JOINT APPENDIX B[1]

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

PART 90 – PRIVATE LAND MOBILE RADIO SERVICES

1. Section 90.210 is amended by revising the text of footnote 3 to read as follows:

§ 90.210 Emission masks.

* * * * *

Equipment used in this band licensed to EA or non-EA systems shall comply with the emission mask provisions of § 90.691.

2. Section 90.615 is revised as follows:

§ 90.615 Spectrum Blocks available in the General Category for 800 MHz SMR

General Category

Table 1 — 806-821/851-866 MHz Band Channels (150 Channels):

Spectrum Block	Channel Nos.
D	1 through 50
E	51 through 100
F	101 through 150

3. Section 90.617 is revised as follows:

§ 90.617 Frequencies in the 809.750-824/854.750-869 MHz, and 896-901/935-940 MHz bands available for trunked or conventional system use in non-border areas.

* * * * *

(d) The channels listed in Tables 4A and 4B are available only to eligibles in the SMR category which consists of Specialized Mobile Radio (SMR) stations and eligible end users. The frequencies listed in Table 4A are available to SMR eligibles desiring to be authorized for EA-based service areas in accordance with Section 90.681. SMR licensees licensed on Channels 401 - 600 on or before March 3, 1996, may continue to utilize these frequencies within their existing service areas, subject to the mandatory relocation provisions of § 90.699. This paragraph deals with the assignment of frequencies only in areas farther than 110 km (68.4 miles) from the U.S./Mexico border and farther than 140 km (87) miles from the U.S./Canada border. See § 90.619 for the assignment of SMR frequencies in these border areas. For stations located within 113 km (70 miles) of Chicago, channels 401-600 will be assigned in blocks as outlined in Table 4C.

Table 4A — SMR Category 806-821/851-866 MHz Band Channels (280 Channels)

[1] This Joint Appendix includes rule changes adopted in the *800 MHz Memorandum Opinion and Order*.

Spectrum Block	Channel Nos.
A	401 through 420
B	421 through 480
C	481 through 600
G	201-241-281-321-361
H	202-242-282-322-362
I	203-243-283-323-363
J	204-244-284-324-364
K	205-245-285-325-365
L	206-246-286-326-366
M	207-247-287-327-367
N	208-248-288-328-368
O	221-261-301-341-381
P	222-262-302-342-382
Q	223-263-303-343-383
R	224-264-304-344-384
S	225-265-305-345-385
T	226-266-306-346-386
U	227-267-307-347-387
V	228-268-308-348-388

4. Section 90.619 is amended by revising paragraphs (a)(5), (b)(8), (b)(9), (b)(10), and (b)(11) to read as follows:

§ 90.619 Frequencies available for use in the U.S./Mexico and U.S/Canada border areas.

(a)* * *

* * * * *

(5) Tables 4A and 4B list the channels that are available for assignment for the SMR Category (consisting of Specialized Mobile Radio systems as defined in § 90.7). These channels are not available for inter-category sharing.

TABLE 4A - UNITED STATES-MEXICO BORDER AREA, SMR AND GENERAL CATEGORIES 806-821/851-866 MHZ BAND (95 CHANNELS):

EA-Based SMR Category (83 Channels)

Spectrum Block	Offset Channel Nos.
A	398-399-400
B	429-431-433-435-437-439-469-471-473-475-477-479
C	509-511-513-515-517-519-549-551-553-555-557-559-589-591-593-595-597-599
G	229-272-349
H	230-273-350
I	231-274-351
J	232-278-352

K	233-279-353
L	234-280-354
M	235-309-358
N	236-310-359
O	237-311-360
P	238-312-389
Q	239-313-390
R	240-314-391
S	269-318-392
T	270-319-393
U	271-320-394
V	228-268-308-348-388

General Category (12 Channels)

Spectrum Block	Offset Channel Nos.
D	275-315-355-395
E	276-316-356-396
F	277-317-357-397

* * * * *

(b)* * *

(8)* * *

TABLE 12 — SMR AND GENERAL CATEGORIES--95 Channels
[Regions 1, 4, 5, 6]

EA-Based SMR Category (90 Channels)

Spectrum Block	Channel Nos.
A	None
B	463 through 480
C	493 through 510, 523 through 540, 553 through 570, 583 through 600
G through V	None

General Category (5 Channels)

Spectrum Block	Channel Nos.
D	30
E	60 and 90
F	120 and 150

(9)* * *

TABLE 16--SMR AND GENERAL CATEGORIES--60 Channels
[Region 2]

SMR Category (55 Channels)

Spectrum Block	Channel Nos.
A	None
B	None
C	518 through 528, 536 through 546, 554 through 564, 572 through 582, 590 through 600
G through V	None

General Category (5 Channels)

Spectrum Block	Channel Nos.
D	18 and 36
E	54-72-90
F	None

(10)* * *

TABLE 20— SMR AND GENERAL CATEGORIES (135 Channels)
[Region 3]

SMR Category (120 Channels)

Spectrum Block	Channel Nos.
A	417 through 420
B	421 through 440, 457 through 480
C	497 through 520, 537 through 560, 577 through 600
G through V	None

General Category (15 Channels)

Spectrum Block	Channel Nos.
D	38-39-40-158-159
E	78-79-80-160-198
F	118-119-120-199-200

(11)* * *

TABLE 24--(REGIONS 7,8) SMR AND GENERAL CATEGORIES — 190 Channels

SMR Category (172 Channels)

Spectrum Block	Channel Nos.
A	389 through 400
B	425 through 440, 465 through 480
C	505 through 520, 545 through 560, 585 through 600
G	155-229-269-309-349
H	156-230-270-310-350
I	157-231-271-311-351
J	158-232-272-312-352
K	159-233-273-313-353
L	160-234-274-314-354
M	195-235-275-315-355
N	196-236-276-316-356
O	197-237-277-317-357
P	198-238-278-318-358
Q	199-239-279-319-359
R	200-240-280-320-360
S	225-265-305-345-385
T	226-266-306-346-386
U	227-267-307-347-387
V	228-268-308-348-388
General Category (18 Channels)	
D	35 through 40
E	75 through 80
F	115 through 120

* * * * *

5. Section 90.621 is amended by revising paragraph (b) to read as follows:

§ 90.621 Selection and assignment of frequencies.

* * * * *

(b) Stations authorized on frequencies listed in this Subpart, except for those stations authorized pursuant to paragraph (g) of this section and EA-based and MTA-based SMR systems, will be afforded protection solely on the basis of fixed distance separation criteria. For Channel Blocks A, through V, as set forth in Section 90.917(d), the separation between co-channel systems will be a minimum of 113 km (70 mi) with one exception. For incumbent licensees in Channel Blocks D through V, that have received the consent of all affected parties to utilize an 18 dBμV/m signal strength interference contour (see Section 90.693), the separation between co-channel systems will be a minimum of 173 km (107 mi) The following exceptions to these separations shall apply:

(1) Except as indicated in paragraph (b)(4) of this section, no station in Channel Blocks A through V shall be less than 169 km (105 mi) distant from a co-channel station that has been granted channel exclusivity and authorized 1 kW ERP on any of the following mountaintop sites: Santiago Peak, Sierra Peak, Mount Lukens, Mount Wilson (California). Except as indicated in paragraph (b)(4) of this section, no incumbent licensee in Channel Blocks D through V that have received the consent of all

affected parties to utilize an 18 dBμV/m signal strength interference contour shall be less than 229 km (142 mi) distant from a co-channel station that has been granted channel exclusivity and authorized 1 kW ERP on any of the following mountaintop sites: Santiago Peak, Sierra Peak, Mount Lukens, Mount Wilson (California).

(2) * * *

(3) Except as indicated in paragraph (b)(4) of this section, stations in Channel Blocks A through V that have been granted channel exclusivity and are located in the State of Washington at the locations listed below shall be separated from co-channel stations by a minimum of 169 km (105 mi). Except as indicated in paragraph (b)(4) of this section, incumbent licensees in Channel Blocks D through V that have received the consent of all affected parties to utilize an 18 dBμV/m signal strength interference contour, have been granted channel exclusivity and are located in the State of Washington at the locations listed below shall be separated from co-channel stations by a minimum of 229 km (142 mi). Locations within one mile of the geographical coordinates listed in the table below will be considered to be at that site.

6. Subpart S is amended by adding a revised heading following Section 90.671 to read as follows:

POLICIES GOVERNING THE LICENSING AND USE OF EA-BASED SMR SYSTEMS IN THE 806-821/851-866 BAND.

7. Section 90.681 is revised to read as follows:

§ 90.681 EA-based SMR Service Areas.

EA licenses in Spectrum Blocks A through V band listed in Table 4A of Section 90.617(d) are available in 175 Economic Areas (EAs) as defined in Section 90.7.

8. Section 90.683(a) is revised to read as follows:

§ 90.683 EA-Based SMR System Operations.

(a) EA-based licensees authorized in the 806-821/851-866 MHz band pursuant to Section 90.681 may construct and operate base stations using any of the base station frequencies identified in their spectrum block anywhere within their authorized EA, provided that:

* * * * *

9. Section 90.685 is revised to read as follows:

§ 90.685 Authorization, Construction and Implementation of EA Licenses.

(a) EA licenses in the 806-821/851-866 MHz band will be issued for a term not to exceed ten years. Additionally, EA licensees generally will be afforded a renewal expectancy only for those stations put into service after August 10, 1996.

(b) EA licensees in the 806-821/851-866 MHz band must, within three years of the grant of their initial license, construct and place into operation a sufficient number of base stations to provide coverage to at least one-third of the population of its EA-based service area. Further, each EA licensee must provide

coverage to at least two-thirds of the population of the EA-based service area within five years of the grant of their initial license. Alternatively, EA licensees in Channel blocks D through V in the 806-821/851-866 MHz band must provide substantial service to their markets within five years of the grant of their initial license. Substantial service shall be defined as: "Service which is sound, favorable, and substantially above a level of mediocre service."

(c) Channel Use Requirement. In addition to the population coverage requirements described in this section, we will require EA licensees in Channel blocks A, B and C in the 816-821/861-866 MHz band to construct 50 percent of the total channels included in their spectrum block in at least one location in their respective EA-based service area within three years of initial license grant and to retain such channel usage for the remainder of the construction period.

(d) An EA licensee's failure to meet the population coverage requirements of paragraphs (b) and (c) of this section, will result in forfeiture of the entire EA license. Forfeiture of the EA license, however, would not result in the loss of any constructed facilities authorized to the licensee prior to the date of the commencement of the auction for the EA licenses.

10. Section 90.687 is revised to read as follows:

§ 90.687 Special provisions regarding assignments and transfers of authorizations for incumbent SMR licensees in the 806-821/851-866 MHz band.

An SMR licensee initially authorized on any of the channels listed in Table 4A of Section 90.617 may transfer or assign its channel(s) to another entity subject to the provisions of §§ 90.153 and 90.609(b). If the proposed transferee or assignee is the EA licensee for the spectrum block to which the channel is allocated, such transfer or assignment presumptively will be deemed to be in the public interest. However, such presumption will be rebuttable.

11. Section 90.689(a) is revised to read as follows:

§ 90.689 Field Strength Limits.

(a) For purposes of implementing §§ 90.689 through 90.699, predicted 36 and 40 dBμV/m contours shall be calculated using Figure 10 of § 73.699 of this Chapter with a correction factor of -9 dB, and predicted 18 and 22 dBμV/m contours shall be calculated using Figure 10a of § 73.699 with a correction factor of -9 dB.

* * * * *

12. Section 90.683 is revised to read as follows:

§ 90.693 Grandfathering provisions for incumbent licensees.

(a) *General Provisions.* These provisions apply to "incumbent licensees", all 800 MHz SMR licensees who obtained licenses or filed applications on or before December 15, 1995.

(b) *Spectrum Blocks A through V.* An incumbent licensee's service area shall be defined by its originally-licensed 40 dBμV/m field strength contour and its interference contour shall be defined as its originally-licensed 22 dBμV/m field strength contour. Incumbent licensees are permitted to add, remove or modify transmitter sites within their original 22 dBμV/m field strength contour without prior notification to the

Commission so long as their original 22 dBμV/m field strength contour is not expanded and the station complies with the Commission's short-spacing criteria in §§ 90.621(b)(4) through 90.621(b)(6). The incumbent licensee must, however, notify the Commission within 30 days of the completion of any changes in technical parameters or additional stations constructed through a minor modification of their license. Such notification must be made by submitting an FCC Form 600 and must include the appropriate filing fee, if any. These minor modification applications are not subject to public notice and petition to deny requirements or mutually exclusive applications.

(c) *Special Provisions for Spectrum Blocks D through V.* Incumbent licensees that have received the consent of all affected parties to utilize an 18 dBμV/m signal strength interference contour shall have their service area defined by their originally-licensed 36 dBμV/m field strength contour and its interference contour shall be defined as their originally-licensed 18 dBμV/m field strength contour. Incumbent licensees are permitted to add, remove or modify transmitter sites within their original 18 dBμV/m field strength contour without prior notification to the Commission so long as their original 18 dBμV/m field strength contour is not expanded and the station complies with the Commission's short-spacing criteria in §§ 90.621(b)(4) through 90.621(b)(6). The incumbent licensee must, however, notify the Commission within 30 days of the completion of any changes in technical parameters or additional stations constructed through a minor modification of their license. Such notification must be made by submitting an FCC Form 600 and must include the appropriate filing fee, if any. These minor modification applications are not subject to public notice and petition to deny requirements or mutually exclusive applications.

(d) *Consolidated License.*

(1) *Spectrum Blocks A through V.* Incumbent licensees operating at multiple sites may, after grant of EA licenses has been completed, exchange multiple site licenses for a single license, authorizing operations throughout the contiguous and overlapping 40 dBμV/m field strength contours of the multiple sites. Incumbents exercising this license exchange option must submit specific information for each of their external base sites after the close of the 800 MHz SMR auction.

(2) *Special Provisions for Spectrum Blocks D through V.* Incumbent licensees that have received the consent of all affected parties to utilize an 18 dBμV/m signal strength interference contour operating at multiple sites may, after grant of EA licenses has been completed, exchange multiple site licenses for a single license. This single site license will authorize operations throughout the contiguous and overlapping 36 dBμV/m field strength contours of the multiple sites. Incumbents exercising this license exchange option must submit specific information for each of their external base sites after the close of the 800 SMR auction.

13. Section 90.699 is revised to read as follows:

§ 90.699 Transition of the Upper 200 Channels in the 800 MHz Band to EA Licensing.

In order to facilitate provision of service throughout an EA, an EA licensee may relocate incumbent licensees in its EA by providing "comparable facilities" on other frequencies in the 800 MHz band. Such relocation is subject to the following provisions:

(a) EA licensees may negotiate with incumbent licensees as defined in § 90.693 of this subpart operating on frequencies in Spectrum Blocks A, B, and C for the purpose of agreeing to terms under which the incumbents would relocate their operations to other frequencies in the 800 MHz band, or alternatively, would accept a sharing arrangement with the EA licensee that may result in an otherwise impermissible level of interference to the incumbent licensee's operations. EA licensees may also negotiate agreements

for relocation of the incumbents' facilities within Spectrum Blocks A, B or C in which all interested parties agree to the relocation of the incumbent's facilities elsewhere within these bands. "All interested parties" includes the incumbent licensee, the EA licensee requesting and paying for the relocation, and any EA licensee of the spectrum to which the incumbent's facilities are to be relocated.

(b) The relocation mechanism consists of two phases that must be completed before an EA licensee may proceed to request the involuntary relocation of an incumbent licensee.

(1) Voluntary Negotiations. There is a one year voluntary period during which an EA licensee and an incumbent may negotiate any mutually agreeable relocation agreement. The Commission will announce the commencement of the first phase voluntary period by Public Notice. EA licensees must notify incumbents operating on frequencies included in their spectrum block of their intention to relocate such incumbents within 90 days of the release of the Public Notice that commences the voluntary negotiation period. Failure on the part of the EA licensee to notify the incumbent licensee during this 90 period of its intention to relocate the incumbent will result in the forfeiture of the EA licensee's right to request involuntary relocation of the incumbent at any time in the future.

(2) Mandatory Negotiations. If no agreement is reached by the end of the voluntary period, a one-year mandatory negotiation period will begin during which both the EA licensee and the incumbent must negotiate in "good faith." Failure on the part of the EA licensee to negotiate in good faith during this mandatory period will result in the forfeiture of the EA licensee's right to request involuntary relocation of the incumbent at any time in the future.

(c) Involuntary Relocation Procedures. If no agreement is reached during either the voluntary or mandatory negotiating periods, the EA licensee may request involuntary relocation of the incumbent's system. In such a situation, the EA licensee must:

(1) Guarantee payment of relocation costs, including all engineering, equipment, site and FCC fees, as well as any legitimate and prudent transaction expenses incurred by the incumbent licensee that are directly attributable to an involuntary relocation, subject to a cap of two percent of the hard costs involved. Hard costs are defined as the actual costs associated with providing a replacement system, such as equipment and engineering expenses. EA licensees are not required to pay incumbent licensees for internal resources devoted to the relocation process. EA licensees are not required to pay for transaction costs incurred by incumbent licensees during the voluntary or mandatory periods once the involuntary period is initiated, or for fees that cannot be legitimately tied to the provision of comparable facilities;

(2) Complete all activities necessary for implementing the replacement facilities, including engineering and cost analysis of the relocation procedure and, if radio facilities are used, identifying and obtaining, on the incumbents' behalf, new frequencies and frequency coordination; and

(3) Build the replacement system and test it for comparability with the existing 800 MHz system.

(d) Comparable Facilities. The replacement system provided to an incumbent during an involuntary relocation must be at least equivalent to the existing 800 MHz system with respect to the following four factors:

(1) System. System is defined functionally from the end user's point of view (*i.e.*, a system is comprised of base station facilities that operate on an integrated basis to provide service to a common end user, and all mobile units associated with those base stations). A system may include multiple-licensed

facilities that share a common switch or are otherwise operated as a unitary system, provided that the end user has the ability to access all such facilities. A system may cover more than one EA if its existing geographic coverage extends beyond the EA borders.

(2) Capacity. To meet the comparable facilities requirement, an EA licensee must relocate the incumbent to facilities that provide equivalent channel capacity. We define channel capacity as the same number of channels with the same bandwidth that is currently available to the end user. For example, if an incumbent's system consists of five 50 kHz (two 25 kHz paired frequencies) channels, the replacement system must also have five 50 kHz channels. If a different channel configuration is used, it must have the same overall capacity as the original configuration. Comparable channel capacity requires equivalent signaling capability, baud rate, and access time. In addition, the geographic coverage of the channels must be coextensive with that of the original system.

(3) Quality of Service. Comparable facilities must provide the same quality of service as the facilities being replaced. Quality of service is defined to mean that the end user enjoys the same level of interference protection on the new system as on the old system. In addition, where voice service is provided, the voice quality on the new system must be equal to the current system. Finally, reliability of service is considered to be integral to defining quality of service. Reliability is the degree to which information is transferred accurately within the system. Reliability is a function of equipment failures (*e.g.*, transmitters, feed lines, antennas, receivers, battery back-up power, etc.) and the availability of the frequency channel due to propagation characteristics (*e.g.*, frequency, terrain, atmospheric conditions, radio-frequency noise, etc.) For digital data systems, this will be measured by the percent of time the bit error rate exceeds the desired value. For analog or digital voice transmissions, this will be measured by the percent of time that audio signal quality meets an established threshold. If analog voice system is replaced with a digital voice system the resulting frequency response, harmonic distortion, signal-to-noise ratio, and reliability will be considered.

(4) Operating Costs. Operating costs are those costs that affect the delivery of services to the end user. If the EA licensee provides facilities that entail higher operating cost than the incumbent's previous system, and the cost increase is a direct result of the relocation, the EA licensee must compensate the incumbent for the difference. Costs associated with the relocation process can fall into several categories. First, the incumbent must be compensated for any increased recurring costs associated with the replacement facilitates (*e.g.*, additional rental payments, increased utility fees). Second, increased maintenance costs must be taken into consideration when determining whether operating costs are comparable. For example, maintenance costs associated with analog systems may be higher than the costs of digital equipment because manufacturers are producing mostly digital equipment and analog replacement parts can be difficult to find. An EA licensee's obligation to pay increased operating costs will end five years after relocation has occurred.

(e) If an EA licensee cannot provide comparable facilities to an incumbent licensee as defined in this section, the incumbent licensee may continue to operate its system on a primary basis in accordance with the provisions of this rule part.

(f) Cost-Sharing Plan for 800 MHz SMR EA licensees. EA licensees are required to relocate the existing 800 MHz SMR licensee in these bands if interference to the existing incumbent operations would occur. All EA licensees who benefit from the spectrum clearing by other EA licensees must contribute, on a *pro rata* basis to such relocation costs. EA licensees may satisfy this requirement by entering into private cost-sharing agreements or agreeing to terms other than those specified in this section. However, EA licensees are required to reimburse other EA licensees that incur relocation costs and are not parties to the alternative agreement as defined in this section.

(1) *Pro Rata* Formula. EA licensees who benefit from the relocation of the incumbent must share the relocation costs on a *pro rata* basis. For purposes of determining whether an EA licensee benefits from the relocation of an incumbent, benefitted will be defined as any EA licensee that: (1) notifies incumbents operating on frequencies included in their spectrum block of their intention to relocate such incumbents within 90 days of the release of the Public Notice that commences the voluntary negotiation period; or (2) fails to notify incumbents operating on frequencies included in their spectrum block of their intention to relocate such incumbents within 90 days of the release of the Public Notice that commences the voluntary negotiation period, but subsequently decides to use the frequencies included in their spectrum block. EA licensees who do not participate in the relocation process will be prohibited from invoking mandatory negotiations or any of the provisions of the Commission's mandatory relocation guidelines. EA licensees who do not provide notice to the incumbent, but subsequently decide to use the frequencies in their EA will be required to reimburse, outside of the Commission's mandatory relocation guidelines, those EA licensees who have established a reimbursement right pursuant to paragraph (f)(3) of this section.

(2) Triggering a Reimbursement Obligation. An EA licensees reimbursement obligation is triggered by:

(a) notification (*i.e.*, files a copy of the relocation notice and proof of the incumbent's receipt of the notice to the Commission within ten days of receipt), to the incumbent within 90 days of the release of the Public Notice commencing the voluntary negotiation period of its intention to relocate the incumbent; or

(b) an EA licensee who does not provide notification within 90 days of the release of the Public Notice commencing the voluntary negotiation period, but subsequently decides to use the channels that were relocated by other EA licensees.

(3) Triggering a Reimbursement Right. In order for the EA licensee to trigger a reimbursement right, the EA licensee must notify (*i.e.*, files a copy of the relocation notice and proof of the incumbent's receipt of the notice to the Commission within ten days of receipt), the incumbent of its intention to relocate the incumbent within 90 days of the release of the Public Notice commencing the voluntary negotiation period, and subsequently negotiate and sign a relocation agreement with the incumbent. An EA licensee who relocates a channel outside of its licensed EA (*i.e.*, one that is in another frequency block or outside of its market area), is entitled to *pro rata* reimbursement from non-notifying EA licensees who subsequently exercise their right to the channels based on the following formula:

$$Ci = Tc \times \frac{Chj}{TCh}$$

Ci	equals the amount of reimbursement
Tc	equals the actual cost of relocating the incumbent
TCh	equals the total number of channels that are being relocated
Chj	equals the number of channels that each respective EA licensee will benefit from

(4) Payment Issues. EA licensees who benefit from the relocation of the incumbent will be required to submit their *pro rata* share of the relocation expense to EA licensees who have triggered a reimbursement right and have incurred relocation costs as follows:

(a) for an EA licensee who, within 90 days of the release of the Public Notice announcing

the commencement of the voluntary negotiation period, provides notice of its intention to relocate the incumbent, but does not participate or incur relocation costs in the relocation process, will be required to reimburse those EA licensees who have triggered a reimbursement right and have incurred relocation costs during the relocation process, its *pro rata* share when the channels of the incumbent have been cleared (*i.e.*, the incumbent has been fully relocated and the channels are free and clear).

(b) for an EA licensee who does not, within 90 days of the release of the Public Notice announcing the commencement of the voluntary negotiation period, provide notice to the incumbent of its intention to relocate and does not incur relocation costs during the relocation process, but subsequently decides to use the channels in its EA, will be required to submit its *pro rata* share payment to those EA licensees who have triggered a reimbursement right and have incurred relocation costs during the relocation process prior to commencing testing of its system.

(5) Sunset of Reimbursement Rights. EA licensees who do not trigger a reimbursement obligation as set forth in paragraph (f)(2) of this section, shall not be required to reimburse EA licensees who have triggered a reimbursement right as set forth in paragraph (f)(3) of this section ten (10) years after the voluntary negotiation period begins for EA licensees (*i.e.*, ten (10) years after the Commission releases the Public Notice commencing the voluntary negotiation period).

(6) Resolution of Disputes that Arise During Relocation. Disputes arising out of the costs of relocation, such as disputes over the amount of reimbursement required, will be encouraged to use expedited ADR procedures. ADR procedures provide several alternative methods such as binding arbitration, mediation, or other ADR techniques.

(7) Administration of the Cost-Sharing Plan. We will allow for an industry supported, not-for-profit clearinghouse to be established for purposes of administering the cost-sharing plan adopted for the 800 MHz SMR relocation procedures.

14. Section 90.813 is amended by replacing it with the following new Section 90.813:

Sect. 90.813 Partitioned Licenses and Disaggregated Spectrum

(a) *Eligibility.*

(1) Parties seeking approval for partitioning and disaggregation shall request an authorization for partial assignment of a license pursuant to § 90.153(c).

(b) *Technical Standards.*

(1) *Partitioning.* In the case of partitioning, requests for authorization for partial assignment of a license must include, as attachments, a description of the partitioned service area and a calculation of the population of the partitioned service area and the licensed geographic service area. The partitioned service area shall be defined by coordinate points at every 3 degrees along the partitioned service area unless an FCC recognized service area is utilized (*i.e.*, Major Trading Area, Basic Trading Area, Metropolitan Service Area, Rural Service Area or Economic Area) or county lines are followed. The geographic coordinates must be specified in degrees, minutes, and seconds to the nearest second of latitude and longitude and must be based upon the 1927 North American Datum (NAD27). Applicants may supply geographical coordinates based on 1983 North American Datum (NAD83) in addition to those required (NAD27). In the case where an FCC recognized service area or county lines are utilized, applicants need only list the specific area(s) (through use of FCC designations or

county names) that constitute the partitioned area.

(2) *Disaggregation.* Spectrum may be disaggregated in any amount.

(3) *Combined Partitioning and Disaggregation.* The Commission will consider requests for partial assignment of licenses that propose combinations of partitioning and disaggregation.

(c) *Unjust Enrichment.*

(1) *Installment Payments.* Licensees that qualified under § 90.812 to pay the net auction price for their licenses in installment payments that partition their licenses or disaggregate their spectrum to entities not meeting the eligibility standards for installment payments, will be subject to the provisions concerning unjust enrichment as set forth in § 90.812(b).

(2) *Bidding Credits.* Licensees that qualified under § 90.810 to use a bidding credit at auction that partition their licenses or disaggregate their spectrum to entities not meeting the eligibility standards for such a bidding credit, will be subject to the provisions concerning unjust enrichment as set forth in § 90.810(b).

(3) *Apportioning Unjust Enrichment Payments.* Unjust enrichment payments for partitioned license areas shall be calculated based upon the ratio of the population of the partitioned license area to the overall population of the license area and by utilizing the most recent census data. Unjust enrichment payments for disaggregated spectrum shall be calculated based upon the ratio of the amount of spectrum disaggregated to the amount of spectrum held by the licensee.

(d) *Installment Payments.*

(1) *Apportioning the Balance on Installment Payment Plans.* When a winning bidder elects to pay for its license through an installment payment plan pursuant to § 90.812, and partitions its licensed area or disaggregates spectrum to another party, the outstanding balance owed by the licensee on its installment payment plan (including accrued and unpaid interest) shall be apportioned between the licensee and partitionee or disaggregatee. Both parties will be responsible for paying their proportionate share of the outstanding balance to the U.S. Treasury. In the case of partitioning, the balance shall be apportioned based upon the ratio of the population of the partitioned area to the population of the entire original license area calculated based upon the most recent census data. In the case of disaggregation, the balance shall be apportioned based upon the ratio of the amount of spectrum disaggregated to the amount of spectrum allocated to the licensed area.

(2) *Parties Not Qualified For Installment Payment Plans.*

(i) When a winning bidder elects to pay for its license through an installment payment plan pursuant to § 90.812, and partitions its license or disaggregates spectrum to another party that would not qualify for an installment payment plan or elects not to pay for its share of the license through installment payments, the outstanding balance owed by the licensee (including accrued and unpaid interest) shall be apportioned according to paragraph (d)(1) of this section.

(ii) The partitionee or disaggregatee shall, as a condition of the approval of the partial assignment application, pay its entire *pro rata* amount within 30 days of Public Notice conditionally granting the partial assignment application. Failure to meet this condition will result in a rescission of the grant of the partial assignment application.

(iii) The licensee shall be permitted to continue to pay its *pro rata* share of the outstanding balance and shall receive new financing documents (promissory note, security agreement) with a revised payment obligation, based on the remaining amount of time on the original installment payment schedule. These financing documents will replace the licensee's existing financing documents which shall be marked "superseded" and returned to the licensee upon receipt of the new financing documents. The original interest rate, established pursuant to § 1.2110(e)(3)(i) at the time of the grant of the initial license in the market, shall continue to be applied to the licensee's portion of the remaining government obligation. We will require, as a further condition to approval of the partial assignment application, that the licensee execute and return to the U.S. Treasury the new financing documents within 30 days of the Public Notice conditionally granting the partial assignment application. Failure to meet this condition will result in the automatic cancellation of the grant of the partial assignment application.

(iv) A default on the licensee's payment obligation will only affect the licensee's portion of the market.

(3) *Parties Qualified For Installment Payment Plans.*

(i) Where both parties to a partitioning or disaggregation agreement qualify for installment payments, the partitionee or disaggregatee will be permitted to make installment payments on its portion of the remaining government obligation, as calculated according to paragraph (d)(1) of this section.

(ii) Each party will be required, as a condition to approval of the partial assignment application, to execute separate financing documents (promissory note, security agreement) agreeing to pay their *pro rata* portion of the balance due (including accrued and unpaid interest) based upon the installment payment terms for which they qualify under the rules. The financing documents must be returned to the U.S. Treasury within thirty (30) days of the Public Notice conditionally granting the partial assignment application. Failure by either party to meet this condition will result in the automatic cancellation of the grant of the partial assignment application. The interest rate, established pursuant to § 1.2110(e)(3)(i) at the time of the grant of the initial license in the market, shall continue to be applied to both parties' portion of the balance due. Each party will receive a license for their portion of the partitioned market or disaggregated spectrum.

(iii) A default on an obligation will only affect that portion of the market area held by the defaulting party.

(iv) Partitionees and disaggregatees that qualify for installment payment plans may elect to pay some of their *pro rata* portion of the balance due in a lump sum payment to the U.S. Treasury and to pay the remaining portion of the balance due pursuant to an installment payment plan.

(e) *License Term.* The license term for a partitioned license area and for disaggregated spectrum shall be the remainder of the original licensee's license term as provided for in § 90.665(a).

(f) *Construction Requirements.*

(1) *Requirements for Partitioning.* Parties seeking authority to partition must meet one of the following construction requirements:

(i) The partitionee may certify that it will satisfy the applicable construction requirements set forth in § 90.665 for the partitioned license area; or

(ii) The original licensee may certify that it has or will meet the construction requirements set forth in § 90.665 for the entire market. In that case, the partitionee must only meet the requirements for renewal of its license for the partitioned license area.

(iii) Applications requesting partial assignments of license for partitioning must include a certification by each p geographic area 800 MHz SMR licenses in the lower 230 channels will be awarded to small entities, as that term is defined by the SBA.

(iv) Partitionees must submit supporting documents showing compliance with the respective construction requirements within the appropriate time frames set forth in § 90.665.

(v) Failure by any partitionee to meet its respective performance requirements will result in the automatic cancellation of the partitioned or disaggregated license without further Commission action.

(2) *Requirements for Disaggregation.* Parties seeking authority to disaggregate must submit with their partial assignment application a certification signed by both parties stating which of the parties will be responsible for meeting the construction requirements for the market as set forth in § 90.665. Parties may agree to share responsibility for meeting the construction requirements. Parties that accept responsibility for meeting the construction requirements and later fail to do so will be subject to license forfeiture without further Commission action.

15. Section 90.901 is revised to read as follows:

§ 90.901 800 MHz SMR spectrum subject to competitive bidding.

Mutually exclusive initial applications for Spectrum Blocks A through V in the 800 MHz band are subject to competitive bidding procedures. The general competitive bidding procedures provided in 47 C.F.R. Part 1, Subpart Q will apply unless otherwise indicated in this subpart.

16. Section 90.902 is revised to read as follows:

§ 90.902 Competitive bidding design for 800 MHz SMR licensing.

The Commission will employ a simultaneous multiple round auction design when selecting from among mutually exclusive initial applications for EA licenses for Spectrum Blocks A through V in the 800 MHz band, unless otherwise specified by the Wireless Telecommunications Bureau before the auction.

17. Section 90.903 is revised to read as follows:

§ 90.903 Competitive bidding mechanisms.

(a) *Sequencing.* The Wireless Telecommunications Bureau will establish and may vary the sequence in which 800 MHz SMR licenses for Spectrum Blocks A through V will be auctioned.

(b) *Grouping.*

(i) *Spectrum Blocks A through C.* All EA licenses for Spectrum Blocks A through C will be auctioned simultaneously, unless the Wireless Telecommunications Bureau announces, by Public Notice prior to the auction, an alternative competitive bidding design.

(ii) *Spectrum Blocks D through V.* All EA licenses for Spectrum Blocks D through V will be auctioned by the following Regions:

(A) Region 1 (Northeast): The Northeast Region consists of the following MTAs: Boston-Providence, Buffalo-Rochester, New York, Philadelphia, and Pittsburgh.

(B) Region 2 (South): The South Region consists of the following MTAs: Atlanta, Charlotte-Greensboro-Greenville-Raleigh, Jacksonville, Knoxville, Louisville-Lexington-Evansville, Nashville, Miami-Fort Lauderdale, Richmond-Norfolk, Tampa-St. Petersburg-Orlando, and Washington-Baltimore; and, Puerto Rico and United States Virgin Islands.

(C) Region 3 (Midwest): The Midwest Region consists of the following MTAs: Chicago, Cincinnati-Dayton, Cleveland, Columbus, Des Moines-Quad Cities, Detroit, Indianapolis, Milwaukee, Minneapolis-St. Paul, and Omaha.

(D) Region 4 (Central): The Central Region consists of the following MTAs: Birmingham, Dallas-Fort Worth, Denver, El Paso-Albuquerque, Houston, Kansas City, Little Rock, Memphis-Jackson, New Orleans-Baton Rouge, Oklahoma City, San Antonio, St. Louis, Tulsa, and Wichita.

(E) Region 5 (West): The West Region consists of the following MTAs: Honolulu, Los Angeles-San Diego, Phoenix, Portland, Salt Lake City, San Francisco-Oakland-San Jose, Seattle (including Alaska), and Spokane-Billings; and, American Samoa, Guam, and the Northern Mariana Islands.

* * * * *

(f) *Duration of Bidding Rounds.* The Wireless Telecommunications Burea retains the discretion to vary the duration of bidding rounds or the intervals at which bids are accepted.

18. Section 90.904 is revised to read as follows:

§ 90.904 Aggregation of EA licenses

The Commission will license each Spectrum Block A through V in the 800 MHz band separately. Applicants may aggregate across spectrum blocks within the limitations specified in § 20.6 of this Chapter.

19. Section 90.906 is revised to read as follows:

§ 90.906 Bidding application (FCC Form 175 and 175-S Short-form).

All applicants to participate in competitive bidding for 800 MHz SMR licenses in Spectrum Blocks A through V must submit applications on FCC Forms 175 and 175-S pursuant to the provisions of §

1.2105 of this Chapter. The Wireless Telecommunications Bureau will issue a Public Notice announcing the availability of these 800 MHz SMR licenses and, in the event that mutually exclusive applications are filed, the date of the auction for those licenses. This Public Notice also will specify the date on or before which applicants intending to participate in a 800 MHz SMR auction must file their applications in order to be eligible for that auction, and it will contain information necessary for completion of the application as well as other important information such as the materials which must accompany the Forms, any filing fee that must accompany the application or any upfront payment that will need to be submitted, and the location where the application must be filed. In addition to identifying its status as a small business or rural telephone company, each applicant must indicate whether it is a minority-owned entity and/or a women-owned entity, as defined in § 90.912(e).

20. Section 90.907 is revised to read as follows:

§ 90.907 Submission of upfront payments and down payments.

(a) *Upfront Payments*. Bidders in a 800 MHz SMR auction for Spectrum Blocks A through V will be required to submit an upfront payment prior to the start of the auction. The amount of the upfront payment for each license auctioned and the procedures for submitting it will be set forth by the Wireless Telecommunications Bureau in a Public Notice in accordance with § 1.2106 of this chapter.

(b) *Down Payments*. Winning bidders in a 800 MHz SMR auction for Spectrum Blocks A through V must submit a down payment to the Commission in an amount sufficient to bring their total deposits up to 20 percent of their winning bids within ten (10) business days after the auction closes. Winning bidders will be required to make full payment of the balance of their winning bids ten (10) business days after Public Notice announcing that the Commission is prepared to award the license.

21. The header for Section 90.909 is revised to read as follows:

§ 90.909 License grant, denial, default, and disqualification.

* * * * *

22. Section 90.910 is revised to read as follows:

§ 90.910 Bidding credits.

(a) A winning bidder that qualifies as a very small business or a consortium of very small businesses, as defined in § 90.912(b)(2) and (b)(5), may use a bidding credit of 35 percent to lower the cost of its winning bid on Spectrum Blocks A through V. A winning bidder that qualifies as a small business or a consortium of small businesses, as defined in § 90.912(b)(1) or (b)(4), may use a bidding credit of 25 percent to lower the cost of its winning bid on Spectrum Blocks A through V.

(b) *Unjust Enrichment*

(1) If a small business or very small business (as defined in §§ 90.912(b)(1) and 90.912(b)(2), respectively) that utilizes a bidding credit under this section seeks to assign or transfer control of an authorization to an entity that is not a small business or very small business, or seeks to make any other change in ownership that would result in the licensee losing eligibility as a small business or very small business, the small business or very small business must seek Commission approval and reimburse the government for the difference between the amount of the bidding credit obtained by the

licensee and the bidding credit for which the assignee, transferee, or licensee is eligible under this section as a condition of the approval of such assignment, transfer, or other ownership change.

(2) If a very small business (as defined in §§ 90.912(b)(2)) that utilizes a bidding credit under this section seeks to assign or transfer control of an authorization to a small business meeting the eligibility standards for a lower bidding credit, or seeks to make any other change in ownership that would result in the licensee qualifying for a lower bidding credit under this section, the licensee must seek Commission approval and reimburse the government for the difference between the amount of the bidding credit obtained by the licensee and the bidding credit for which the assignee, transferee, or licensee is eligible under this section as a condition of the approval of such assignment, transfer, or other ownership change.

(3) The amount of of payments made pursuant to paragraphs (b)(1) and (b)(2) of this section 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 (or the difference between the bidding credit obtained by the original licensee and the bidding credit for which the post-transfer licenss is eligible); 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 assessment.

23. Section 90.911 is revised to read as follows:

Sect. 90.911 Partitioned Licenses and Disaggregated Spectrum

(a) *Eligibility.*

(1) Parties seeking approval for partitioning and disaggregation shall request an authorization for partial assignment of a license pursuant to § 90.153(c).

(b) *Technical Standards.*

(1) *Partitioning.* In the case of partitioning, requests for authorization for partial assignment of a license must include, as attachments, a description of the partitioned service area and a calculation of the population of the partitioned service area and the licensed geographic service area. The partitioned service area shall be defined by coordinate points at every 3 degrees along the partitioned service area unless an FCC recognized service area is utilized (*i.e.*, Major Trading Area, Basic Trading Area, Metropolitan Service Area, Rural Service Area or Economic Area) or county lines are followed. The geographic coordinates must be specified in degrees, minutes, and seconds to the nearest second of latitude and longitude and must be based upon the 1927 North American Datum (NAD27). Applicants may supply geographical coordinates based on 1983 North American Datum (NAD83) in addition to those required (NAD27). In the case where an FCC recognized service area or county lines are utilized, applicants need only list the specific area(s) (through use of FCC designations or county names) that constitute the partitioned area.

(2) *Disaggregation.* Spectrum may be disaggregated in any amount.

(3) *Combined Partitioning and Disaggregation.* The Commission will consider requests for partial assignment of licenses that propose combinations of partitioning and disaggregation.

(c) *Unjust Enrichment.*

(1) *Bidding Credits.* Licensees that qualified under § 90.910 to use a bidding credit at auction that partition their licenses or disaggregate their spectrum to entities not meeting the eligibility standards for such a bidding credit, will be subject to the provisions concerning unjust enrichment as set forth in § 90.910(b).

(2) *Apportioning Unjust Enrichment Payments.* Unjust enrichment payments for partitioned license areas shall be calculated based upon the ratio of the population of the partitioned license area to the overall population of the license area and by utilizing the most recent census data. Unjust enrichment payments for disaggregated spectrum shall be calculated based upon the ratio of the amount of spectrum disaggregated to the amount of spectrum held by the licensee.

(d) *License Term.* The license term for a partitioned license area and for disaggregated spectrum shall be the remainder of the original licensee's license term as provided for in §§ 90.629(a), 90.665(a) or 90.685(a).

(e) *Construction and Channel Usage Requirements - Incumbent Licensees.* Parties seeking to acquire a partitioned license or disaggregated spectrum from an incumbent licensee will be required to construct and commence "service to subscribers" all facilities acquired through such transactions within the original construction deadline for each facility as set forth in §§ 90.629 and 90.683. Failure to meet the individual construction deadline will result in the automatic termination of the facility's authorization.

(f) *Construction and Channel Usage Requirements - EA Licensees.*

(1) *Licensees in Channel Blocks A, B and C.*

(i) *Requirements for Partitioning.*

(A) The partitionee may certify that it will satisfy the applicable construction requirements set forth in § 90.685(c) for the partitioned license area; or

(B) The original licensee may certify that it has or will meet the three and five year construction requirements set forth in § 90.685(c) for the entire market.

(C) Applications requesting partial assignments of license for partitioning must include a certification by each party as to which of the above options they select.

(D) Partitionees must submit supporting documents showing compliance with the respective construction requirements within the appropriate time frames set forth in § 90.685(c).

(E) Failure by any partitionee to meet its respective construction requirements will result in the automatic cancellation of the partitioned license without further Commission action.

(ii) *Requirements for Disaggregation.* Parties seeking authority to disaggregate spectrum from an EA licensee in Spectrum Blocks A, B and C must meet one of the following channel use requirements:

(A) The partitionee may certify that it will satisfy the channel usage requirements set forth in § 90.685(d) for the disaggregated spectrum; or

(B) The original licensee may certify that it has or will meet the channel usage requirements as set forth in § 90.685(d) for the entire spectrum block. In that case, the disaggregatee must only satisfy the requirements for "substantial service," as set forth in § 90.685(c), for the disaggregated spectrum within five years of the license grant.

(C) Applications requesting partial assignments of license for disaggregation must include a certification by each party as to which of the above options they select.

(D) Disaggregatees must submit supporting documents showing compliance with the respective channel usage requirements within the appropriate time frames set forth in § 90.685(c).

(E) Failure by any disaggregatee to meet its respective channel usage requirements will result in the automatic cancellation of the disaggregated license without further Commission action.

(2) *Licensees in Channel Blocks D through V.*

(i) *Requirements for Partitioning.* Parties seeking authority to partition an EA license must meet one of the following construction requirements:

(A) The partitionee may certify that it will satisfy the applicable construction requirements set forth in § 90.685(c) for the partitioned license area; or

(B) The original licensee may certify that it has or will meet the construction requirements set forth in § 90.685(c) for the entire market.

(C) Applications requesting partial assignments of license for partitioning must include a certification by each party as to which of the above options they select.

(D) Partitionees must submit supporting documents showing compliance with the respective construction requirements within the appropriate time frames set forth in § 90.685(c).

(E) Failure by any partitionee to meet its respective construction requirements will result in the automatic cancellation of the partitioned license without further Commission action.

(ii) *Requirements for Disaggregation.* Parties seeking authority to disaggregate must submit with their partial assignment application a certification signed by both parties stating which of the parties will be responsible for meeting the construction requirements for the market as set forth in § 90.685. Parties may agree to share responsibility for meeting the construction requirements. Parties that accept responsibility for meeting the construction requirements and later fail to do so will be subject to license forfeiture without further Commission action.

(g) *Certification Concerning Relocation of Incumbent Licensees.* Parties seeking approval of a partitioning or disaggregation agreement pursuant to this section must include a certification with their partial assignment of license application as to which party will be responsible for meeting the incumbent relocation requirements set forth at § 90.699 of our rules.

24. Section 90.912 is revised to read as follows:

§ 90.912 Definitions.

(a) Scope. The definitions in this section apply to §§ 90.910 and 90.911, unless otherwise specified in those sections.

(b) *Small Business; Very Small Business; Consortium of Small Businesses; Consortium of Very Small Businesses*

(1) A *small business* is an entity that together with its affiliates and controlling principals, has average gross revenues that do not exceed $15 million for the three preceding years; or

(2) A *very small business* is an entity that together with its affiliates and controlling principals, has average gross revenues that do not exceed $3 million for the preceding three years.

(3) For purposes of determining whether an entity meets the $3 million or $15 million average annual gross revenues size standard set forth in paragraph (b)(1) of this section, the gross revenues of the entity, its affiliates, and controlling principals shall be considered on a cumulative basis and aggregated.

(4) A *consortium of small business* is a conglomerate organization formed as a joint venture between or among mutually-independent business firms, each of which individually satisfies the definition of a small business in paragraphs (b)(1) of this section. In a consortium of small businesses, each individual member must establish its eligibility as a small business, as defined in this section.

(5) A *consortium of very small business* is a conglomerate organization formed as a joint venture between or among mutually-independent business firms, each of which individually satisfies the definition of a very small business in paragraph (b)(2) of this section. In a consortium of small businesses, each individual member must establish its eligibility as a very small business, as defined in this section.

(c) *Gross Revenues*. Gross revenues shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (e.g., cost of goods sold). Gross revenues are evidenced by audited financial statements for the relevant number of calendar or fiscal years preceding the filing of the applicant's short-form application (FCC Form 175). If an entity was not in existence for all or part of the relevant period, gross revenues shall be evidenced by the audited financial statements of the entity's predecessor-in-interest or, if there is no identifiable predecessor-in-interest, unaudited financial statements certified by the applicant as accurate. When an applicant does not otherwise use audited financial statements, its gross revenues may be certified by its chief financial officer or its equivalent.

(d) *Affiliate*.

(1) *Basis for Affiliation*. An individual or entity is an affiliate of an applicant if such individual or entity:

(i) Directly or indirectly controls or has the power to control the applicant, or

(ii) Is directly or indirectly controlled by the applicant, or

(iii) Is directly or indirectly controlled by a third party or parties who also control or have the power to control the applicant, or

(iv) Has an "identity of interest" with the applicant.

(2) *Nature of control in determining affiliation.*

(i) Every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative and it is immaterial whether it is exercised so long as the power to control exists.

> Example for paragraph (d)(2)(i). An applicant owning 50 percent of the voting stock of another concern would have negative power to control such concern since such party can block any action of the other stockholders. Also, the bylaws of a corporation may permit a stockholder with less than 50 percent of the voting stock to block any actions taken by the other stockholders in the other entity. Affiliation exists when the applicant has the power to control a concern while at the same time another person, or persons, are in control of the concern at the will of the party or parties with the power of control.

(ii) Control can arise through stock ownership; occupancy of director, officer, or key employee positions; contractual or other business relations; or combinations of these and other factors. A key employee is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

(iii) Control can arise through management positions if the voting stock is so widely distributed that no effective control can be established.

> Example for paragraph (d)(2)(iii). In a corporation where the officers and directors own various size blocks of stock totaling 40 percent of the corporation's voting stock, but no officer or director has a block sufficient to give him/her control or the power to control and the remaining 60 percent is widely distributed with no individual stockholder having a stock interest greater than 10 percent, management has the power to control. If persons with such management control of the other entity are controlling principals of the applicant, the other entity will be deemed an affiliate of the applicant.

(3) *Identity of interest between and among persons.*

Affiliation can arise between or among two or more persons with an identity of interest, such as members of the same family or persons with common investments. In determining if the applicant controls or is controlled by a concern, persons with an identity of interest will be treated as though they were one person.

(i) *Spousal Affiliation.* Both spouses are deemed to own or control or have the power to control interests owned or controlled by either of them, unless they are subject to a legal separation recognized by a court of competent jurisdiction in the United States.

(ii) *Kinship Affiliation.* Immediate family members will be presumed to own or control or have the power to control interests owned or controlled by other immediate family members. In this context "immediate family member" means father, mother, husband, wife, son, daughter, brother,

sister, father- or mother-in-law, son- or daughter-in-law, brother- or sister-in-law, step-father or -mother, step-brother or -sister, step-son or -daughter, half-brother or -sister. This presumption may be rebutted by showing that:

(A) The family members are estranged,

(B) The family ties are remote, or

(C) The family members are not closely involved with each other in business matters.

Example for paragraph (d)(3)(ii). A owns a controlling interest in Corporation X. A's sister-in-law, B, has a controlling interest in an SMR application. Because A and B have a presumptive kinship affiliation, A's interest in Corporation X is attributable to B, and thus to the applicant, unless B rebuts the presumption with the necessary showing.

(4) *Affiliation through stock ownership.*

(i) An applicant is presumed to control or have the power to control a concern if he/she owns or controls or has the power to control 50 percent or more of its voting stock.

(ii) An applicant is presumed to control or have the power to control a concern even though he/she owns, controls, or has the power to control less than 50 percent of the concern's voting stock, if the block of stock he/she owns, controls, or has the power to control is large as compared with any other outstanding block of stock.

(iii) If two or more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, the presumption arises that each one of these persons individually controls or has the power to control the concern; however, such presumption may be rebutted by a showing that such control or power to control, in fact, does not exist.

(5) *Affiliation arising under stock options, convertible debentures, and agreements to merge.* Stock options, convertible debentures, and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures, and agreements will generally be treated as though the rights held thereunder had been exercised. However, neither an affiliate nor an applicant can use such options and debentures to appear to terminate its control over another concern before it actually does so.

Example 1 for paragraph (d)(5). If company B holds an option to purchase a controlling interest in company A, who holds a controlling interest in an SMR application, the situation is treated as though company B had exercised its rights and had become owner of a controlling interest in company A. The gross revenues of company B must be taken into account in determining the size of the applicant.

Example 2 for paragraph (d)(5). If a large company, BigCo, holds 70% (70 of 100 outstanding shares) of the voting stock of company A, who holds a controlling interest in an SMR application, and gives a third party, SmallCo, an option to purchase 50 of

the 70 shares owned by BigCo, BigCo will be deemed to be an affiliate of company A, and thus the applicant, until SmallCo actually exercises its options to purchase such shares. In order to prevent BigCo from circumventing the intent of the rule, which requires such options to be considered on a fully diluted basis, the option is not considered to have present effect in this case.

Example 3 for paragraph (d)(5). If company A has entered into an agreement to merge with company B in the future, the situation is treated as though the merger has taken place.

(6) *Affiliation under voting trusts.*

(i) Stock interests held in trust shall be deemed controlled by any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will.

(ii) If a trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the stock interests held in trust will be deemed controlled by the grantor or beneficiary, as appropriate.

(iii) If the primary purpose of a voting trust, or similar agreement, is to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control a concern in order that such concern or another concern may meet the Commission's size standards, such voting trust shall not be considered valid for this purpose regardless of whether it is or is not recognized within the appropriate jurisdiction.

(7) *Affiliation through common management.* Affiliation generally arises where officers, directors, or key employees serve as the majority or otherwise as the controlling element of the board of directors and/or the management of another entity.

(8) *Affiliation through common facilities.* Affiliation generally arises where one concern shares office space and/or employees and/or other facilities with another concern, particularly where such concerns are in the same or related industry or field of operations, or where such concerns were formerly affiliated, and through these sharing arrangements one concern has control, or potential control, of the other concern.

(9) *Affiliation through contractual relationships.* Affiliation generally arises where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control, or potential control, of the other concern.

(10) *Affiliation under joint venture arrangements.*

(i) A joint venture for size determination purposes is an association of concerns and/or individuals, with interests in any degree or proportion, formed by contract, express or implied, to engage in and carry out a single, specific business venture for joint profit for which purpose they combine their efforts, property, money, skill and knowledge, but not on a continuing or permanent basis for conducting business generally. The determination whether an entity is a joint venture is based upon the facts of the business operation, regardless of how the business operation may be designated by the parties involved. An agreement to share profits/losses proportionate to each party's contribution to the business operation is a significant factor in determining whether the business