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

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

SECOND REPORT AND ORDER

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

By the Commission: Commissioner Chong issuing a separate statement.

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I. INTRODUCTION

1. On December 15, 1995, the Commission adopted the *First Report and Order, Eighth Report and Order* (collectively, *800 MHz Report and Order*), and *Second Further Notice of Proposed Rule Making* (*Second Further Notice*) in this proceeding regarding licensing of the 800 MHz Specialized Mobile Radio (SMR) service.[1] The *First Report and Order* established geographic area licensing and service rules for the "upper 200" 800 MHz SMR channels, and the *Eighth Report and Order* established auction rules for these channels.[2] The *Second Further Notice* sought comment on the service rules for the "lower 80" SMR channels and the 150 General Category channels (collectively, the "lower 230" channels) and remaining matters not settled in the *800 MHz Report and Order*.[3]

2. This *Second Report and Order* resolves issues raised in the *Second Further Notice* and completes the process by establishing technical and operational rules for the lower 230 800 MHz channels. Specifically, this order establishes the U.S. Department of Commerce Bureau of Economic Analysis Economic Areas (EAs)[4] as the relevant geographic service area for licensing these channels and defines the rights of incumbent SMR licensees already operating on the lower 230 channels. It also provides further details concerning the mandatory relocation rules adopted in the *800 MHz Report and Order*, and establishes rules for partitioning and disaggregation of EA licenses. Coupled with the rules adopted in the *800 MHz Report and Order*, the decisions reached in this order complete the process of converting to new rules for the 800 MHz SMR service and enable us to commence geographic area licensing of the service. These rule revisions not only eliminate a cumbersome and outdated regulatory regime, they will promote competition and provide SMR licensees with flexibility to deploy multiple technologies in response to a changing marketplace, and they further the Congressionally mandated goal of establishing regulatory symmetry between 800 MHz SMR licensees and other competing providers of Commercial Mobile Radio Services (CMRS).[5]

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[1] Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making*, 11 FCC Rcd 1463 (1995).

[2] The "upper 200" channels consist of a 10 Mhz block of channels including Channel Nos. 401-600 in the 800 MHz band, for a total of 200 paired channels at 816-821/861-866 MHz.

[3] The "lower 230" channels consist of a 11.5 MHz block of spectrum including blocks D and E, which were formerly referred to as the General Category and the lower 80 800 MHz SMR channels, respectively. *See* 47 C.F.R. § 90.617(d), Table 4A. The channels included in spectrum block D (7.5 Mhz) are Channel Nos. 1-150, corresponding to frequencies 806-809.750/851-854.750 in the 800 MHz band. The channels included in spectrum block E (4 MHz) are the non-contiguous SMR channels in the 806-809.750/851-859.750 MHz bands (*i.e.* Channels 201-108, 221-228, 241-248, 261-268, 281-288, 301-308, 321-328, 341-348, 361-368 and 381-388).

[4] The Department of Commerce Bureau of Economic Analysis has established 172 EAs which cover the continental United States. *See* "Final Redefinition of the BEA Economic Areas," 60 Fed. Reg. 31,114 (Mar. 10, 1995). As discussed in Section IV-F-b *infra*, we are establishing three additional licensing regions for the five U.S. possessions.

[5] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66. Title VI, § 6002(b), 107 Stat. 312, 392 (1993) ("*Budget Act*"), *codified at* 47 U.S.C. § 332.

II. BACKGROUND

3. As described in the *800 MHz Report and Order*, the Commission formerly used a site-by-site licensing approach for 800 MHz SMR channels, which were primarily used to provide dispatch radio service. In recent years, however, a number of SMR licensees have expanded the geographic scope of their services, aggregated channels, and developed digital networks to enable them to provide a type of service comparable to that provided by cellular and Personal Communications Service (PCS) operators. This trend led us to rethink our site-by-site licensing procedures, which were very cumbersome for systems comprised of several hundred sites because licensees were required to receive individual Commission approval for each site. We were concerned that site-by-site licensing procedures also impaired an SMR licensee's ability to respond to changing market conditions and consumer demand. We concluded that granting licenses through waivers and other case-by-case mechanisms was administratively burdensome and had resulted in a licensing regime that lacked uniformity.[6] Accordingly, we initiated this proceeding to transition to a geographic area licensing approach for the 800 MHz SMR service.[7] At the same time, we emphasized the need to consider the interests of incumbent SMR licensees, many of whom continue to provide traditional dispatch service and do not seek to develop services comparable to cellular or PCS.

4. In the *800 MHz Report and Order*, the Commission established an EA-based licensing procedure for the upper 200 channels in the 800 MHz SMR band.[8] That procedure will enable an EA licensee to, among other things, construct facilities at any available site within its EA and to add, remove or relocate sites within the EA without prior Commission approval.[9] The new rules also give the EA licensee flexibility to determine the channelization of available spectrum within the authorized channel block, the right to use any spectrum within its EA block that is recovered by the Commission from an incumbent licensee (*i.e.*, the incumbent's license is terminated for some reason), and establishes a presumption that assignments from incumbents to the relevant EA licensee are in the public interest.[10] In addition, the *800 MHz Report and Order* adopted a 10-year license term, and a five-year construction period with three-year and five-year coverage requirements for EA licensees on the upper 200 channels.[11] We also created a mechanism for relocation of incumbent licensees on the upper 200 channels, delineated the parameters of unrelocated incumbents' expansion rights, and reallocated the former General Category channels to the 800 MHz SMR service.[12] Finally, we established competitive bidding procedures for 525

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[6] *See 800 MHz Report and Order*, 11 FCC Rcd at 1474, ¶ 4.

[7] *See* Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *Notice of Proposed Rule Making*, 8 FCC Rcd 3950 (1993); *Further Notice of Proposed Rule Making*, 10 FCC Rcd 7970 (1995) (*Further Notice*).

[8] *800 Mhz Report and Order*, 11 FCC Rcd 1476-1537, ¶¶ 9-142.

[9] *Id.* at 1517-8, ¶¶ 93-95.

[10] *Id.* at 1485-1490, 1498-1502, ¶¶ 26-37 & ¶¶ 54 -62.

[11] *Id.* at 1502-3 & 1520-30, ¶¶ 63-4 & 102-122.

[12] *Id.* at 1503-1510, ¶¶ 65-79.

EA licenses in the upper 200 channel block.[13]

5. In the *Second Further Notice*, we sought comment on additional service rules for the upper 200 channels, and on instituting geographic area licensing for the lower 230 800 MHz SMR channels. With respect to the upper 200 channels, we asked commenters to address whether EA licensees should be permitted to partition and disaggregate their spectrum blocks. We also proposed additional procedures and clarifications regarding mandatory relocation of incumbent licensees from the upper 200 channels. With respect to the lower 230 channels, we proposed geographic area licensing procedures and auction rules similar to those adopted for the upper 200 channels.[14] We declined to propose a mandatory relocation plan for incumbents on the lower 230 channels, however, and we proposed to adopt operating parameters for incumbents that would give them a reasonable opportunity to expand their businesses.[15] We further proposed to establish competitive bidding rules for licensing the General Category and lower 80 channels with special provisions to encourage participation by designated entities in the auction of that spectrum.

6. Sixty-five parties filed initial comments and fifty-eight parties filed reply comments in response to the *Second Further Notice*.[16] Numerous written *ex parte* presentations also have supplemented the record.[17] Notably, in reply comments, AMTA, SMR WON and Nextel offered a proposal ("Industry Proposal") for licensing the lower 230 channels through a pre-auction process that would allow incumbents to obtain rights to unlicensed spectrum through settlement agreements with one another.[18] The parties submit that the Industry Proposal represents a consensus of the SMR industry and takes into account the interests of wide-area licensees as well as site-by-site incumbents.

III. EXECUTIVE SUMMARY

7. This *Second Report and Order* resolves the issues raised in the *Second Further Notice* as follows:

A. Lower 230 Channel Service Rules

- The lower 230 channels will be licensed on a geographic basis using EA service areas.
- The lower 80 SMR channels (Spectrum block E) will be licensed in sixteen non-contiguous five-channel blocks. The 150 General Category channels (Spectrum block D) will be licensed in three

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[13] *Id.* at 1537-1578, ¶¶ 143-256.

[14] *Second Further Notice* at 1601-1631, ¶¶ 323-401.

[15] *Id.* at 1597-99, ¶¶ 315-317.

[16] See Appendix A for a list of commenters and reply commenters.

[17] See Appendix A for a list of entities that submitted *ex parte* filings. We have also received a number of petitions for reconsideration of the *800 MHz SMR Report and Order*. Those petitions will be resolved in a separate document.

[18] *See* Joint Reply Comments of SMR WON, AMTA and Nextel (filed March 1, 1996); AMTA, SMR WON, PCIA, Nextel *ex parte* Comments (filed September 6, 1996).

contiguous fifty-channel blocks.[19]

- We decline to adopt an aggregation limit on the number of lower 230 frequencies that can be licensed to a single applicant. Aggregation remains limited by the 45 MHz CMRS spectrum aggregation limit.[20]

B. Rights and Obligations of Lower 230 Channel Licensees

- EA licensees have the right to provide service anywhere within their EAs, provided that they afford protection to incumbents as required below.

- EA licensees have the right to recover spectrum licensed to incumbents within their EAs where the incumbent's license cancels automatically or where there is discontinuation of spectrum use by the incumbent.

- EA licensees must provide coverage to at least one-third of the population of their markets within three years of license grant and two-thirds population within five years. Alternatively, EA licensees must provide "substantial service" to their markets within five years of the grant of their licenses.

- We decline to adopt the Industry Proposal. We will, however, allow incumbents on the lower 230 channels to operate within their 18 dBμV/m interference contours. We will also require EA licensees to afford protection to incumbents based on the incumbents' 36 dBμV/m contours. This will enhance incumbent flexibility and provide an incentive for voluntary relocation from the upper 200 channels.

- Incumbents on the lower 230 channels will not be subject to mandatory relocation. Both SMR and non-SMR incumbents may continue to operate on these channels under their existing authorizations.

C. Mandatory Relocation of Incumbents From the Upper 200 Channels

- An incumbent who receives notice from an EA licensee that such EA licensee intends to relocate that incumbent may compel the licensee to negotiate, and may compel simultaneous negotiations with all EA licensees who have so notified the incumbent.

- EA licensees who notify the incumbent that they will be relocated will share, *pro rata*, the costs of relocating the incumbent. An incumbent's *pro rata* share will be determined by the number of the incumbent's channels in EA licensee's spectrum block compared with the total number of channels in the incumbent's system.

- We establish procedures for EA licensees who relocate incumbents to obtain *pro rata*

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[19] In the *800 MHz Report and Order*, we redesignated the General Category channels as SMR channels, which would prevent non-SMRs from applying for geographic area licenses on these channels. In our *Memorandum Opinion and Order* on reconsideration of the *800 MHz Report and Order*, adopted simultaneously with this order, we have concluded that non-SMRs as well as SMRs should be eligible for geographic area licenses on these channels.

[20] *See* 47 C.F.R. § 20.6.

reimbursement from other EA licensees who benefit from the relocation.

- We establish criteria for defining "comparable facilities," which the EA must provide to an incumbent as a precondition of involuntary relocation.

D. Partitioning and Disaggregation for 800 MHz and 900 MHz Licensees

- Geographic area licensees in the 800 MHz and 900 MHz SMR services may partition their license areas or disaggregate spectrum to other eligible entities.

- Partitioning of geographic area licenses is permitted for any geographic area defined by the parties, and disaggregation is allowed for any amount of spectrum.

- The original geographic area licensee and the partitionee/disaggregatee may choose between flexible coverage and channel usage requirements that are consistent with the underlying requirements for the respective 800 MHz and 900 MHz channel bands.

- Designated entity licensees that partition or disaggregate to non-designated entities will be required to compensate the Federal government through an unjust enrichment payment, calculated on a proportionate basis.

E. Auction Rules for the Lower 230 Channels

- Award licenses for the lower 80 and General Category channels through competitive bidding.

- Multiple round bidding and a simultaneous stopping rule will be used. We also adopt the Milgrom-Wilson activity rule.

- We establish competitive bidding rules for resolving mutually exclusive applications for EA licensees in the General Category and lower 80 channels.

- We make bidding credits available on a tiered basis for small businesses. Small businesses with average gross revenues that do not exceed $3 million for the preceding three years would receive a 35 percent credit, while small businesses with average gross revenues that do not exceed $15 million for the preceding three years would receive a 25 percent credit.

IV. DISCUSSION

A. Service Rules for the Lower 230 Channels

1. Geographic Area Licensing

8. Background. In the *Second Further Notice*, we tentatively concluded that the lower 230 channels would be licensed on a geographic basis and subject to competitive bidding to decide between mutually exclusive applications.[21] We reasoned that geographic area licensing would afford smaller SMR licensees the flexibility to provide service to a defined geographic area on the same basis as licensees on

[21] *800 MHz SMR Report and Order*, 11 FCC Rcd at 1601-3, ¶¶ 294, 323-35.

the upper 200 channels.[22] We also noted that geographic area licensing would simplify system expansion by reducing the administrative burden on lower 230 channel licensees.[23] We anticipated that in many instances, existing licensees would seek to obtain geographic area licenses for areas in which they already operate, which would enable them to consolidate and expand their operations under a more flexible regulatory regime.[24]

9. Comments. The proponents of the Industry Proposal support geographic licensing in principle, agreeing with our view that it provides superior flexibility and is administratively simpler than site-by-site licensing.[25] Many other SMR incumbents question the feasibility of geographic licensing for the lower 230 channels on the grounds that these channels are already heavily encumbered and will become even more so after relocation of licensees from the upper 200 channels.[26] Licensees who are not SMR licensees also oppose geographic licensing as unsuitable to the needs of private systems, which do not typically seek to cover large geographic areas in the manner of commercial service providers.[27]

10. Discussion. We adopt geographic area licensing for the lower 230 channels. Geographic area licensing will increase the flexibility afforded to licensees to manage their spectrum, and will reduce administrative burdens and operating costs by allowing licensees to modify, move, or add to their facilities within specified geographic areas without need for prior Commission approval. Geographic area licensing will also ensure that licensees on these channels have operational flexibility similar to that afforded to SMR licensees on the upper 200 channels as well as to cellular and PCS licensees.

11. We reject the view that the heavy use of the lower 230 channels by incumbents renders geographic area licensing impractical. To the contrary, incumbents benefit from geographic area licensing because it will make it far easier for them to fill in gaps in their current systems, make modifications to meet shifting market demands, and expand into unserved areas. Even where a licensee's ability to expand is limited by the presence of adjacent systems, geographic licensing is preferable to site-specific licensing because it affords the same degree of protection from interference but allows licensees greater flexibility within their existing service areas. We also do not agree with the view that the prospective relocation of SMR incumbents from the upper 200 channels to the lower 230 is an obstacle to geographic licensing. Upon moving to the lower 230 channels, relocated licensees will be able to take advantage of the flexibility in our rules to the same extent as other licensees.

12. We also disagree with UTC and other commenters who contend that geographic area licensing is inappropriate because of the presence of non-SMRs on the lower 230 channels. While non-SMR

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[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] AMTA Comments at 18; Nextel Comments at 4.

[26] City of Coral Gables, Florida ("Coral Gables") Comments at 3; Entergy Comments at 9; Fresno Comments at 21-22; Genesee Comments at 4; ITA Comments at 8; Southern Comments at 13; UTC Comments at 14; General Motors Research Corporation ("GM") Reply Comments at 1; Southern Reply Comments at 6.

[27] UTC Comments at 14; Entergy Reply Comments at 4; GM Reply Comments at 2; Coral Gables Comments at 3-4. These licensees also oppose the designation of the General Category for SMR use only. However, we have reconsidered that decision in the *Memorandum Opinion and Order* adopted today.

operators may not require geographic licenses to operate systems designed for internal communications, geographic area licensing remains the most efficient and logical licensing approach for the majority of licensees in the band. We are not persuaded that we should forego the benefits of geographic licensing to accommodate the interests of a small minority of systems. In any event, systems that are not SMR systems will remain fully protected under our geographic licensing rules. In addition, non-SMRs can obtain spectrum to suit their internal communications needs by forming joint bidding consortia or by entering into partitioning and disaggregation agreements with EA licensees.

2. Service Areas

13. Background. In the *Second Further Notice*, we tentatively concluded that EAs would be the most appropriate service areas for a geographic-area licensing approach on the lower 230 channels.[28] We noted that EA service areas were adopted for the upper 200 channels and that EA service areas are based on urban, suburban, and rural traffic patterns that accurately reflect the coverage provided by most 800 MHz SMR operators other than the largest wide-area systems.[29] We found that using the same service area definition for licenses on these channels as for licenses on the upper 200 channels would result in greater administrative efficiency.[30]

14. Comments. AMTA supports our proposal and argues that EAs closely approximate the coverage of traditional SMR systems.[31] Genesee agrees that we should adopt the same service area for both the upper 200 and lower 230 channels.[32]

15. Discussion. We adopt EAs as the basis for geographic licensing of the lower 230 channels. EAs are generally recognized by the SMR industry as being optimally sized for geographic licensing in this band, because EAs approximate the coverage of most SMR systems except the largest wide-area operations.[33] As we stated in the *800 MHz Report and Order*, EAs will encourage a diverse group of prospective bidders, because they are small enough that licensees seeking to serve small markets can bid on areas they wish to serve, but are large enough that they can also form the basis for wide-area systems.[34] By encouraging more diverse bidders in the auction, we believe we will fulfill the mandate of Section 309(j)(3)(B) & (4)(C) of the Communications Act to disseminate licenses among a wide variety of applicants and to ensure economic opportunities for a wide variety of applicants.[35] In addition, having the same geographic area licenses for the upper 200 and lower 230 channels makes it easier for licensees

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[28] *Second Further Notice*, 11 FCC Rcd at 1590, ¶ 297.

[29] *Id.*

[30] *Id.*

[31] AMTA Comments at 21.

[32] Genesee Comments at 4.

[33] AMTA Comments at 21; Genesee Comments at 4.

[34] *800 MHz Report and Order*, 11 FCC Rcd at 1483, ¶ 23.

[35] *See* 47 U.S.C. § 309(j)(3)(B) & (4)(C).

to develop systems that use both upper 200 and lower 230 channels in a common licensing area.[36]

3. Channel Blocks

a. Lower 80 Channels

16. Background. In the *Second Further Notice*, we proposed that the lower 80 channels be licensed in the same five-channel blocks that were previously used for site-by-site licensing. We observed that because the current five-channel blocks are non-contiguous and interleaved with blocks of non-SMR channels, this spectrum could not be reconfigured into continguous spectrum blocks.[37]

17. Comments. Several commenters support our proposal to license the lower 80 channels in five channel blocks.[38] AMTA supports preserving the current groupings on the lower 80 channels.[39]

18. Discussion. We adopt our proposal to license the lower 80 channels in five-channel blocks. The non-contiguous nature of these channels makes it impractical to impose any other channel plan. This approach will also provide opportunities for incumbents and applicants that base their systems on trunking of non-contiguous channels, in keeping with the mandate of Section 309(j)(4)(C) of the Communications Act to make equitable distribution of licenses and provide economic opportunities for a wide variety of entities.[40] Furthermore, we find that this will be the less disruptive method for smaller incumbent licensees since they have acquired their channels in five channel increments. Therefore, we will license the lower 80 channels in sixteen five-channel blocks as set forth in Section 90.617(d) of our rules.

b. General Category Channels

19. Background. In the *Second Further Notice*, we tentatively concluded that the 150 General Category channels should be licensed in discrete channel blocks, and proposed three alternatives: (1) a 120-channel block, a 20-channel block, and a 10-channel block; (2) six 25-channel blocks; or, (3) fifteen 10-channel blocks.[41]

20. Comments. Some commenters support licensing the General Category in large blocks to accommodate licensees who seek to use contiguous spectrum technologies. These commenters note that this was the basis for our establishing large channel blocks on the upper 200 channels.[42] Other commenters argue that large contiguous blocks do not suit the needs of smaller SMR systems, which

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[36] Genesee Comments at 4.

[37] *800 MHz Report and Order*, 11 FCC Rcd at 1592, ¶ 300.

[38] Ericsson Comments at 5; Genesee Comments at 4; PCIA Comments at 20; SMR WON Comments at 23.

[39] AMTA Comments at 20.

[40] *See* 47 U.S.C. § 309(j)(4)(C).

[41] *800 MHz Report and Order*, 11 FCC Rcd at 1592, ¶ 301.

[42] AMTA Comments at 23; Genesee Comments at 4; SMR WON Comments at 23.

typically trunk smaller numbers of non-contiguous channels.[43] These commenters argue that large blocks of contiguous channels could be prohibitively expensive to bid for at auction, thereby limiting the opportunies for smaller system operators to take advantage of geographic area licensing. The proponents of the Industry Proposal argue for three contiguous 50-channel blocks, but emphasize that their plan would allow channel-by-channel settlements prior to auction.[44] Other commenters propose a variety of alternatives for smaller blocks, including blocks of 10 or 20 channels;[45] 30 five-channel blocks with 1 MHz separation between channels;[46] or licensing all 150 channels individually.[47]

21. Discussion. We understand the needs of those providers who want contiguous spectrum to implement frequency re-use technology,[48] and those that want non-contiguous spectrum because the spectrum is highly encumbered, or because it suits their current technology.[49] If we were to adopt very large contiguous blocks of spectrum we would preclude smaller entities from participating in the auction because presumably bigger blocks of spectrum would require larger bids to acquire than smaller blocks of spectrum. On the other hand, if we were to auction EAs on a channel-by-channel basis, as suggested by Fresno,[50] it would be difficult to accumulate contiguous spectrum and would require all licensees interested in accumulating spectrum to keep track of 150 auctions at one time. If one entity wanted to acquire five channel blocks in three EAs, the licensee would have to potentially keep track of 450 simultaneous auctions.

22. To accommodate licensees who want contiguous as well as those licensees that want large blocks of spectrum, we will adopt the Industry Proposal and allot three contiguous 50-channel blocks. We expect a significant amount of the former General Category channels to continue to be used for traditional SMR systems and retaining the contiguity of these channels will permit alternative offerings that may require multiple, contiguous channels. In addition, we find that allotting 50 channel blocks will allow bidders to aggregate even larger contiguous blocks of spectrum. We find that adopting such a channel plan strikes a balance between licensees with different spectrum allocation needs and allows licensees with different goals to pursue spectrum in the General Category. Once again, this fulfills the mandate of Section 309(j)(4)(C) of the Communications Act that we distribute licenses in such a way so as to ensure economic opportunities for a wide variety of entities.[51] While we do not adopt Fresno's or

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[43] Sierra Comments at 2; *see generally* Fresno Comments at 24.

[44] AMTA Comments at 23; Genesee Comments at 4; SMR WON Comments at 23. AMTA and SMR WON recommend fifty channel blocks as part of a larger proposal called the Industry Coalition Proposal. *See infra* Section IV-B-3-b.

[45] PCIA Comments at 20. PCIA has in latter filings joined the Industry Coalition Proposal which calls for three, fifty-channel blocks. AMTA, SMR WON, PCIA, Nextel *ex parte* filing at 1 (filed September 6, 1996).

[46] Sierra Comments at 2.

[47] Fresno Comments at 24.

[48] *See e.g.*, AMTA Comments at 23; SMR WON Comments at 23.

[49] Sierra Comments at 2.

[50] Fresno Comments at 24.

[51] *See* 47 U.S.C. § 309(j)(4)(C).

Sierra's proposals,[52] small system licensees will have the opportunity to acquire smaller amounts of spectrum compatible with their existing technology through the newly-created disaggregation rules we adopt herein. Meanwhile licensees seeking to deploy contiguous spectrum technology will have the opportunity to acquire a 100 or 150 channel block of contiguous spectrum.[53] Adopting this channel plan addresses the competing demands of trunked systems and wide-area systems that require contiguous spectrum.

4. Channel Aggregation Limits

23. Background. In the *CMRS Third Report and Order*, we adopted a 45 MHz spectrum cap on the amount of broadband CMRS spectrum an entity may acquire in any geographic area.[54] In the *800 MHz Report and Order*, we concluded that in light of the spectrum cap, no separate limit was necessary on aggregation of SMR spectrum on the upper 200 channels.[55] Similarly, in the *Second Further Notice*, we proposed not to limit the number of lower 230 channels a single applicant could acquire at one time. We tentatively concluded that allowing aggregation of lower 230 channels would not lead to anti-competitive results, and could encourage the development of wide-area systems that would be competitive with other CMRS providers.[56]

24. Comments. AMTA and SMR WON support our proposal not to limit the number of channels a single applicant can obtain at one time.[57] Genesee, on the other hand, argues that the applicants for the lower 80 channels should be limited to obtaining one five-channel block at a time per geographic area and should not be entitled to apply for an additional block until the previous block has been constructed.[58]

25. Discussion. We conclude that no aggregation limit is necessary for the lower 230 channels. In both the *CMRS Third Report and Order* and the *800 MHz Report and Order*, we observed that the 800 MHz SMR service is just one of many competitive services in the CMRS marketplace.[59] If a single licensee were to acquire all 230 channels in a single market, it would hold an aggregated 11.5 MHz of spectrum, not all of which would be contiguous. Even if a single licensee combined this spectrum with spectrum from the upper 200 channels, it would fall well short of the 45 MHz spectrum cap, and would

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[52] *See* Sierra Comments at 2. As a practical matter it is not possible to adopt thirty five-channel blocks that are 1 MHz apart on General Category channels.

[53] *See e.g.*, AMTA Comments at 23.

[54] Implementation of Sections 3(n) and 332 of the Communications Act, Gen Dkt No. 93-252, *Third Report and Order*, 9 FCC Rcd 7988, 8099-8100, ¶ 237 (1994) (*CMRS Third Report and Order*).

[55] *800 MHz Report and Order*, 11 FCC Rcd at 1493-4, ¶¶ 42-44

[56] *Id.* at 1594-95, ¶ 308.

[57] AMTA Comments at 25, SMR WON Comments at 26.

[58] Genesee Comments at 5.

[59] *See CMRS Third Report and Order*, 9 FCC Rcd at 8100-8110, ¶¶ 238-65; *800 MHz Report and Order*, 11 FCC Rcd at 1490, ¶ 43.

have less spectrum than PCS and cellular providers in the same market.[60] We do not believe that this level of aggregation would enable an SMR licensee to have an anticompetitive effect on the CMRS market. Moreover, we are concerned that limiting the ability of SMR providers to aggregate spectrum could handicap their efforts to compete with other services. As a practical matter, the presence of numerous incumbents on the lower 230 channels reduces the likelihood that significant aggregation of this spectrum will occur. However, we conclude that the marketplace, not our rules, should determine whether these channels will be used on an aggregated or disaggregated basis.

26. We also decline to limit SMR applicants on the lower 230 channels to obtaining one channel block at a time. This is inconsistent with our approach to licensing of other CMRS, including cellular, PCS, 900 MHz SMR, and the upper 200 channels in the 800 MHz band. In addition, the use of competitive bidding to resolve mutually exclusive geographic area licenses on the lower 230 channels provides a strong incentive for licenses to utilize the channels.

5. Licensing in the Mexican and Canadian Border Areas

27. Background. In the *Second Further Notice*, we proposed that the lower 230 channels be licensed in Economic Areas without distinguishing border from non-border areas, even though some use of this spectrum is limited by international understandings or agreements. We stated that applicants could assess the impact of more limited spectrum availability in the Canadian and Mexican border regions when evaluating those regions for competitive bidding purposes. We also stated that altering the size of particular market areas because they were located near international borders was likely to be administratively unworkable. We therefore proposed that geographic-area licensees be entitled to use any available border-area channels in their areas, subject to the relevant rules regarding international assignment and coordination of such channels.[61]

28. Comments. Commenters are generally concerned about the limited number of channels available in the Mexican and Canadian border areas. Commenters also ask the Commission to clarify the status of channels that are part of the General Category in non-border areas but are assigned to pool categories other than SMR in the border areas.[62] Incumbent licensees operating on such channels in border areas that are not SMRs oppose any plan that would limit their ability to operate or require them to relocate.[63]

29. Discussion. In the *800 MHz Report and Order*, we acknowledged that in the Canadian and Mexican border areas, some upper 200 channels would not be available or would be subject to power and height restrictions. Nevertheless, we did not distinguish between border and non-border areas for the upper 200 channels in our EA licensing plan, because we concluded that EA applicants could best

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[60] The total potential aggregation of spectrum in the 800 MHz SMR service, combined with the General Category, is 21.5 MHz of spectrum, not all of which is contiguous. Cellular licensees have 25 MHz and A, B, and C block PCS licensees have 30 MHz of continguous spectrum. We note that we may institute a future proceeding to consider whether continued use of the CMRS spectrum cap is appropriate.

[61] *800 MHz Report and Order*, 11 FCC Rcd at 1599, ¶ 319.

[62] *See e.g.*, Consumers Power Company (CPC) Comments at 5.

[63] CPC Comments at 4-5; Genesee Comments at 6; GM Comments at 5; GM Reply Comments at 3; ITA/Telefac Reply Comments at 10; UTC Reply Comments at 15.

determine the effect of such restrictions on the value of the spectrum.[64] We adopt the same approach for the lower 230 channels as well. Thus, EA licensees on the lower 230 channels of EAs that are adjacent to Canada or Mexico will be entitled to use any available channels within their spectrum blocks, except where use of such channels is restricted by international agreement.[65]

30. In addition, we clarify that SMR and General Category channels assigned to non-SMR pools in the border areas are not available for use by EA licensees in those regions.[66] Thus, non-SMR licensees operating on those channels in border areas may continue to operate and will not be subject to relocation. Moreover, EA licensees must afford full interference protection to non-SMR licensees operating on these channels. We admonish potential applicants for EA licenses to carefully evaluate these limitations on spectrum availability when determining their bidding strategies for blocks of spectrum adjacent to the Mexican and Canadian borders.

31. Finally, we note that there are some non-SMR channels in the non-border areas that in the Canadian and Mexican border areas are available soley to SMR eligibles. These channels will be associated with specific SMR and General Category spectrum blocks in these border areas.[67] Prospective bidders on EAs near the Canadian and Mexican borders should be aware that these channels, which are not available to them anywhere else except in the border regions, will be assigned for their use in the Canadian and Mexican border regions. EA licensees must also afford full interference protection to non-SMR licensees operating in adjacent areas on these channels.

6. Construction and Coverage Requirements for the Lower 230 Channels

a. Requirements for EA Licensees

32. Background. In the *800 MHz Report and Order*, we required EA licensees on the upper 200 channels to construct their systems within five years of licensing.[68] We stated that this requirement would be met by providing coverage to one-third of the EA's population within three years of initial license grant and to two-thirds of the population within five years.[69] We also required EA licensees to use at least 50 percent of the channels in their spectrum blocks in at least one location within the EA within three years

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[64] *800 MHz Report and Order*, 11 FCC Rcd at 1496, ¶ 48.

[65] Appendix C to this order contains a chart which lists the channels available in the Canadian and Mexican border areaas.

[66] Availability of these channels in the border areas is determined by Section 90.619(a) of our rules. 47 C.F.R. § 90.619(a). Section 619(a) provides that within 110 km (68.4 miles) of the US/Mexico border, and within 140 km (87 miles) of the US/Canada border, certain General Category channels and certain upper 200 channels assigned to EA blocks D and E by the *800 MHz Report and Order* are designated as non-SMR pool channels in the border areas. For EA licensees, this means that these channels cannot be used in the border regions defined by the rules.

[67] *See* Joint Appendix B.

[68] *800 MHz Report and Order*, 11 FCC Rcd at 1521, ¶ 104.

[69] *Id.*

of license grant.[70] In the *Second Further Notice*, we similarly proposed that EA licensees on the lower channels should cover one-third of the EA population within three years and two-thirds within five years.[71] We did not propose a channel usage requirement, however. In addition, as an alternative to the proposed coverage requirements, we proposed to allow lower 230 channel licensees to satisfy their coverage requirements by meeting a "substantial service" standard like the standard previously adopted in the 900 MHz SMR service and in the broadband PCS D, E, and F blocks.[72]

33. Comments. Commenters generally support applying strict coverage requirements to EA licensees to ensure efficient use of the spectrum and to act as a deterrence against speculation or warehousing of spectrum.[73] SMR WON contends that construction and coverage requirements are necessary to prevent speculators from preying on the general public.[74] PCIA contends that geographic licensees should not be able to construct a single transmitter in a remote portion of the EA and claim that the channel is constructed throughout the EA.[75] PCIA further argues that geographic licensees should be required to demonstrate construction covering the proper proportion of the population or substantial service on a per-channel basis.[76]

34. Discussion. We adopt the construction requirements proposed in the *Second Further Notice* for the lower 230 channels. We believe that adoption of such flexible construction requirements will enhance the rapid deployment of new technologies and services and will expedite service to rural areas. We disagree with those commenters that contend that adoption of stricter construction requirements for the lower 230 channels will better serve the public interest. We find that more flexible construction requirements will allow EA licensees in the encumbered lower 230 channels to respond to market demands for service and thus eliminate the need for an EA licensee to meet construction requirements based on population alone. We disagree with those commenters that believe that strict construction requirements are necessary to deter speculation and warehousing.[77] We believe that, by participating in the auction, licensees will have shown that they are genuinely interested in acquiring spectrum to utilize and not warehouse. At the same time, we continue to believe that licensees should be held to some type of construction requirement in order to encourage expedited construction and foster service to rural areas. Therefore, EA licensees in the lower 230 channel blocks, just as their counterparts in the upper 200 channels, will be required to provide coverage to one-third of the population within three years of the license grant, and to two-thirds of the population within five years of the license grant. However, in the alternative, EA licensees in the lower 230 channel block may provide "substantial service" to the geographic license area within five years of license grant. "Substantial service" will be defined as service

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[70] *Id.* at 1521, 1529-30, ¶¶ 104, 120-121.

[71] *Second Further Notice*, 11 FCC Rcd at 1596-97, ¶ 312.

[72] *Id.*

[73] Personal Communications Industry Association (PCIA) Comments at 22; Genesee Comments at 5; Pittencrieff Communications, Inc. (PCI) Comments at 10.

[74] SMR WON Comments at 27.

[75] PCIA Comments at 22.

[76] *Id.*

[77] *See* PCIA Comments at 22; Genesee Comments at 5; Pittencrief Comments at 10.

that is sound, favorable, and substantially above a level of mediocre service, which would barely warrant renewal.[78] For example, a licensee may demonstrate that it is providing a technologically innovative service or that it is providing service to unserved or underserved areas. This flexibility will allow EA licensees to expedite service to rural areas that may have a higher service demand than a heavily populated urban area with less demand. As we proposed in the *Second Further Notice*, we will not adopt a channel usage requirement for licensees in the lower 230 channel block. In addition, we decline to adopt PCIA's proposal to require that construction requirements be met on a "per-channel" basis. We believe EA licensees should have the flexibility to respond to market-based demands for service and that adopting a "per-channel" construction requirement would greatly interfere with licensees' ability to respond to such demands.

35. The failure to meet these performance requirements will result in automatic termination of the geographic area license. This is consistent with our rules for broadband PCS,[79] 900 MHz SMR services,[80] Multipoint Distribution Services (MDS),[81] and most recently for paging.[82] We will individually license any incumbent facilities that were authorized, constructed, and operating at the time of termination of the geographic area license.

b. Requirements for Site-Based Licensees

36. Background. In the *CMRS Third Report and Order*, we established a uniform 12-month period for constructing a standard base station in all CMRS services that are licensed on a site-specific basis. We also indicated that CMRS providers would be required to commence service to subscribers by the end of their construction period.[83] In the *Second Further Notice*, we proposed to apply this standard to site-based licensees remaining on or relocating to the lower 230 channels.[84]

37. Discussion. As a result of our decision to convert to EA-based licensing of the lower 230 channels, the only instances in which future site-based applications will be necessary are those few instances where site approval continues to be required, *e.g.*, for sites at environmentally sensitive locations

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[78] *See CMRS Third Report and Order*, 9 FCC Rcd at 8157 n.712.

[79] *See* Amendment of the Commission's Rules to Establish New Personal Communications Service, Gen Dkt No. 90-314, *Second Report and Order*, 8 FCC Rcd 7700, 7754, ¶ 134 (1993).

[80] *See* Amendment of the Commission's Rules to Provide for Use of 200 Channels Allotted to Specialized Mobile Radio Pool, PR Dkt No. 89-553, *Second Report and Order and Second Further Notice of Proposed Rulemaking*, 10 FCC Rcd 6884, 6899 ¶ 43 (1995).

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

[82] *See* Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, *Second Report and Order and Further Notice of Proposed Rulemaking*, FCC 97-59 (February 24, 1997).

[83] *Id.* at 8074-75, ¶¶ 177-78. "Service to subscribers" is defined as provision of service to at least one party not affiliated with, controlled by, or related to the CMRS provider. *Id.* at 8075, ¶ 178.

[84] *800 MHz Second Further NPRM*, 11 FCC Rcd at 1596, ¶ 311.

that require Commission approval under NEPA. In such instances, we will require incumbent licensees to construct facilities and commence service within 12 months in accordance with our proposal. EA licensees that are required to seek separate approval for environmentally sensitive locations within their geographic areas will be permitted to include those sites in their geographic area license and will not be subject to the 12 month construction deadline.

38. We also take this opportunity to clarify two points. First, we note the applicability of the 12-month construction requirement to incumbents on the lower 230 channels holding site-based authorizations with construction periods that have not yet expired. In general, SMR licensees with site specific authorizations have 12 months from the grant date to complete construction and commence service, unless the authorization is part of a system that has received an extended implementation grant.[85] Pursuant to the new rules we adopt herein, interior sites added within an incumbent's existing footprint will not be subject to construction requirements because they do not require separate authorizations.

c. Transfers and Assignments of Unconstructed Site-Specific Licenses

39. Background. Section 90.609(b) of our rules prevents the transfer or assignment of SMR licenses issued on a site-by-site basis prior to the completion of construction.[86] A number of commenters suggest that the Commission should waive or suspend application of this rule in order to facilitate relocation of incumbents from the upper 200 channels. SMR WON, for example, proposes that the Commission waive the restrictions of Section 90.609 to enable EA applicants to transfer unconstructed licenses to incumbents as part of a relocation plan.[87] In its petition for reconsideration, Digital also argues for such an exception to our prohibition against the transfer of unconstructed facilities.[88] Nextel supports Digital's proposal, although it argues that such transfers should only be permitted between incumbent wide-area SMR licensees and EA licensees.[89]

40. Discussion. We agree with SMR WON and Digital that temporary waiver of our restrictions against assignment or transfer of unconstructed site-specific SMR licenses would facilitate the relocation process and geographic licensing. We believe that there is good cause to support waiver of the rule in this case.[90] The special circumstances that exist with this innovative approach to licensing support temporary waiver of Section 90.609(b) of the rules.[91] That rule was designed to prevent trafficking in site-specific licenses and spectrum warehousing by taking back unused spectrum. However, in this proceeding, we seek to encourage rapid migration of incumbents, preferably through voluntary negotiations, from the upper 200 channels to lower band 800 MHz channels. If we were to rigidly apply Section 90.609(b) in such circumstances, licensees holding unconstructed site-specific licenses on the lower channels would not

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[85] *Id.*

[86] 47 C.F.R. § 90.609(b).

[87] SMR WON Comments at 8, n.5.

[88] Digital Petition at 10.

[89] Nextel Reply at 6.

[90] *See* 47 C.F.R. § 1.3; *see also WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

[91] *See Northeast Cellular Telephone Company v. FCC*, 897 F. 2d 1164 (D.C. Cir. 1990).

be able to transfer their authorizations for relocation purposes unless they had constructed them first.[92] Therefore, it is more efficient to waive the rule and allow licensees who have unconstructed lower channels suitable for relocation of upper channel incumbents to transfer them without prior construction, so that the relocated licensees can construct facilities suitable to their needs.

41. In addition, relaxing our transfer restrictions facilitates geographic licensing of the lower channels themselves. We expect that in many instances, incumbents on the lower channels will bid for EA licenses on those channels to consolidate their existing holdings. However, because we are adopting new channel blocks for geographic licensing, particularly in the General Category, incumbents may find it advantageous to their bidding strategy to modify their holdings in advance of the auction through transfers or channel swaps. In addition, allowing transfer of unconstructed as well as constructed spectrum provides an opportunity for new entrants to position themselves for the auction by acquiring existing licenses in areas where they intend to bid.

42. Therefore, to facilitate relocation and geographic licensing, we will temporarily waive the prohibition on assignment or transfer of unconstructed authorizations on the lower 80 and General Category channels. Thus, licensees on these channels may apply to transfer or assign their authorizations regardless of construction.[93] This waiver will remain in effect until six months after the conclusion of the upper band EA auction. We believe this period will provide sufficient time for licensees to identify suitable lower band spectrum for transfer as part of voluntary relocation agreements, and for potential bidders in the lower band auction to negotiate transfers as part of their pre-auction strategy.

43. We will extend this waiver to all holders of unconstructed spectrum on the lower 80 and General Category channels, including both SMR and non-SMR licensees. We will also allow these licensees to transfer or assign their authorizations to any eligible entity. Although Nextel argues that such transfers should be allowed only if they are between wide-area SMR incumbents and EA licensees, we believe such restrictions are unnecessary and unduly restrictive. First, we see no reason to allow only wide-area licensees to transfer unconstructed spectrum. The purpose of this policy is to facilitate the rapid assignment of all lower band spectrum -- not just spectrum held by wide-area licensees -- to those who are most likely to use it. Similarly, we will not restrict holders of unconstructed spectrum to dealing with EA licensees. Although we expect that many transfers will in fact be to EA licensees, we do not believe that incumbents should be prevented from negotiating transfers to other parties who value the spectrum. In any event, such a restriction would prevent incumbents from negotiating transfers prior to the conclusion of the auction because EA winners will not be identified until then.

44. We recognize that relaxing transfer restrictions makes it more difficult to take action against speculators who have not constructed facilities on their spectrum but instead have sought to warehouse spectrum for profit. However, we believe that the benefits of this approach for relocation and future geographic licensing in this service outweigh the potential cost. First, not all 800 MHz licensees who have failed to construct are necessarily speculators: our application freeze and uncertainty caused by the lengthy pendency of this proceeding have also made it difficult for legitimate licensees to develop their systems. Moreover, even in the case of licensees who acquired spectrum through application mills, allowing

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[92] *Id.*

[93] Where unconstructed spectrum is transferred, the assignee or transferee will be subject to the same construction deadline as the transferor/assignor. We will, however, allow licensees with extended implementation authority to apply their system-wide construction deadlines to licenses acquired by transfer that are within their pre-existing footprint.

unconstructed spectrum to be transferred rapidly and efficiently to those who value it most allows development of the service to proceed and provides potential benefits to prospective bidders in the auction. This approach will also not compromise the objectives of geographic area licensing: because only currently licensed spectrum can be transferred, there is no impact on unlicensed spectrum that will be awarded to EA licensees. In addition, EA licensees are not obliged by this policy to negotiate with incumbents they believe have no intention of constructing facilities; if an incumbent fails to construct and commence operations within the period required by its license, the unused spectrum reverts to the EA licensee.

B. Rights and Obligations of EA Licensees in the Lower 230 Channels

1. Operational Restrictions

45. Background. In the *800 MHz Report and Order*, we adopted rules allowing EA licensees on the upper 10 MHz block to construct, expand, or modify their facilities anywhere in their licensing areas without prior Commission approval so long as their operations comply with our technical rules and incumbent licensees are fully protected.[94] While we eliminated the requirement of prior Commission approval, we required EA licensees to notify the Commission of all system additions, deletions, or modifications. We concluded that notification was necessary to ensure the successful coexistence of EA licensees and incumbents on the upper 200 channels. In the *Second Further Notice*, we proposed to extend these same operational rules to EA licensees on the lower 230 channels.[95]

46. Comments. A few parties filed comments supporting our proposal to allow incumbents to modify or add transmitters in their existing service area without prior Commission approval, so long as the transmitters are within the incumbent's 22 dBμV/m contour.[96] Entergy added that incumbents should also be notified of any modifications that EA licensees make, or should have access to the Commission's database detailing the same information.[97] Entergy noted that this issue was particularly important to non-SMR incumbent systems, such as public safety and industrial systems, who need to be aware of the activities of EA licensees to avoid interference problems before they occur.[98]

47. Discussion. Except for using the 18 dBμV/m contour to define the interference protection obligations of EA licensees with respect to lower 230 incumbents (discussed in Section IV-B-3-b, *infra.*), we will apply the same operational rules to EA licensees on the lower 230 channels that are applicable to the upper 200 channels. No commenter has suggested that EA licensees on the lower 230 channels should not have the right to modify their facilities without prior Commission approval, and we see no reason to treat the lower 230 channels differently in this regard. We also adopt the same notification requirements applicable to the upper 200 channels with respect to system additions, deletions, and modifications.

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[94] *800 MHz SMR Report and Order*, 11 FCC Rcd at 1498, ¶¶ 52-53.

[95] *Id.* at 1593, ¶ 305.

[96] U.S. Sugar Comments at 15; UTC Comments at 15; GM Reply Comments at 2.

[97] Entergy Comments at 14.

[98] *Id.*

2. Spectrum Management Rights--Acquisition and Recovery of Channels Within Spectrum Blocks

48. Background. In the *800 MHz Report and Order*, we adopted rules to assist EA licensees in consolidating spectrum within their respective blocks by providing that (a) if an incumbent fails to construct, discontinues operations, or otherwise has its license terminated by the Commission, the spectrum covered by the incumbent's authorization automatically reverts to the geographic area licensee; and, (b) if a geographic area licensee negotiates to acquire an incumbent's system by assignment or transfer, the assignment or transfer presumptively will be considered in the public interest.[99] Because upper 200 EA licensees were given the right to spectrum that was returned to the Commission, we concluded that waiting lists for these channels, which were a byproduct of channel-by channel licensing, were inconsistent with geographic area licensing and should be discontinued.[100] We therefore dismissed all wait-listed applications for the upper 200 channels.[101]

49. Discussion. In light of our decision to extend EA licensing to the lower 230 channels, we adopt the same rules for these channels with respect to recovery of unused spectrum and transfers and assignments of spectrum from incumbents to EA licensees. For the same reasons, we dismiss all wait-listed applications for these channels.[102]

3. Treatment of Incumbents

a. Mandatory Relocation of Lower Channel Incumbents

50. Background. In the *Second Further Notice*, we tentatively concluded that incumbents on the lower 230 channels should not be subject to mandatory relocation.[103] While we had determined that incumbents on the upper 200 channels could relocate to the lower 230 channels, we determined that there was no analogous alternative spectrum suitable for mandatory relocation of lower 230 incumbents. In addition, we stated in the *800 MHz Report and Order* that incumbent licensees relocated from the upper 200 channels should not be subject to relocation a second time.[104] We therefore proposed that all incumbent SMR licensees on these frequencies -- including incumbents who had relocated from the upper 200 channels -- be allowed to continue to operate under their existing authorizations, and that geographic area licensees be required to provide protection to all co-channel systems within their licensing areas.[105]

51. Comments. Most commenters addressing the issue agree with our tentative conclusion that

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[99] *Id.* at 1501-2, ¶¶ 59-62.

[100] *Id.*

[101] *Id.*

[102] Our action today will not apply to any application that is currently pending that includes a request for waiver of the processing freeze. We shall resolve those applications by separate action.

[103] *Second Further Notice*, 11 FCC Rcd at 1597-8, ¶ 315.

[104] *800 MHz Report and Order*, 11 FCC Rcd at 1508, ¶ 74.

[105] *Second Further Notice*, 11 FCC Rcd at 1597-8, ¶ 315.

incumbents on the lower 230 channels should not be subject to mandatory relocation.[106] Public safety incumbents are particularly adamant that they should not be required to relocate, arguing that alternative spectrum is not available in the public safety bands and that public safety users cannot be accommodated by commercial services.[107] Only one commenter, Telecellular, supports mandatory relocation of non-SMR incumbents from the lower 230 channels so that the spectrum can be used to implement wide-area SMR systems.[108]

52. Discussion. We will not adopt mandatory relocation procedures for either SMR or non-SMR incumbents on the lower 230 channels. The record supports our tentative conclusion that requiring incumbents to migrate off this spectrum would be impractical because there is no identifiable alternative spectrum to accommodate such migration.[109] In addition, it is likely that many of the incumbents who will operate on these channels will have relocated from the upper 200 channels, and we have already determined that such relocatees should not be required to relocate more than once. Therefore, EA licensees on the lower 230 channels will not have the right to move incumbents off of their spectrum blocks unless the incumbent voluntarily agrees to move.

b. Incumbent Operations

i. Expansion and Flexibility Rights of Lower Channel Incumbents

53. Proposal. In the *Further Notice* in this proceeding, we recognized that the geographic licensing scheme we designed for the upper 200 channels could result in some incumbent licensees remaining in this channel block, despite our mandatory relocation provisions.[110] To avoid interference between these incumbent licensees and the new EA licensees in the upper 200 channel block, we concluded in our *800 MHz Report and Order* that it was necessary to limit the ability of incumbent licensees to expand their systems after geographic licensing had occurred. At the same time, we concluded that incumbents should be afforded operational flexibility to add sites or make system modifications within those areas already licensed to them.[111] We concluded that, for the upper 200 channel block, incumbent licensees would be allowed to make modifications within their current 22 dBμV/m interference contour and would be allowed to add new transmitters in their existing service areas

[106] AMTA Comments at 28; Southern Comments at 16; UTC Reply Comments at 14; GM Comments at 4-5; ITA Comments at 8-9; Entergy Comments at 13; FedEx Comments at 2; Entergy Comments at 13; GM Comments at 4.

[107] Association of Public-Safety Communications Officials-International, Inc. ("APCO") Comments at 5-6, City of Los Angeles Police Department ("LAPD") Comments at 6, City of Richardson, Texas ("Richardson") Comments at 1, Florence County Sheriff's Office ("Florence") Comments at 1, State of Florida, Division of Communications ("Florida Division of Communications") Comments at 1-2, Hayes, Seay, Mattern, Inc. ("HSMM") Comments at 2; Department of Water and Sewers - City of Hialeah Comments at 1; County of San Bernadino, California, Department of Information Services ("San Bernadino") Comments at 2.

[108] *See* Telecellular Comments at 2-3.

[109] AMTA Comments at 28; Southern Comments at 16; UTC Reply Comments at 14.

[110] *Further Notice* at ¶ 37.

[111] *Id.*

without prior notification to the Commission.[112] However, incumbents would be required to notify the Commission of any changes in technical parameters or additional stations constructed, including agreements with an EA licensee to expand beyond their signal strength contour, through a minor modification of their license.[113]

54. In the *Second Further Notice*, we acknowledged that transitioning to a geographic licensing scheme in the lower 230 channels raises similar issues with respect to the rights of incumbents.[114] We proposed to limit expansion rights of incumbent SMR licensees in the lower 230 channels in the same manner as we did in the upper 200 channel block.[115] Under our proposal, incumbent licensees on the lower 230 channels would be allowed to modify or add transmitters in their existing service area without prior notification to the Commission, so long as they did not expand their 22 dBμV/m interference contour.[116] We proposed that incumbents would not be allowed to expand beyond the 22 dBμV/m contour and into the geographic area licensee's territory without obtaining the prior consent of the geographic area licensee or unless the incumbent is the geographic area licensee for the relevant channel.[117] We sought comment on this proposal and asked commenters to discuss whether a basis other than the 22 dBμV/m interference contour should be used to determine an incumbent's service area.[118]

55. Comments. SMR WON argues that confining incumbents to their 22 dBμV/m is a "discriminatory, confiscatory, unequal treatment of similarly situated licensees," and would relegate incumbent licensees to second class license status.[119] SMR WON argues that under the Commission's proposal, the area in which incumbent licensees could operate would be limited to a 35 mile radius around each transmitter site, whereas EA licensees would have an exclusive area covering thousands of square miles, depending on the size of the particular EA.[120] SMR WON contends the incumbent licensee would, by all measures, be the inferior licensee.[121]

56. AMTA, SMR WON, and Nextel filed joint reply comments proposing an alternative to our plan to limit incumbent expansion rights on the lower 230 channels.[122] The AMTA/SMR WON/Nextel proposal, which has generally come to be known as the "Industry Coalition Proposal" ("Industry

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[112] *800 MHz Report and Order*, 11 FCC Rcd at 1514, ¶ 86.

[113] *Id.*

[114] *Second Further Notice*, 11 FCC Rcd at 1597-98, ¶ 316.

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] SMR WON Comments at 20 - 21.

[120] *Id.*

[121] *Id.*

[122] *See* SMR WON, AMTA, Nextel Joint Reply Comments *seriatum*.

Proposal"), called for the Commission to permit incumbent licensees in the lower 230 channels to negotiate expansion rights within each EA through a settlement process.[123] The proposed settlement process would occur on a channel-by-channel basis prior to the auction of the lower 230 channels, but after incumbents on the upper 200 channels had had an opportunity to relocate or retune to the lower 230 channels. For each channel, incumbents licensed on the channel within the EA would negotiate among themselves to allocate rights to the channel within the EA.[124] If all incumbents on the single channel negotiated an agreement for use of that channel within the EA (*e.g.*, by forming a partnership, joint venture, or consortium), they would then receive an EA license for that channel.[125] If only one incumbent operated on the channel within an EA, it would receive an EA license for that channel automatically.[126] If incumbents on a channel were unable to reach a settlement, the channel would be included in the auction of the lower 230 channels. The Industry Proposal called for non-settling channels in the lower 80 channels to be auctioned in five-channel blocks and the 150 General Category channels to be auctioned in three 50-channel blocks.[127]

57. Numerous commenters have expressed support for the Industry Proposal.[128] Supporters argue that it would: (1) result in a more rapid end to the retuning/relocation process in the upper 200 channel block; (2) bring service more quickly to the public; (3) reduce the administrative burden on the Commission by limiting the need for competitive bidding; (4) provide significant opportunities for small businesses; and (5) comply with Section 309(j) of the Communications Act.[129]

58. With respect to relocation from the upper 200 channel block, commenters argue that the Industry Proposal will help induce incumbent licensees in the upper 200 channel block to relocate to the lower 230 channel block.[130] Commenters contend that by providing an opportunity for relocatees to acquire rights to their frequencies throughout an EA without having to participate in an auction, the Commission would create a powerful incentive for voluntary relocation by both commercial and non-commercial licensees.[131] With such incentives in place, commenters argue, licensees would determine new channel positions and settle on geographic service areas more quickly, which will translate into more rapid delivery of service to the public.[132] Incumbents with heavily-loaded analog systems would also be able to add new customers more quickly, these commenters contend, and there would be a more rapid

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[123] *Id.*

[124] *Id.* at iii.

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] PCIA eventually joined in support of the Industry Proposal. *See* AMTA, SMR WON, PCIA and Nextel *Ex Parte* Filing (September 6, 1996).

[129] *Id.*

[130] *Id.* at 2-3.

[131] *Id.* at 3.

[132] *Id.*

availability of enhanced services on contiguous channel blocks in the upper 200 channels.[133]

59. The commenters supporting the Industry Proposal also argue that it will result in a faster, less resource-intensive process for settling the entire 800 Mhz band, with less strain on Commission resources as well.[134] Although commenters acknowledge that auctions are a fast and generally efficient means of licensing new spectrum, they argue that small businesses will "have no chance of succeeding in gaining the spectrum they need for future growth if they must compete against larger entities with deeper pockets."[135] The commenters contend that, in the case of non-SMR licensees, the provision of communications services is not their primary business and they will not be in the position to compete with commercial operators at auction.[136] Commenters also argue that the Industry Proposal complies with Section 309(j) of the Communications Act, which requires the Commission to "use . . . negotiation, threshold qualifications, . . . and other means in order to avoid mutual exclusivity in application and licensing proceedings."[137] They argue that the proposed settlement process meets this statutory goal by establishing a negotiation process that will eliminate mutual exclusivity in many instances.[138]

60. Discussion. We agree with the supporters of the Industry Proposal that the public interest would be served by giving incumbents on the lower 230 channels some flexibility to expand beyond their 22 dBμV/m contours. However, we decline to adopt the Industry Proposal in its entirety. The settlement concept would, in essence, allow incumbents to divide all remaining unlicensed spectrum on the lower 230 channels among themselves, with no opportunity for new entrants to obtain or even compete for such spectrum. As set forth below, this raises both statutory and policy concerns that prevent us from endorsing the proposal.

61. First, by restricting the settlement process to incumbents, the Industry Proposal would foreclose new entrants from obtaining spectrum on any of the lower 230 channels that are subject to a settlement among incumbents. In any market where all of the channels in an EA were allocated by such settlements, the result would be that no opportunities for geographic licensing would be available to new entrants. The Industry Proposal would also preclude competition in the licensing process and restrict the number of potential applicants who can obtain licenses. Thus, it could yield a higher concentration of licenses than would result if non-incumbents were allowed to compete for the spectrum at the same time. We conclude that allowing only incumbent licensees to obtain rights to an entire EA while foreclosing opportunities for new entrants would be at odds with our goals of promoting economic competition in the 800 MHz SMR service and avoiding an undue concentration of licenses.[139] The approach we adopt herein, unlike the Industry Proposal, would encourage participation of new entrants, including small businesses, and, therefore, promote vigorous economic competition and avoid excessive concentration of licenses.

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[133] *Id.*

[134] *Id.* at 4.

[135] *Id.* at 5.

[136] *Id.* at 6.

[137] SMR WON, AMTA, Nextel Joint Reply Comments at 6 (*citing* 47 U.S.C. § 309(j)(6)(E)).

[138] *Id.*

[139] *See* 47 U.S.C. §§ 257 and 309(j)(3)(B).