), *infra*.

v. Bid Withdrawal, Default, and Disqualification

263. Background. In the *Competitive Bidding Second Report and Order*, we noted the importance to the success of our competitive bidding process that potential bidders be required to make a monetary payment if they withdraw a high bid, are found not to be qualified to hold licenses, or default on payment of a balance due.[581] In the *Second Further Notice*, we proposed to apply our general bid withdrawal rules to the 800 MHz SMR auctions in order to prevent insincere bidding.[582]

264. Discussion. To prevent insincere bidding we will apply our general bid withdrawal, default, and disqualification rules, as set forth in Section 1.2104(g) of the Commission's Rules, to the Lower 80 and General Category auctions. Genesee, the sole commenter to address these issues, supports this proposal. Any bidder that withdraws a high bid before the Commission declares bidding closed will be required to reimburse the Commission in the amount of the difference between its high bid and the amount of the winning bid the next time the license is offered by the Commission if this subsequent winning bid is lower than the withdrawn bid.[583] If a bidder has withdrawn a bid or defaulted, but the amount of the withdrawal or default payment cannot yet be determined, the bidder will be required to make a deposit of up to 20 percent on the amount bid on such licenses. When it becomes possible to calculate and assess the payment, any excess deposit will be refunded.

265. In the event an auction winner defaults on its initial down payment, the Commission must exercise our discretion to decide whether to hold a new auction or offer the licenses to the second highest bidder.[584] In exercising our discretion, the Commission will evaluate the particular facts and circumstances of the specific case. In the unlikely event that there is more than one bid withdrawal on the same licenses, we will hold each withdrawing bidder responsible for the difference between its withdrawn bid and the amount of the winning bid the next time the license is offered by the Commission.

vi. Long-Form Applications and Petitions to Deny

266. In the *Second Further Notice* we proposed to adopt the general procedures for filing long-form applications to the 800 MHz SMR auctions.[585] In addition, we proposed that the petition to deny procedures that were adopted in the *CMRS Third Report and Order* should apply to the processing of applications for the 800 MHz SMR service.[586] Genesee, the sole commenter on this issue, supports our

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

[582] *Second Further Notice*, 11 FCC Rcd at 1615, ¶ 363.

[583] 47 C.F.R. § 1.2104(g)(1). We also recently addressed the issue of how our bid withdrawal payment provisions apply to bids that are mistakenly placed and withdrawn in a decision involving the 900 MHz SMR and the broadband PCS C block auctions. *See* Atlanta Trunking Associates, Inc. and MAP Wireless L.L.C. Request to Waive Bid Withdrawal Payment Provisions, FCC 96-203, *Order* (released May 3, 1996) (summarized in 61 Fed. Reg. 25,807 (May 23, 1996)), *recon. pending*.

[584] *See Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2383-2384. *See also* 47 C.F.R. § 1.2109(c).

[585] *Second Further Notice*, 11 FCC Rcd at 1616, ¶ 365. *See also Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2383.

[586] *CMRS Third Report and Order*, 9 FCC Rcd at 1617.

proposal. Therefore, we adopt our proposals regarding petitions to deny. A party filing a petition to deny against an 800 MHz SMR license application will be required to demonstrate standing and meet all other applicable filing requirements. The restrictions in Section 90.162 were established to prevent the filing of speculative applications and pleadings (or threats of the same) designed to extract money from 800 MHz license applicants. Thus, we will limit the consideration that a winning bidder or an individual or entity filing a petition to deny 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. We note also that we recently amended Section 90.162 to reflect the fact that discussions regarding withdrawal of short-form applications are subject to 1.2105(c) of our Rules.

vii. Transfer Disclosure Requirements

267. 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."[587] Therefore, we imposed a transfer disclosure requirement on licenses obtained through the competitive bidding process, whether by designated entity or not. We tentatively concluded in the *Second Further Notice* that the transfer disclosure requirements should apply to all 800 MHz SMR licenses obtained through the competitive bidding process.[588] Genesee, again the sole commenter on this issue, supports the Commission's tentative conclusion.[589] We will adopt the transfer disclosure requirements contained in Section 1.2111(a) of our rules to auctions for the Lower 80 and General Category. We will 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 relating to unjust enrichment outside the designated entity context have arisen.[590]

3. Treatment of Designated Entities

a. Overview and Objectives

268. In authorizing the Commission to use competitive bidding, Congress mandated that the Commission "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services."[591] The statute required the Commission to "consider the use of tax certificates, bidding preferences and other procedures" in order to achieve this congressional goal.[592] In addition, Section 309(j)(3)(B) provided that in establishing eligibility criteria and bidding methodologies the Commission shall promote "economic opportunity and competition . . . by avoiding excessive concentration of licenses

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[587] 47 U.S.C. § 309(j)(4)(E).

[588] *Second Further Notice*, 11 FCC Rcd at 1619, ¶ 370.

[589] Genesee Comments at 7.

[590] *Id. See also Competitive Bidding Second Report & Order*, 9 FCC Rcd at 2385. These particular transfer disclosure requirements are in addition to the unjust enrichment provisions discussed *infra*.

[591] 47 U.S.C. § 309(j)(4)(D).

[592] *Id.*

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."[593] Section 309(j)(4)(A) provides that to promote these objectives, the Commission shall consider alternative payment schedules, including installment payments.[594]

269. We have employed a wide range of special provisions and eligibility criteria designed to meet the statutory objectives of providing opportunities to designated entities in other spectrum-based services. The measures considered for each service were established after closely examining the specific characteristics of the service and determining whether any particular barriers to accessing capital stood in the way of designated entity opportunities. For example, in narrowband PCS we provided installment payments for small businesses and bidding credits for minority-owned and women-owned businesses.[595] In 900 MHz SMR, we adopted bidding credits and installment payment plans for small businesses.[596]

270. In the *Second Further Notice,* we sought 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.[597] We requested comment on the possibility 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. We requested commenters to discuss whether the capital requirements of the 800 MHz SMR service pose a barrier to entry by minorities and women and whether overcoming such a barrier, if it exists, would constitute a compelling governmental interest.[598] In particular, we sought comment on the actual costs associated with the acquisition, construction, and operation of an 800 MHz SMR system with a service area based on a pre-defined geographic area as well as the proportion of existing 800 MHz SMR businesses that are owned by women and minorities. We also urged the parties to submit evidence about patterns or actual cases of discrimination in the 800 MHz SMR industry or in related communications services.

b. Eligibility for Designated Entity Provisions

271. At this time, we have not developed a record sufficient to sustain race-based measures in

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[593] 47 U.S.C. § 309(j)(3)(b).

[594] 47 U.S.C. § 309(j)(4)(A).

[595] *Competitive Bidding Third Report and Order,* 9 FCC Rcd. at 2978. Minority and women-owned businesses received a 25 percent bidding credit in the nationwide narrowband PCS auctions In the regional narrowband PCS 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.

[596] *See* Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool/Implementation of Section 309(j) of the Communications Act, *Second Order on Reconsideration and Seventh Report and Order*, 11 FCC Rcd 2639 at 2705-6 (1995) *(900 MHz Second Report and Order*).

[597] *Second Further Notice*, 11 FCC Rcd at 1620, ¶ 374.

[598] *Second Further Notice,* 11 FCC Rcd at 1624-5, ¶¶ 384-5.

the Lower 80 and General Category licenses based on the standard established by the *Adarand* decision.[599] In addition, we believe that the record is insufficient to support any gender-based provisions under the intermediate scrutiny standard established in the *VMI* decision.[600] Fresno urges the Commission to design a regulatory scheme that will provide opportunities for businesses owned by women and minorities to comply with the congressional mandate set out in Section 309(j).[601] Fresno, however, does not provide any evidence of past discrimination.[602] Conversely, Nextel states that there is no evidence that minorities and women have been historically discriminated against in the SMR industry.[603] Based upon the record in this proceeding, we will adopt bidding credits solely for applicants qualifying as small businesses. We believe these provisions will provide small businesses with a meaningful opportunity to obtain licenses for the Lower 80 and General Category channels. Moreover, many women- and minority-owned entities are small businesses and will therefore qualify for these provisions. As such, these provisions will meet Congress' goal of promoting wide dissemination of licenses in this spectrum. We have determined that no special provisions for rural telephone companies are warranted but we note that rural telephone companies may take advantage of the geographic partitioning and disaggregation provisions and, to the extent that they fall within the definition of small businesses, they can take advantage of the designated entity provisions too.

i. Small Businesses Definition

272. Background. We proposed two-tiered small business definition for this spectrum consistent with our desire to provide two levels of bidding credits.[604] Under our proposal to obtain a 10 percent bidding credit, an applicant would be limited to not more than $15 million in average gross revenues for the previous three years; to obtain a 15 percent bidding credit, an applicant would be limited to not more than $3 million in average gross revenues for the previous three years.[605] We stated that in both cases we would require the applicant to aggregate the gross revenues of its affiliates and attributable investors for the preceding three years for purposes of determining eligibility.[606] We noted that the proposed thresholds are comparable to what we adopted in 900 MHz SMR.[607] We sought comment on whether the thresholds (and the proposed bidding credits associated with them, as discussed below) would be sufficient for the Lower 80 and General Category channels in light of the build-out costs associated with constructing an

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[599] *Adarand Constructors, Inc. v. Peña*, 115 S.Ct. 2097 (1995).

[600] *See United States v. Virginia*, 116 S.Ct. 2264 (1996) (Reviewing the single sex admission policy of the Virginia Military Institute, the Supreme Court held that gender-based government action is subject to the intermediate scrutiny standard of review); *see also J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127 (1994); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).

[601] Fresno Comments at 33.

[602] *Id.*

[603] Nextel Comments at 11.

[604] *See infra* at ¶ 62 .

[605] *Second Further Notice*, 11 FCC Rcd at 1622-3, ¶¶ 379-380.

[606] *Id.*

[607] *Id.*

SMR system throughout a market area, or whether alternative definitions would be more suitable.[608]

273. We also sought comment on the degree to which the revenues of affiliates and other investors should be considered in determining whether an entity is eligible for small business provisions.[609] In particular, we sought comment on what attribution standard should be applied to 800 MHz SMR applicants seeking to qualify as small businesses. We noted that in determining whether a PCS applicant qualifies as a small business, we included the gross revenues of the applicant's affiliates and investors with ownership interests of 25 percent or more.[610]

274. Discussion. Based upon the record in this proceeding, we conclude that special provisions for small businesses are appropriate for 800 MHz SMR services.[611] We will adopt a two-tiered definition of small business. We will define a small business as an entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years that do not exceed $15 million; we will define a very small business as an entity that, together with affiliates and controlling principals, has average gross revenues for the preceding three years of that do not exceed $3 million. Bidding credits will be determined, as discussed *infra*, based upon this two-tiered approach.

275. In determining whether an applicant qualifies as a small business at any level, we will consider the gross revenues of the small business applicant and its affiliates. Specifically, for purposes of determining small business status, we will follow the procedure recently adopted for auctions involving other services[612] and will attribute the gross revenues of affiliates of the applicant. We thus choose not to impose specific equity requirements on the controlling principals that meet our small business definition, as suggested by SMR WON and Genesee.[613] We will still require, however, that in order for an applicant to qualify as a small business, qualifying small business principals must maintain "control" of the applicant. The term "control" would include both *de facto* and *de jure* control of the applicant. For this purpose, we will borrow from certain SBA rules that are used to determine when a firm should be deemed an affiliate of a small business.[614] Typically, *de jure* control is evidenced by ownership of 50.1 percent of an entity's voting stock. *De facto* control is determined on a case-by-case basis. An entity must demonstrate at least the following indicia of control to establish that it retains *de facto* control of the applicant: (1) the entity constitutes or appoints more than 50 percent of the board of directors or partnership management committee; (2) the entity has authority to appoint, promote, demote and fire senior executives that control the day-to-day activities of the licensees; and (3) the entity plays an integral

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[608] *Id.*

[609] *Second Further Notice,* 11 FCC Rcd at 1628, ¶ 392.

[610] *See e.g.,* 47 C.F.R. § 24.720(j)(1); § 24.320(b)(2)(iv).

[611] *See, e.g.,* Genesee Comments at 8; SMR WON Comments at 28.

[612] *See, e.g.,* Amendment of Part 20 and Part 24 of the Commission's Rules - Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, *Report and Order*, 11 FCC Rcd 7824, 7843-44 (1996) (*Broadband PCS DE&F Report and Order*).

[613] SMR WON Comments at 28-9, Genesee Comments at 8.

[614] *See* 13 C.F.R. § 121.401

role in all major management decisions.[615] While we are not imposing specific equity requirements on the small business principals, the absence of significant equity could raise questions about whether the applicant qualifies as a *bona fide* small business.

ii. Bidding Credits

276. Background. As noted above, in the *Second Further Notice* we proposed two levels of bidding credits.[616] We stated our belief that tiered bidding credits can help achieve the statutory objective under Section 309(j)(3)(B) by providing varying sizes of small businesses with a meaningful opportunity to obtain SMR licenses.

277. Discussion. We believe that bidding credits are appropriate as a special provision for designated entities in the Lower 80 and General Category licenses. While bidding credits do not guarantee the success of small businesses, we believe that they at least provide such bidders with an opportunity to successfully compete against larger, well-financed bidders. We also conclude that it is appropriate to adopt tiered bidding credits for 800 MHz SMR auction participants based on the size of the small businesses. Such an approach, we believe, furthers our mandate under Section 309(j) of the Communications Act to disseminate licenses to a variety of applicants. Consistent with the tiered small business definition that we adopt today, we will give small businesses that, together with affiliates and controlling principals, have average gross revenues for the preceding three years that do not exceed $3 million, a 35 percent bidding credit. We will give small businesses that, together with affiliates and controlling principals, have average gross revenues for the preceding three years that do not exceed $15 million, a 25 percent bidding credit. Consistent with our approach in the upper 200 channels, we believe that these tiered bidding credits take into account the difficulties smaller businesses have in accessing capital and their differing business strategies.[617]

iii. Installment Payments

278. Background. In the *Second Further Notice,* we proposed to offer an installment payment option for small businesses that successfully bid for lower 80 and General Category licenses.[618]

279. Discussion. We will defer the decision regarding whether to adopt installment payments in the lower 80 and General Category channels to our Part 1 proceeding. We do not disagree with the contention of Genesee and AMTA that small businesses benefit from the ability to pay for their licenses in installments.[619] Nonetheless, in the Part 1 proceeding, we sought comment on whether there are better alternatives to help small businesses, such as offering higher bidding credits in lieu of installment

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[615] *See* Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403, 447 (1994) (*Competitive Bidding Fifth Memorandum Opinion and Order*).

[616] *Second Further Notice*, 11 FCC Rcd at 1628, ¶ 391.

[617] *See Memorandum Opinion and Order* at Sec. IV(H)(2). *See also Part One NPRM* at ¶ 39-40.

[618] *Second Further Notice*, 11 FCC Rcd at 1630, ¶ 397.

[619] Genesee Comments at 8; AMTA Comments at 31.

payments for qualified winning bidders.[620]

280. Finally, we do not see a reason to adopt an alternative payment plan for public safety auction winners, as suggested by Coral Gables. Coral Gables argues that there is a greater public interest value to use these channels for public safety purposes and that special installment payment provisions should be made in the auction rules for public safety auction winners.[621] We decline to provide this benefit for several reasons. First, Coral Gables will not be forced to relocate to other channels and will not be required to participate in the auction to retain the spectrum for which it is currently licensed. Second, we are granting Coral Gables' request to allow disaggregation of channels by geographic area license winners which should enable public safety entities to secure more frequencies from auction winners. Also, as noted above, the Commission is engaged in a separate proceeding dedicated to the issue of spectrum allocation for public safety entities.[622]

iv. Reduced Upfront Payment

281. Background. In the *Second Further Notice,* we proposed to adopt a reduced upfront payment for small businesses for geographic licenses on the Lower 80 and General Category channels.[623]

282. Discussion. In view of the favorable bidding credits adopted herein, we do not see a need to adopt reduced upfront payments in order to ensure small business participation in the auction, as advocated by Genesee.[624] Rather, we believe that the standard upfront payment is appropriate for all participants and will help guard against defaults. In addition, reduced upfront payments impose heavy administrative burdens on the Commission and are more confusing to auction participants. We do note that the standard upfront payment amount of $.02/MHz-pop will be discounted on a uniform basis by the Bureau to account for incumbency on this spectrum. The Bureau will announce by Public Notice the amount of this discount.

v. Set-Aside Spectrum

283. Background. In the *Second Further Notice,* we tentatively concluded that the Lower 80 and the General Category Channels should be designated as an entrepreneurs' block and sought comment on that tentative conclusion.[625]

284. Discussion. We will not adopt an entrepreneurs' block for the Lower 80 and General Category channels for several reasons.[626] First, contrary to the contention of some commenters that an

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[620] *See Part One NPRM* at ¶ 34.

[621] Coral Gables Comments at 9.

[622] *See* discussion at Sec. IV(F)(1), *supra.*

[623] *Second Further Notice*, 11 FCC Rcd at 1626, ¶ 388.

[624] Genesee Comments at 8.

[625] *Second Further Notice*, 11 FCC Rcd at 1630, ¶ 399.

[626] Several commenters advocated against the creation of an entrepreneurs' block. *See* Southern Comments at 16; Nextel Comments at 5, 7-8.

entrepreneurs' block is required to ensure small businesses will be able to obtain licenses,[627] we believe that small businesses will have significant opportunity to compete for licenses given the bidding credits we adopt herein. Second, as noted by at least two commenters, the establishment of an entrepreneurs' block could unfairly exclude some incumbent operators from participation in the auction because some incumbents on these channels are larger companies.[628] Finally, we agree with the argument of one commenter that adoption of an entrepreneurs' block for these channels would contravene the goal of regulatory parity since there is no set-aside in the cellular service and only one-third of the broadband PCS spectrum was set aside for small businesses.[629]

vi. Unjust Enrichment Provisions

285. Background. Our unjust enrichment provisions are integral to the success of the special provisions for designated entities in the various auctionable services. In the *Second Further Notice,* we sought comment regarding the appropriate approach to prevent unjust enrichment.[630]

286. Discussion. To ensure that large businesses do not become the unintended beneficiaries of measures meant for smaller firms, we adopt unjust enrichment provisions similar to those adopted for narrowband PCS and 900 MHz SMR services.[631] No comments were received on this issue. Licensees seeking to transfer their licenses to entities which do not qualify as small businesses, as a condition to approval of the transfer, must remit to the government a payment equal to a portion of the total value of the benefit conferred by the government. The amount of this payment will be reduced over time as follows: a transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit; in year three of the license term the payment will be 75 percent; in year four the payment will be 50 percent and in year five the payment will be 25 percent, after which there will be no payment. These assessments will have to be paid to the U.S. Treasury as a condition of approval of the assignment or transfer.[632] Thus, a small business that received bidding credits seeking transfer or assignment of a license to an entity that does not qualify as a small business will be required to reimburse the government for the amount of the bidding credit before the transfer will be permitted.

287. Also, if an investor subsequently purchases an interest in a small business licensee and, as a result, the gross revenues of the business exceed the applicable financial caps, the unjust enrichment provision will apply. We will apply these payment requirements for the entire license term to ensure that

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[627] *See e.g.,* Fresno Mobile Comments at 28. AMTA Comments at 25, SMR WON Comments at 23-25. Other commenters contend only part of the General Category channels should be designated as an entrepreneurs' block to prevent speculators from driving up prices for the entire block. SMR WON Comments at 19.

[628] *See e.g.,* Southern Comments at 16; UTC Comments at 14.

[629] Nextel Comments at 8-11.

[630] *Second Further Notice,* 11 FCC Rcd at 1631, ¶ 401.

[631] Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Third Report and Order*, 9 FCC Rcd 2941, 2979 (1994) (*Competitive Bidding Third Report and Order*).

[632] *See* Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Erratum to Third Memorandum Opinion and Order*, PP Docket No. 93-253, 10 FCC Rcd 173 (1994).

small businesses will look first to other small businesses when deciding to transfer their licenses.[633] While small business licensees must abide by these unjust enrichment provisions when transferring their licenses to entities that would not qualify under our small business definitions, we will not impose a holding period or other transfer restrictions on small businesses.

V. CONCLUSION

288. We believe that the service and auction rules we adopted herein in this *Second Report and Order* are necessary to continue our implementation of a new licensing scheme for the 800 MHz and 900 MHz SMR services. We further believe that the rules will facilitate the rapid implementation of wide-area licensing in the 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 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.

VI. PROCEDURAL MATTERS

A. Ordering Clauses

289. Accordingly, IT IS ORDERED that, pursuant to authority of 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), Part 90 of the Commission's Rules, 47 C.F.R. § 90 IS AMENDED as set forth in Appendix B below.

290. IT IS FURTHER ORDERED that the rule changes made herein WILL BECOME EFFECTIVE 60 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).

291. 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 C is ADOPTED.

292. IT IS FURTHER ORDERED that all waiting lists for the lower 230 channels of 800 MHz SMR spectrum ARE ELIMINATED and all applications currently on waitings lists for such frequencies ARE DISMISSED, effective **July 10, 1997.**

B. Regulatory Flexibility Act

293. The Final Regulatory Flexibility Analysis pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 604, is contained in Appendix D.

C. Further Information

294. For further information concerning this proceeding, contact Shaun A. Maher or Michael

[633] We note that normal projected growth of gross revenues and assets will not generally jeopardize continued small business eligibility. *See Competitive Bidding Fourth Memorandum Opinion and Order,* 10 FCC Rcd at 421.

Hamra, Policy and Rules Branch, Commercial Wireless Division, Wireless Telecommunications Bureau at (202) 418-0620 or Alice Elder, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau at (202) 418-0660.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Parties Filing Comments to *Second Further Notice*

A and B Electronics (A&B)
Airtouch Communications, Inc. (Airtouch)
American Mobile Telecommunications Association (AMTA)
American Petroleum Institute (API)
Association of Public Safety Communications Officilas-International, Inc. (APCO)
Baltimore Gas & Electric (BGE)
Bell Atlantic Enterprises International, Inc. (BAEII)
Bell Atlantic Mobile Systems (Bell Atlantic)
Bell South Corporation (Bell South)
CELSMER
Cen Call Communications Corporation (Cen Call)
Centennial Telecommunications, Inc. (CTI)
City of Coral Gables, Florida (Coral Gables)
City of Gainesville, Florida (Gainesville)
City of Los Angeles, Police Department (LAPD)
City of Richardson, Texas (Richardson)
Clark's Communications (Clark)
Consumers Power Company (CPC)
Council of Independent Communications Suppliers (CICS)
County of San Bernadino, California (San Bernadino)
Courtesy Commmunications, Inc. (Courtesy)
Delta Communications, Inc. (Delta)
Dial Page, Inc. (Dial Page)
Digital Radio, L. P. (Digital)
Duke Power Company (Duke)
E. F. Johnson Company (E.F. Johnson)
Entergy Services, Inc. (Entergy)
Ericsson Corporation (Ericsson)
Federal Express Corporation (FedEx)
Fisher Communications, Inc. (Fisher)
Fleet Call, Inc. (Fleet Call)
Freedom Mobile Communications, Inc. (Freedom)
Fresno Mobile Radio, Inc. (Fresno)
General Motors Research Corporation (GMRC)
Genesee Business Radio Systems (Genesee)
Geotek Communications (Geotek)
G. P. and Partners (G.P.)
GTE Services Corporation (GTE)
Industrial Communications and Electronics, Inc. (IC&E)
Industrical Communications Association, Inc., and Telephone Maintenance Frequency Advisory Committee (ICAI)
Idaho Communications Limited Partnership (ICLP)
Keller Communications, Inc. (Keller)
McCaw Cellular Communications, Inc. (McCaw)
Motorola, Inc. (Motorola)

National Association of Business and Educational Radio, Inc. (NABER)
Nextel Communications, Inc. (Nextel)
Northern States Power Company (NSPC)
Pactel Paging (Pactel)
Personal Communications Industry Association (PCIA)
Pittencrieff Communications, Inc. (PCI)
Powerspectrum, Inc. (Powerspectrum)
Pro Tec Mobile Communications, Inc. (Pro Tec)
Puerto Rico Telephone Company (PRTC)
Rural Telecommunications Group (RTG)
Sierra Electronics (Sierra)
Small Business in Telecommunications (SBT)
SMR Systems, Inc. (SSI)
SMR WON
Southwestern Bell Corporation (SBC)
Southern California Edison (SCE)
Southern California Gas Company (SCGC)
Southern Company (Southern)
State of Florida, Division of Communications (State of Florida)
Telecellular de Puerto Rico, Inc. (Telecellular)
United States Sugar Corporation (U.S. Sugar)
Utilities Telecommunications Council (UTC)
Wiztronics, Inc. (Wiztronics)

Parties Filing Reply Comments to *Second Further Notice*
Advanced Communications, Inc. (ACI)
Advanced Mobilecomm, Inc. (AMI)
AMTA, SMR WON, & Nextel (Industry Proposal)
Applied Technology Group, Inc. (ATGI)
Banks Tower Communications, Ltd. (Banks)
Cellcall, Inc. (Cellcall)
CICS
Coral Gables
CPC
Cumulous Communications Corporation (Cumulous)
DCL Associates, Inc. (DCL)
Dial Call Communications, Inc. (Dial Call)
Digital
Dow Chemical Telecommunications Corporation (DCTC)
Dru Jenkins, Inc. (Dru Jenkins)
Duke
Eden Communications, Inc. (Eden)
E. F. Johnson
Entergy
Ericsson
Fisher
Fresno
GMRC
Genesee

Geotek
Jana Green, Inc. (Jana Green)
IC&E
ICLP
Industrial Telecommunications Association, Inc. (ITA)
J. A. Placek Construction Company (Placek)
Lagorio Communications (Lagorio)
Luczak, Thomas
Madera Radio Dispatch, Inc. (Madera)
Mobex Idaho,Inc. (Mobex)
Motorola
NABER
North Carolina Communications, Inc. (NCCI)
Pacific Bell Mobile Services (PacBel)
PCIA
PRTC
Polar Communications Mutual Aid Corporation (PCMAC)
PRO-TEC Mobile Communications, Inc. (Pro-Tec)
Qualicom Systems, Inc. (Qualicom)
Questar Telecom, Inc. (Questar)
R. F. Communications (RF)
SBT
Shelly Curttright, Inc. (Shelly Curttright)
Shipman, Mitchell E.
Skyline Communications
SMR Operators
Southern
Spectrum Resources, Inc. (SRI)
Starrick Plumbing, Inc. (Starrick)
Supreme Radio Communications, Inc. (SRCI)
T&K Communications, Inc. (T&K)
Triangle Communications, Inc. (Triangle)
United States Telephone Association (USTA)
UTC

Parties Making *Ex Parte* Presentations/Communications Concerning the *Second Further Notice*
AMTA, Nextel, SMR WON and PCIA
Association of College and University Telecommunications Administrators (ACUTA)
Boeing Company
Commerce Committee, U. S. House of Representatives
Duke
Ericsson
Honorable Conrad Burns, U. S. Representative
Honorable Benjamin L. Cardin, U.S. Reprentative
Honorable Alphonse D'Amato, U. S. Senator
Honorable Pat Danner, U. S. Representative
Honorable Sam Farr, U. S. Representative
Honorable Vic Fazio, U. S. Representative
Honorable Dianne Feinstein, U. S. Senator
Honorable Tillie Fowler, U. S. Representative

Honorable James C. Greenwood, U. S. Representative
Honorable Slade Gorton, U. S. Senator
Honorable Porter Goss, U. S. Representative
Honorable Bob Graham, U. S. Senator
Honorable Phil Gramm, U. S. Senator
Honorable Jesse Helms, U. S. Senator
Honorable Kay Bailey Hutchison, U. S. Senator
Honorable J. Bennett Johnston, U. S. Senator
Honorable Dirk Kempthorne, U. S. Senator
Honorable Peter T. King, U. S. Representative
Honorable Rick Lazio, U. S. Representative
Honorable Joseph Lieberman, U. S. Senator
Honorable John Linder, U. S. Representative
Honorable Connie Mack, U. S. Senator
Honorable Patricia Murray, U. S. Senator
Honorable Richard Pombo, U. S. Representative
Honorable George Radnovich, U. S. Representative
Honorable Ike Skelton, U. S. Representative
Honorable Arlen Specter, U. S. Senator
Honorable Esteban E. Torres, U. S. Represenative
IC&E
International Taxicab and Livery Assn. (ITLA)
ITA
LAPD
Motorola
North Carolina Utilities Commission (NCUC)
RAM Mobile Data USA
Smith, Susan, The White House
Southern
South Carolina Public Service Commission (SCPCS)
SSI
Wackenhut Corporation
Washington State Department of Transportation

Parties Filing Comments to the *AMTA Public Notice*
CelSMer
DW Communications, Inc.
Fisher Communications, Inc.
Geotek Communications, Inc.
Industrial Communications & Electronics, Inc. (ICE)
Motorola, Inc.
Nextel Communications, Inc.
Personal Communications Industry Association (PCIA)
Pittencrief Communications, Inc.
Rural Telecommunications Group (RTG)

Parties Filing Reply Comments to the *AMTA Public Notice*
American Mobile Telecommunications Association (AMTA)
Geotek Communications, Inc.
Nextel Communications, Inc.