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

In the Matter of	)	
	)	
Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service	)	WT Docket No. 98-169 RM-8951
	)	
Amendment of Part 95 of the Commission's Rules to Allow Interactive Video and Data Service Licensees to Provide Mobile Services	)	WT Docket No. 95-47 RM-8476 (proceeding terminated)

ORDER, MEMORANDUM OPINION AND ORDER AND NOTICE OF PROPOSED RULEMAKING

Adopted: September 15, 1998 **Released:** September 17, 1998

Comment Date: October 30, 1998
Reply Comment Date: November 25, 1998
Comments to be filed in WT Docket No. 98-169 only.

By the Commission:

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I. INTRODUCTION

1. In this *Order (Order), Memorandum Opinion and Order (MO&O) and Notice of Proposed Rulemaking (Notice)*, we undertake a comprehensive examination of the Commission's regulations governing the licensing and use of frequencies in the 218-219 MHz band, allocated to the Interactive Video and Data Service (IVDS) in the Personal Radio Services.[1] IVDS is a point-to-multipoint, multipoint-to-point, short distance communications service in which licensees may provide information or services to individual subscribers within a service area, and subscribers may provide interactive responses.[2] These systems use radio channels in the 218-219 MHz band for fixed and mobile services between the licensee's cell transmitter station (CTS) and the subscriber's response transmitter unit (RTU), or between two CTSs.[3] In the *Order*, we address issues regarding the IVDS installment payment portfolio. In the *MO&O*, we redesignate this service as the "218-219 MHz Service," and resolve matters raised in petitions for reconsideration of the Commission's *Mobility Report and Order*.[4] In the *Notice*, we examine ways to maximize the efficient and effective use of the 218-219 MHz Service, both on our own motion, and in response to issues raised in a Petition for Rulemaking filed by Euphemia Banas, *et al.* (collectively, "Petitioners"), RM-8951.[5] Finally, we seek comment on whether any of the general competitive bidding rules set forth in Part 1, subpart Q of the Commission's rules, as amended by the *Part 1 Third Report and Order*,[6] would be inappropriate for future auctions of 218-219 MHz Service licenses. We believe that

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[1] *See* 47 C.F.R. Part 95, Subpart F.

[2] 47 C.F.R. § 95.803(a).

[3] 47 C.F.R. §§ 95.803(b), 95.805(a)-(b), (e).

[4] Amendment of Part 95 of the Commission's Rules to Allow Interactive Video and Data Service Licensees to Provide Mobile Service to Subscribers, WT Docket No. 95-47, *Report and Order*, 11 FCC Rcd 6610 (1996) (*Mobility Report and Order*).

[5] Petition for Rulemaking of Euphemia Banas, Trans Pacific Interactive, Inc., Wireless Interactive Return Path, LLC, New Wave Communications, LLC, Loli, Inc., Multimedia Computer Communication, Inc., Southeast Equities, Inc., Robert H. Steele, MAR Partnership, IVDS On-Line Partnership, A.B.R. Communications Inc., IVIDCO, LLC, Vision TV, Dunbar TV Corp., and Legacy TV, Inc. (Sept. 4, 1996) ("Petition for Rulemaking"); Letter Amendment to Petition for Rulemaking, RM-8951 (Jan. 28, 1997) ("Letter Amendment"); Second Letter Amendment to Petition for IVDS Rulemaking, RM-8951 (Feb. 26, 1997) ("Second Letter Amendment"); Third Letter Amendment to IVDS Petition for Rulemaking, RM-8951 (Mar. 13, 1998) ("Third Letter Amendment").

[6] Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, WT Docket No. 97-82, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374 (1997), *errata*, 13 FCC Rcd 4621 (WTB 1998) *and* 13 FCC Rcd 10274 (WTB 1998) (*Part 1 Third Report and Order*).

these actions will result in a regulatory framework that will promote efficient use of spectrum, foster competition, and facilitate technological innovation in the 218-219 MHz band.

II. EXECUTIVE SUMMARY

2. As the agency charged with management of the non-government radio frequency spectrum, we continually seek to improve the efficiency of spectrum use, reduce the regulatory burden on spectrum users, encourage competition and provide services to the largest feasible number of users.[7] We believe our proposals herein help further these goals.[8]

3. The following is a synopsis of our principal decisions and major proposals:

Order

- Pending resolution of the issues raised in the *Notice*, the Commission will not act on properly filed grace period requests from IVDS licensees, and the late payment fee and automatic cancellation provisions of Section 1.2110(f)(4) of the Commission's rules will not apply to such IVDS licensees, until such time as these grace period requests are addressed.

- The late payment fee and automatic cancellation provisions of Section 1.2110(f)(4) of the Commission's rules are suspended during the pendency of the rulemaking initiated by the *Notice* for IVDS licensees that have remitted adequate installment payments as of March 16, 1998.

Memorandum Opinion and Order

- Redesignates this service as the "218-219 MHz Service" to reflect the breadth of services evolving in this spectrum.

- Dismisses the request that the Commission eliminate the 100 milliwatt power limitation on mobile RTU operation, in light of our request for comment on the issue in the *Notice*.

- Denies the request that the Commission expand the RTU duty cycle limitation to service areas at least ten miles outside the Grade B contour of a TV Channel 13 facility.

- Clarifies that CTS-to-CTS communications are subject to general interference protections.

- Clarifies that 218-219 MHz Service licensees may use the public switched network (PSN) or commercial mobile radio services (CMRS) facilities for internal system communications.

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[7] 47 U.S.C. § 332(a).

[8] While our proposals are designed to foster service in the 218-219 MHz band, the Commission makes no representations or warranties about the use of this spectrum for particular services. An FCC auction represents an opportunity to become an FCC licensee in this service, subject to certain conditions and regulations, and does not constitute an endorsement by the FCC of any particular services, technologies or products, nor does an FCC license constitute a guarantee of business success. Applicants for an auction of FCC licenses should perform their individual due diligence before proceeding as they would with any new business venture.

- Denies the request that the Commission undertake annual reviews of 218-219 MHz Service licensee system use.

Notice of Proposed Rulemaking

- Revisits the regulatory status and permissible uses of licenses in the 218-219 MHz Service, and seeks comment on allowing licensees to provide both common carrier and private services.

- Proposes to extend the license term for stations licensed in the 218-219 MHz Service from five to ten years, which would result in a reamortization of installment plan principal and interest payments from three to eight years.

- Proposes to grant all properly filed 218-219 MHz Service licensee grace period requests pending as of the effective date of the proposed reamortization, and allow all non-defaulting licensees the option of retaining their licenses under reamortized payment obligations or returning their licenses to the Commission for reauction (*i.e.*, amnesty).

- Proposes to increase buildout flexibility for the 218-219 MHz Service by eliminating the three-year and five-year construction benchmarks currently required, seeks comment on allowing 218-219 MHz Service licensees to meet their build-out requirement through a "substantial service" showing, and seeks comment on how to apply the anti-trafficking rule to licenses granted pursuant to lotteries under the proposed construction benchmark scheme.

- Seeks comment on whether to allow the same entity to own or control both A and B licenses in a single market; what impact such a rule change would have on competition; and whether existing substitute services exist.

- Proposes that licensees should be permitted to partition and disaggregate their licenses, and seeks comment on what limits, if any, should be placed on a licensee's ability to partition its service area and disaggregate its spectrum.

- Seeks comment on several technical matters, including raising the 100 milliwatt restriction on mobile RTUs, changing or eliminating duty cycle requirements, and easing tower height and transmitter power ratio rules.

- Seeks comment on whether any of the general competitive bidding rules set forth in Part 1, subpart Q of the Commission's rules would be inappropriate for future auctions of 218-219 MHz Service licenses.

III. BACKGROUND

4. IVDS was established in response to a petition for rulemaking filed by TV Answer, Inc. (TV Answer) (now known as EON Corporation (EON)), a company proposing a system that would provide interactivity capabilities to television viewers.[9] In the *1992 Allocation Report and Order*,[10] the

[9] Amendment of Parts 0, 1, 2 and 95 of the Commission's Rules to Provide for Interactive Video Data Services, GEN Docket No. 91-2, *Notice of Proposed Rule Making*, 6 FCC Rcd 1368 (1991) (*Allocation Notice*).

Commission established a frequency allocation at 218-219 MHz for IVDS, allowing a 500 kilohertz frequency segment to two licensees in each of the 734 cellular-defined service areas (306 Metropolitan Statistical Areas (MSAs) and 428 Rural Service Areas (RSAs)).[11] When the Commission adopted the service rules governing IVDS in the *1992 Allocation Report and Order*, it decided, *inter alia*, to regulate IVDS as a private radio service, and to establish licensing criteria such as a five-year license term, restrictions on ownership of both frequency segments in a given market, and construction benchmarks.[12] We designed technical requirements that would permit the spectrum allocation for IVDS as sought by TV Answer and reduce the potential for harmful interference to nearby operations, including reception of TV Channel 13 broadcasts in the 210-216 MHz band.[13] We later modified the IVDS construction benchmark scheme,[14] and, in our *Mobility Report and Order*, we authorized use of this spectrum to provide mobile as well as fixed operation.[15]

5. In the Omnibus Budget Reconciliation Act of 1993 (*1993 Budget Act*), Congress authorized the Commission to award licenses for certain spectrum-based services by competitive bidding (*i.e.*, auctions).[16] In the *Competitive Bidding Second Report and Order*, the Commission determined that IVDS licenses should be awarded through competitive bidding, and prescribed certain general rules and procedures to be used for all auctionable services.[17] In the *Competitive Bidding Fourth Report and Order*, we established specific auction procedures for IVDS, setting forth auction methodology and payment procedures,[18] and incorporating by reference many of the general rules and procedures set forth in the *Competitive Bidding Second Report and Order*, such as the installment payment and associated grace

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[10] Amendment of Parts 0, 1, 2 and 95 of the Commission's Rules to Provide Interactive Video and Data Services, GEN Docket No. 91-2, *Report and Order*, 7 FCC Rcd 1630, 1630-33 (1992) (*1992 Allocation Report and Order*), *on recon.*, *Memorandum Opinion and Order*, 7 FCC Rcd 4923 (1992), *further recon.*, *Second Memorandum Opinion and Order*, 8 FCC Rcd 2787 (1993).

[11] *1992 Allocation Report and Order*, 7 FCC Rcd at 1630-33. The 218.0-218.5 MHz block is frequency segment A, and the 218.5-219.0 MHz block is frequency segment B. 47 C.F.R. § 95.853(a).

[12] *1992 Allocation Report and Order*, 7 FCC Rcd at 1637-41.

[13] *Id.* at 1633-37.

[14] *See* Amendment of Part 95 of the Commission's Rules to Modify Construction Requirements for Interactive Video and Data Service (IVDS) Licenses, WT Docket No. 95-131, *Report and Order*, 11 FCC Rcd 2472 (1996) (eliminating the one-year construction benchmark) (*One-Year Construction Report and Order*).

[15] *Mobility Report and Order*, 11 FCC Rcd 6610.

[16] Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 312, 387 (1993).

[17] Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348 (1994) (*Competitive Bidding Second Report and Order*), *on recon.*, *Second Memorandum Opinion and Order*, 9 FCC Rcd 7245 (1994).

[18] Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Fourth Report and Order*, 9 FCC Rcd 2330 (1994) (*Competitive Bidding Fourth Report and Order*), *on recon.*, *Sixth Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd 19341 (1996) (*Competitive Bidding Sixth MO&O/Further Notice*).

period rules.[19] In addition, the *Competitive Bidding Fourth Report and Order* established provisions such as installment payments to ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women (collectively, "designated entities") are afforded a meaningful opportunity to participate in IVDS auctions.[20] More recently, in the *Part 1 Third Report and Order*, we streamlined the general competitive bidding procedures to provide a uniform set of Part 1 provisions to be applied to all auctionable services, including IVDS.[21] The new Part 1 license-related payment rules apply to existing IVDS licensees effective March 16, 1998.[22]

6. The first eighteen IVDS system licenses (two licenses in nine of the top ten MSAs) were awarded by lottery held September 15, 1993, and granted on March 28, 1994.[23] Subsequently, utilizing the procedures adopted in the *Competitive Bidding Fourth Report and Order*, we held the first auction for IVDS licenses on July 28 and 29, 1994, covering the remaining 594 MSA licenses.[24] On January 18, 1995 and February 28, 1995, the Commission conditionally granted licenses to the winning bidders, subject to the bidder meeting the terms of the auction rules, including down payment requirements.[25]

7. On September 4, 1996, Petitioners filed the Petition for Rulemaking, seeking a change in the IVDS license term from five to ten years, with a corresponding extension of installment payment amortization.[26] The Petition for Rulemaking was later amended with requests for regulatory relief on other

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[19] *See, e.g.*, 47 C.F.R. § 95.816(d)(3) (1994) (referencing 47 C.F.R. § 1.2110 (1994)).

[20] *Competitive Bidding Fourth Report and Order*, 9 FCC Rcd 2336-40. The Commission offered two other designated entity preferences in the IVDS auction: a tax certificate program, and bidding credits for businesses owned by minorities and/or women. *Id.* We eliminated the tax certificate program after Congress repealed our authorizing statute, 26 U.S.C. § 1071. *Competitive Bidding Sixth MO&O/Further Notice*, 11 FCC Rcd at 19360. We subsequently revised the eligibility for bidding credits to race- and gender-neutral criteria in light of the Supreme Court's decisions in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) and *United States v. Virginia*, 518 U.S. 515 (1996). *See* Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Tenth Report and Order*, 11 FCC Rcd 19974, 19981-85 (1996), *recon. pending*.

[21] *See Part 1 Third Report and Order*, 13 FCC Rcd 374.

[22] *Id.* at 385. Summary of the *Part 1 Third Report and Order* appeared in the Federal Register on January 15, 1998, *see* 63 Fed. Reg. 2315, so the revised license-related payment terms took effect on March 16, 1998 (*i.e.*, 60 days after publication of the rule in the Federal Register).

[23] Public Notice, Interactive Video and Data Service Licenses Granted, Mimeo No. 42412 (released Mar. 30, 1994). The September 1993 IVDS lottery was permitted under the *1993 Budget Act* (passed Aug. 1993), the pertinent applications having been accepted for filing by the Commission prior to July 26, 1993. *1993 Budget Act* § 6002(e).

[24] Public Notice, Announcing High Bidders for 594 Interactive Video and Data Service (IVDS) Licenses, Mimeo No. 44160 (released Aug. 2, 1994), *erratum*, Public Notice, Mimeo No. 44265 (released Aug. 9, 1994).

[25] *See* News Release, Interactive Video and Data Service (IVDS) Applications to be Granted January 18, 1995, Mimeo No. 51403 (Dec. 29, 1994) (listing first group of grants); Public Notice, Interactive Video and Data Service (IVDS) Applications to be Granted February 28, 1995, 10 FCC Rcd 3388 (1995) (listing second group of grants).

[26] The Commission designated the Petition for Rulemaking as RM-8951. *See* Public Notice, Report No. 2166 (Nov. 22, 1996) (setting comment date of Dec. 23, 1996). Comments in support of the Petition for Rulemaking were timely filed by ITV, Inc. and IVDS Affiliates, LC (ITV/IALC), In-Sync Interactive Corporation (In-Sync), and

issues such as construction benchmarks, ownership limitations, and technical restrictions.[27] During the pendency of the Petition for Rulemaking, the IVDS License Holders Committee, an ad-hoc coalition, informally contacted Commission staff with similar requests.[28] We received no comments in opposition to the Petition for Rulemaking.

8. On December 4, 1996, the Wireless Telecommunications Bureau ("Bureau") announced a February 18, 1997 start date for an auction of 981 IVDS licenses, consisting of the 856 RSA licenses, and 125 MSA licenses being reauctioned because the first auction winners were found in default.[29] Then, on January 29, 1997, the Bureau announced postponement of the IVDS auction, "to give the Commission an opportunity to consider [the] Petition for Rulemaking and numerous informal requests of potential bidders and license holders seeking to obtain additional flexibility for the service."[30]

IV. ORDER

9. *Background.* In authorizing the use of auctions to award licenses, Congress directed the Commission to ensure that designated entities are given the opportunity to participate in the provision of spectrum-based services.[31] In accordance with this statutory mandate, the Commission's competitive bidding rules for the first auction of IVDS licenses allowed winning bidders that qualified as small businesses to pay 20 percent of their net bid price(s) as a down payment and the remaining 80 percent in installments over the five-year term of the license(s), with interest only paid for the first two years, and interest and principal payments amortized over the remaining three years.[32] The first interest payment, due March 31, 1995, was deferred to June 30, 1995 pursuant to administrative action by the Office of Managing Director.[33] The Bureau further stayed the date for making the initial interest payment pending Commission resolution of licensees' substantive requests related to the payment requirements.[34] The stay

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Progressive Communications, Inc. (Progressive).

[27] *See* Letter Amendment; Second Letter Amendment; and Third Letter Amendment.

[28] *See, e.g.*, Letter from Michele C. Farquhar, Chief, Wireless Telecommunications Bureau to Donald F. Lounibos, IVDS License Holders Committee (Jan. 8, 1997) (responding to issues raised by the Committee at a meeting held with Commission staff on November 13, 1996, and in a follow-up electronic mail correspondence).

[29] Public Notice, Auction of Interactive Video and Data Service (IVDS) – Auction Notice and Filing Requirements for 981 IVDS Licenses Scheduled for February 18, 1997, 11 FCC Rcd 20950 (1996).

[30] Public Notice, Wireless Telecommunications Bureau Postpones February 18, 1997 Auction Date for 981 Interactive Video and Data Service (IVDS) Licenses, 12 FCC Rcd 1389 (1997).

[31] *See* 47 U.S.C. § 309(j)(4)(D).

[32] 47 C.F.R. § 95.816(d)(3) (1994) (incorporating by reference 47 C.F.R. § 1.2110 (1994)).

[33] Public Notice, Quarterly Installment Payments for IVDS "Auction" Licensees to Begin June 30, 1995, Mimeo No. 53031 (released Mar. 29, 1995).

[34] Interactive Video and Data Service (IVDS) Licensees, Request for Stay to Postpone Commencement of Installment Payment Program, *Order*, 11 FCC Rcd 3031 (WTB 1995).

was lifted on January 5, 1996, with licensees required to make the interest payments back-due from March 31, 1995 and June 30, 1995.[35] Although the interest payments due September 30, 1995 and December 31, 1995 remained uncollected (hereinafter, the "Suspension Interest"), we denied requests to "set-back" the payment schedule.[36] Therefore, the first installment payment consisting of principal and interest was due March 31, 1997.

10. Pursuant to the installment payment rules in effect for payments due prior to March 16, 1998,[37] any licensee whose installment payment is more than 90 days past due is in default, unless a "grace period" request is filed prior to the default date.[38] Specifically, in anticipation of default on one or more installment payments, a licensee could request that the Commission grant a three- to six- month grace period during which no installment payments need be made.[39] The licensee would not be declared in default during the pendency of such request. If the Commission (or the Bureau upon delegated authority) grants the request, the licensee would not be considered in default during the grace period, and the interest that accrues while no payments are made is amortized by adding it to the other interest payments over the remaining term of the license.[40] Upon expiration of any grace period without successful resumption of payment, or upon default with no such request submitted, the license is cancelled automatically.[41]

11. In the *Part 1 Third Report and Order*, we modified the grace period provisions as applied to all existing licensees who are currently paying for their licenses in installments.[42] Thus, beginning with installment payments due on or after March 16, 1998, a licensee that does not make payment on an installment obligation when due will automatically have an additional 90 days in which to submit its required payment without being considered delinquent, but will be assessed a late payment fee equal to

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[35] *See* Interactive Video and Data Service (IVDS) Licensees, Various Requests by Auction Winners, *Order*, 11 FCC Rcd 1282, 1284 n.23 (1995) (*IVDS Omnibus Order*); Letter from Regina W. Dorsey, Chief, Billings and Collections Branch, Financial Operations Division, OMD to IVDS Licensees (Mar. 29, 1996); Interactive Video and Data Service (IVDS) Licenses – Request for Stay, *Order*, 12 FCC Rcd 13129 (1996).

[36] *IVDS Omnibus Order*, 11 FCC Rcd at 1285.

[37] As explained at footnote 22, *supra*, March 16, 1998 is the effective date of the grace period rule, as revised by the *Part 1 Third Report and Order*.

[38] 47 C.F.R. § 1.2110(e)(4) (1994). *See also* Public Notice, Reminder to Licensees with Installment Payment Plans: Availability of Grace Periods, 12 FCC Rcd 7971 (1997); Public Notice, Wireless Telecommunications Bureau Staff Clarifies "Grace Period" Rule for IVDS "Auction" Licensees Paying by Installment Payments, 10 FCC Rcd 10724 (1995).

[39] 47 C.F.R. § 1.2110(e)(4)(ii) (1994). In considering whether to grant a request for a grace period, the Commission (or the Bureau upon delegated authority) may consider, among other things, the licensee's payment history, including whether the licensee has defaulted before; how far into the license term the default occurs; the reasons for default; whether the licensee has met construction build-out requirements; the licensee's financial condition; and whether the licensee is seeking a buyer under an authorized distress sale policy. *Id.*

[40] *Id.*

[41] 47 C.F.R. § 1.2110(e)(4)(iii) (1994).

[42] *Part 1 Third Report and Order*, 13 FCC Rcd at 436.

five percent of the amount of the past due payment.[43] If the licensee fails to make the required payment within the first 90-day period, the licensee automatically will be provided a subsequent 90 days in which to submit its required payment without being considered delinquent, this time subject to a second, additional late payment fee equal to ten percent of the amount of the past due payment.[44] The licensee is not required to submit a filing to take advantage of these provisions. A licensee who fails to make payment within 180 days after an installment payment due date sufficient to pay all past-due late payment fees, interest, and principal, will be deemed to have failed to make full payment of its obligation and the license shall automatically cancel without further Commission action.[45] The late payment fee and automatic cancellation provisions described above do not apply to licensees with properly filed grace period requests until such time as the Commission (or the Bureau upon delegated authority) addresses these grace period requests.[46]

12. *Discussion.* As of March 16, 1998, the effective date of the revised grace period rule, the IVDS installment payment portfolio consisted of licensees that have remitted their requisite installment payments, licensees that have not remitted their requisite installment payments but have properly filed grace period requests under the former installment payment rules, and licensees that have not remitted their requisite installment payments and do not have grace period requests on file in conformance with the former rules. Petitioners request that the Commission forego acting on the pending grace period requests and not apply the revised installment payment rules to IVDS licensees until resolution of the proposals set forth in the *Notice* below in an initial Report and Order.[47] In that regard, Petitioners seek a waiver of the late payment fee and automatic cancellation provisions of the revised grace period rule for IVDS licensees until the Commission issues an initial order in this rulemaking.[48] In addition, the Commission has before it several requests from IVDS licensees for broader relief associated with the installment

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[43] *Id.* (codified at 47 C.F.R. § 1.2110(f)(4)(i)).

[44] *Id.* (codified at 47 C.F.R. § 1.2110(f)(4)(ii)).

[45] *Id.* at 438 (codified at 47 C.F.R. § 1.2110(f)(4)(iii)).

[46] "We further clarify that such licensees are not deemed to be in default on these licenses until such time as the Bureau issues a decision on these grace period requests." *Part 1 Third Report and Order*, 13 FCC Rcd at 442.

[47] *See* Third Letter Amendment (attaching Letter of Cyberforce L.L.C. to Magalie Roman Salas, Secretary, Federal Communications Commission at 3 (Feb. 26, 1998)); *see also* Letter of J. Jeffrey Craven to Jerome Fowlkes, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau at 2 (Feb. 11, 1997).

[48] *See* Third Letter Amendment at 1.

payment program.[49] Some licensees seek more modest relief, generally associated with the pendency of this rulemaking.[50] Other licensees request various types of payment deferral and/or restructuring.[51]

13. We believe that widespread cancellation of IVDS licenses through operation of the late payment fee and automatic cancellation provisions of the revised grace period rule would be inconsistent with many of the proposals made in the *Notice* below. Therefore, we will grant Petitioners' request to the extent that the Commission will not act on grace period requests until the rulemaking is resolved. Since the late payment fee and automatic cancellation provisions of the revised grace period rule do not apply to licensees with properly filed grace period requests until such time as those grace period requests are addressed,[52] there is no reason to grant a service-wide waiver of those provisions as Petitioners request. We also believe that IVDS licensees that have remitted adequate installment payments as of March 16, 1998, and thus did not have grace period requests on file when the revised rules took effect, should not be penalized through the operation of the late payment fee and automatic cancellation provisions of the revised grace period rule, insofar as the Commission will need time to evaluate the issues set forth in the *Notice*. Therefore, for those licensees, we suspend the operation of the late payment fee and automatic cancellation provisions of the revised grace period rule during the pendency of this rulemaking. In sum, the Commission will not assess late payment fees or cancel any IVDS license for which a properly filed grace period request is pending, or for which adequate installment payments were made as of March 16, 1998, until resolution of the issues raised in the *Notice* in an initial Report and Order. Licensees that have been delinquent in payment without properly filed grace period requests are in default of their payment obligations and will be notified by the Bureau regarding debt collection procedures.

14. All other requests for payment deferral or restructuring that are inconsistent with this *Order*, including those contained in the Miscellaneous Payment Relief Requests, are hereby denied. We conclude

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[49] *See* Petition for Special and Extraordinary Relief of MKS Interactive, Inc. (Mar. 12, 1996) ("MKS Petition"); Request for Modification of Interactive Video & Data Service ("IVDS") Installment Payment Obligations from a Quarterly to Annual Payment Schedule of J. Jeffrey Craven and Stephen E. Coran (Apr. 3, 1997) ("Craven/Coran Request"); Request for Continuance of Interest-Only Payments of Cyberforce, LLC (June 17, 1997) ("Cyberforce Request"); Letter in Support of Request for Modification of Interactive Video & Data Service ("IVDS") Installment Payment Obligations from a Quarterly to Annual Payment Schedule, from Denise B. Moline, P.C. (June 20, 1997) ("Moline Letter"); Letter Request of IVDS Interactive Acquisition Partners (June 27, 1997) ("IIAP Letter"); Application for Restructured Payment Schedule of S. Blair Elliott (July 1, 1997) ("Elliott Application"); Formal Proposal for Work-Out of Loli, Inc. (Mar. 6, 1998) ("Loli Proposal") (collectively, "Miscellaneous Payment Relief Requests").

[50] *See* Craven/Coran Request (requesting suspension of all IVDS installment payments during the pendency of the rulemaking; also requests modification of IVDS installment payment obligations from a quarterly to annual payment schedule); Moline Letter (supporting the Craven/Coran Request).

[51] *See* MKS Petition at 4-5 (seeks suspension of all payments due under the IVDS installment payment plan until IVDS licenses are commercially viable); Cyberforce Request at 1 (requesting interest-only payments to remain in effect until (a) the arrival of technology that will enable IVDS licensees to develop a bankable business plan for the construction and operation of the license; or (b) the operation of at least 1 nationwide network of IVDS licensees for a period of 6 months); IIAP Letter at 2 (requesting a general postponement of all IVDS principal payments for a minimum of two years, or until such time that a bank could refinance the installment debt); Elliott Application at 2 (seeking extension of installment payment terms from five to ten years, with interest only during the first five years and principal plus interest over the remaining five years); Loli Proposal at 3-4 (requesting a reduction in principal).

[52] *See supra* footnote 46 and accompanying text.

that the options presented in the *Notice* offer the most appropriate and fair method of resolving IVDS financial concerns, and we are reluctant to adopt any solutions that will only postpone these payment difficulties and further prolong uncertainty.[53] In that regard, we remind licensees that there is no suspension of the requirement to make quarterly payments under our installment payment rules, irrespective of our actions today, and that we will strictly enforce the late payment fee and automatic cancellation provisions of the revised grace period rule beginning with the first payment due upon sunset of the waiver.

V. MEMORANDUM OPINION AND ORDER

15. On May 16, 1996, the Commission adopted the *Mobility Report and Order*, in which we amended our rules to authorize mobile in addition to fixed operation for IVDS RTUs operated with an effective radiated power (ERP) of 100 milliwatts or less.[54] We decided that the output power of these mobile RTUs could be measured in terms of "mean power" rather than "peak power,"[55] and we eliminated the requirement that such units utilize automatic power controls.[56] In addition, we eliminated the IVDS duty cycle requirement for RTU operations outside of TV Channel 13 predicted Grade B contours.[57] Finally, we permitted direct CTS-to-CTS communications on a primary basis, enabling licensees to transmit point-to-point communications between fixed points within their systems.[58] We found that these amendments would provide additional flexibility for licensees to meet the communications needs of the public, which the record indicated may include commercial data distribution and inventory monitoring services, without increasing the likelihood of interference.[59] Timely petitions for reconsideration of the *Mobility Report and Order* were filed by Euphemia Banas, *et al.* (Banas) and the National Association

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[53] *Accord* Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Second Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd 16436, 16446 (1997) (*C Block Second Report and Order*).

[54] *Mobility Report and Order*, 11 FCC Rcd at 6613, 6617.

[55] The terms "mean power" and "peak power" (referred to as "peak envelope power") are defined at 47 C.F.R. § 2.1(c). Limited to a maximum of 100 milliwatts peak power output, a mobile RTU is precluded from transmitting more than 100 milliwatts. With a 100 milliwatt mean power output limit, however, the output power is limited to 100 milliwatts only over a time interval, thereby permitting the RTU output power at some points during the time interval (the modulation peaks) to exceed 100 milliwatts.

[56] *Mobility Report and Order*, 11 FCC Rcd at 6621. Automatic power control capability, included in the RTU circuitry, automatically adjusts the RTU power output to the minimum amount necessary for communication between the CTS and the RTU. This capability minimizes the possibility of an RTU causing interference to a television broadcast receiver. We implemented the automatic power control requirement for all RTUs in the *1992 Allocation Report and Order*, 7 FCC Rcd at 1635, 1648.

[57] *Mobility Report and Order*, 11 FCC Rcd at 6618-19. A transmitter "duty cycle" is a limit to the amount of time a transmitter can transmit during a specific time frame, which, in IVDS, minimizes the potential for interference to reception of TV Channel 13.

[58] *Id.* at 6621.

[59] *Id.* at 6611.

of Broadcasters (NAB); and ITV/IALC timely filed a Request for Clarification.[60] We address these filings below.

A. Service Designation

16. As a threshold matter, given the regulatory flexibility provided to 218-219 MHz band licensees in the *Mobility Report and Order*, we believe the service designation "Interactive Video and Data Service" no longer describes the breadth of different services evolving in the 218-219 MHz band. In addition to radio-based interactive television services,[61] the Commission has noted a myriad of services that licensees can offer, including "commercial data applications such as transmission of database information to point-of-sale terminals, home banking or downloading of data to personal computers, VCRs, or other consumer electronic products."[62] We are also aware of other uses of this spectrum, including two-way telemetry services such as remote meter reading and energy management operations,[63] inventory monitoring services,[64] a link between automatic teller machines (ATMs) and a bank's central computer,[65] alarm security functions,[66] cable television theft deterrence,[67] and stock transaction or quotation services.[68] Indeed, this list of applications is not exhaustive. Therefore, on our own motion, we redesignate this service as the "218-219 MHz Service," to eliminate any confusion regarding the service's existing

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[60] Petition for Reconsideration of Banas (filed July 25, 1996); Petition for Partial Reconsideration of NAB (filed July 25, 1996); Request for Clarification of ITV/IALC (filed July 1, 1996). *See* Public Notice, Report No. 2150, 61 Fed. Reg. 46807 (Sept. 5, 1996) (setting comment date of Sept. 20, 1996 and reply comment date of Sept. 30, 1996). Comments were timely filed by Concepts To Operations, Inc. (CTO), EON, Radio Telecom & Technology Inc. (RTT), NAB, and ITV/IALC. Reply Comments were timely filed by EON and NAB. Any filings in response to our resolution of these petitions should be filed under the new docket number.

[61] *See, e.g.*, *Allocation Notice*, 6 FCC Rcd at 1368.

[62] Amendment of Part 95 of the Commission's Rules to Allow Interactive Video and Data Service Licensees to Provide Mobile Service to Subscribers, WT Docket No. 95-47, *Notice of Proposed Rule Making*, 10 FCC Rcd 4981, 4981 n.2 (1995).

[63] *See 1992 Allocation Report and Order*, 7 FCC Rcd at 1638 n.83.

[64] *See One-Year Construction Report and Order*, 11 FCC Rcd at 2472.

[65] *See* Kingdon R. Hughes, Request for Waiver of Section 95.863 of the Commission's Rules, *Order*, 10 FCC Rcd 8642 (WTB 1995).

[66] *See* Petition for Rulemaking at 2.

[67] *See* In-Sync Comments at 2.

[68] *Mobility Report and Order*, 11 FCC Rcd at 6614.

capabilities.[69] This change in nomenclature is procedural in nature under the Administrative Procedure Act, and consequently, the requirement of notice and comment rulemaking does not apply.[70]

B. Operation of Mobile RTUs

17. *Background.* As we stated in the *Mobility Report and Order*, by definition, mobility makes it more likely that an RTU will transiently operate in areas where interference may result.[71] We therefore recognized that allowing unrestricted mobile operations may promote flexibility within the service, but it also increases the interference potential with respect to the operation of licensees in other services.[72]

18. *Discussion.* Banas requests that the Commission eliminate the 100 milliwatt ERP limitation on mobile RTU transmission, and instead, require the incorporation of automatic power control capability in mobile RTUs.[73] In support of its request, Banas states that: (1) our limitation on mobile RTU power is unreasonable compared to our treatment of fixed RTUs or CTSs, which operate at a much higher ERP without causing interference;[74] (2) the limitation raises the cost and amount of time necessary to construct a network;[75] and (3) other interference protection rules ensure that 218-219 MHz Service stations do not cause interference to other radio services.[76] ITV/IALC supports Banas' request,[77] while NAB opposes it.[78] In addition, NAB objects to measuring RTU and CTS output power in terms of mean power rather than peak power.[79] As ITV/IALC point out, NAB appears to assume that the Commission changed the power limit measurements for all RTUs and CTSs to mean power.[80] We reiterate that mean power measurement currently only applies to *mobile* RTUs, and we will address NAB's objection solely in that context. EON

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[69] The 218-219 MHz band is allocated on a primary basis to the IVDS operations. 47 C.F.R. § 2.106 Footnote US317. Licensees are also assigned to these frequencies on a secondary basis pursuant to 47 C.F.R. § 90.259. Irrespective of our redesignation of "IVDS" to the "218-219 MHz Service," any current or future rules promulgated at 47 C.F.R. Part 95, Subpart F, apply only to those entities licensed to use the 218-219 MHz band on a primary basis.

[70] *See* 5 U.S.C. § 553(b)(A).

[71] *Mobility Report and Order*, 11 FCC Rcd at 6617.

[72] *Id.*

[73] Banas Petition for Reconsideration at 3-7.

[74] *Id.* at 3-4.

[75] *Id.* at 5-6.

[76] *Id.* at 6-7 (referencing Section 95.861 of the Commission's Rules, discussed at Section V.D.1., *infra*).

[77] ITV/IALC Comments at 2-3.

[78] NAB Comments at 3-6.

[79] NAB Petition for Partial Reconsideration at 3-6.

[80] ITV/IALC Comments at 5.

opposes NAB's request,[81] as does CTO, who states that if the Commission returns to peak power measurement for mobile RTUs, mobile RTUs should be allowed to transmit at the same peak power as fixed RTUs (*i.e.*, 20 watts).[82] RTT similarly suggests that the Commission allow mobile RTUs to transmit at either mean power of 100 milliwatts or peak power of 20 watts, whichever is less based on the licensee's particular operation.[83] In reply, NAB states that it would support this hybrid approach.[84]

19. We find Banas' claim that the 100 milliwatt power limit raises the cost and amount of time necessary to construct a network as unpersuasive because 218-219 MHz Service licensees are not required to provide service to mobile RTUs -- it is merely one type of service licensees may provide. Moreover, we expect that licensees will factor additional cost considerations into their decision making process concerning what services to provide their subscribers and how much to charge for them. We also disagree with NAB's request to measure output in terms of peak power rather than mean power. We purposefully chose the mean power measurement for these low power mobile RTUs because we concluded that a mean power standard would provide licensees with greater economic flexibility and efficiency in equipment design, while only insignificantly increasing the risk of interference to TV Channel 13 operations.[85] Nonetheless, the combination of suggestions in the petitions for reconsideration and associated comments (*i.e.*, raising the ERP limit along with requiring automatic power controls, and measuring output power in terms of peak power if we do so) leads us to question whether the 100 milliwatt ERP limit may be unnecessarily low. As the record does not provide the empirical data to support a reasonable alternative, we dismiss Banas' and NAB's petitions with respect to the mobile RTU power limit issue, and reexamine the issue *de novo* in the *Notice* portion of this proceeding.[86]

C. Duty Cycle

20. *Background.* In the *Mobility Report and Order*, we eliminated the duty cycle requirement for: (1) fixed RTUs operating outside a TV Channel 13 predicted Grade B contour; and (2) mobile RTUs operating in system service areas that do not overlap with a TV Channel 13 predicted Grade B contour.[87] In doing so, we noted that in such areas, TV Channel 13 operations have no expectation of protection from interference, thereby rendering the duty cycle restriction unnecessary, and furthermore, that the duty cycle limitation was an additional safeguard against interference rather than one of the principal ways we intended to minimize the interference potential of the 218-219 MHz Service.[88]

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[81] EON Comments at 3.

[82] CTO Comments at 2.

[83] RTT Comments at 3.

[84] NAB Reply at 5.

[85] *Mobility Report and Order*, 11 FCC Rcd at 6617.

[86] *See* Section VI.G., *infra*.

[87] *Mobility Report and Order*, 11 FCC Rcd at 6619.

[88] *Id.* at 6618-19.

21. *Discussion.* CTO, EON and ITV/IALC support our decision, which reflects a balancing of competing interests on this issue.[89] NAB, however, requests that the Commission expand this interference protection requirement to include an area far outside the TV Channel 13 Grade B contour (*i.e.*, at least ten miles),[90] but presents no evidence suggesting that interference would be caused to TV Channel 13 reception as a result of RTU transmissions under the revised duty cycle standards set forth in the *Mobility Report and Order* (generally determined by TV Channel 13 Grade B contour overlap). As a result, we believe that expanding the area of RTU duty cycle limits ten miles further in all directions would burden 218-219 MHz Service technical operations with no attendant public interest benefits. We therefore deny NAB's request because it is inconsistent with our goal of providing flexibility to licensees to design their systems in the most efficient way. We also deny NAB's request for expanded duty cycle regulations in anticipation of advanced television (ATV) implementation. This request was fully considered in the *Mobility Report and Order*, in which we stated that we expect that whatever system is adopted will generally be more immune to interference from signals in adjacent spectrum than is the case with current analog TV systems.[91] NAB has submitted no evidence to refute that decision. We do, however, solicit comment on the extent to which the duty cycle rules can be relaxed or eliminated in the *Notice* portion of this proceeding.[92]

D. Limitations on Types of Service

1. CTS-to-CTS Communications and Section 95.861

22. *Background.* Households receiving over-the-air television broadcasts are provided interference protection from any component of a 218-219 MHz Service system pursuant to Section 95.861 of our rules. Specifically, under the rule, a 218-219 MHz Service licensee must: (1) notify all households within its service area located within a TV Channel 13 station Grade B predicted contour of the potential for interference to television reception from the 218-219 MHz Service system;[93] (2) upon request, provide and install a filter, free of charge, to any household within a TV Channel 13 station Grade B predicted contour that experiences interference due to a component CTS or RTU;[94] and (3) investigate and eliminate interference to television broadcasting and reception due to a component CTS or RTU within 30 days of

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[89] CTO Comments at 3; EON Comments at 4; ITV/IALC Comments at 5-7.

[90] NAB Petition for Partial Reconsideration at 8. Despite NAB's concern about duty cycle requirements for CTS facilities, we note that, in fact, duty cycle limitations apply only to RTUs. *See* 47 C.F.R. § 95.863.

[91] *Mobility Report and Order*, 11 FCC Rcd at 6619.

[92] *See* Section VI.G., *infra*.

[93] 47 C.F.R. § 95.861(c). All reasonable forms of notification satisfy this requirement, with the selection of the particular means to the discretion of the 218-219 MHz Service licensee. *See* Request for Interpretation of Waiver of Section 95.861(c), Concerning Notification of Potential Interference from Interactive Video and Data Service (IVDS) Systems, *Order*, 11 FCC Rcd 12187 (WTB 1996).

[94] 47 C.F.R. § 95.861(d).

receipt of a written interference complaint, and if it fails to do so, the CTS or RTU causing the interference must discontinue operation.[95]

23. *Discussion.* NAB seeks clarification that the fixed point-to-point direct CTS-to-CTS communications we authorized in the *Mobility Report and Order* are subject to these general interference protection regulations.[96] Although we believe that our rules regarding 218-219 MHz Service interference protection requirements are clear, we nonetheless reiterate our policy in response to NAB's request. Specifically, all transmissions related to the 218-219 MHz Service, including the CTS-to-CTS communications now permitted under Section 95.805(b) of our rules,[97] are subject to the Section 95.861 general interference protections described above.[98]

2. Use of PSN or CMRS for Internal Control Purposes

24. *Background.* Under our current rules, mobile RTUs are prohibited from interconnecting with the PSN or CMRS providers.[99]

25. *Discussion.* ITV/IALC states that the Commission did not define the phrase "interconnection with the PSN" when it adopted this rule, and seeks clarification that this prohibition does not prohibit any use of the PSN or CMRS providers for a licensee's internal control purposes.[100] NAB opposes such an interpretation as inconsistent with what it claims to be the purposes of "IVDS" (enabling interactive enhancement of broadcast material).[101] It is also concerned that if an RTU is interconnected with the PSN, the wire providing the connection could act as an antenna, presumably increasing the potential for interference to television reception.[102]

26. A licensee's use of the PSN or CMRS providers for internal control purposes is not an "interconnected service."[103] Since our rules do not limit the method by which a 218-219 MHz Service licensee can configure internal control communications, we clarify, at ITV/IALC's request, that the mobile

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[95] 47 C.F.R. § 95.861(e). An affected television station, an affected viewer, or the Commission can notify the licensee in writing of an interference complaint. *Id.*

[96] NAB Petition for Partial Reconsideration at 9.

[97] 47 C.F.R. § 95.805(b).

[98] 47 C.F.R. § 95.861.

[99] 47 C.F.R. § 95.805(c).

[100] ITV/IALC Request for Clarification at 2.

[101] NAB Comments at 6-7. EON opposes NAB's view and supports ITV/IALC's construction of the regulation. EON Reply at 2-4.

[102] NAB Comments at 7.

[103] *See* Implementation of Sections 3(n) and 332 of the Communications Act – Regulatory Treatment of Mobile Services, GN Docket No. 93-252, *Second Report and Order*, 9 FCC Rcd 1411, 1435 (1994) (*CMRS Second Report and Order*).

RTU prohibition on interconnection with the PSN or CMRS providers does not limit a 218-219 MHz Service licensee's use of the PSN or CMRS for internal control purposes. Although we reexamine interconnection issues in the *Notice* herein,[104] this clarification does not affect the current prohibition on PSN or CMRS interconnection by mobile RTUs operated by 218-219 MHz Service licensees. We previously considered and rejected NAB's contention that the 218-219 MHz band should be developed primarily as an interactive service for use in conjunction with the broadcast industry.[105] In doing so, we reasoned that consumers, through market forces, should determine the variety of uses for this allocation, whether broadcast-related or otherwise.[106] NAB's interference concern is adequately addressed by the technical standards for connection of terminal equipment to the PSN contained in Part 68 of our rules.[107]

3. Annual Reviews

27. Finally, NAB requests that we undertake annual review of the services provided by 218-219 MHz Service licensees to assure that licensees are not using their facilities for unintended purposes or for services duplicative of services provided by other licensed communications operators.[108] EON opposes the request as unnecessary and a burdensome regulatory procedure.[109] As both EON and ITV/IALC point out, this request is contrary to current FCC policy, which allows the marketplace to develop efficient uses for spectrum and encourages competition between varied communications operators.[110] We agree that such a requirement would constitute unnecessary and burdensome regulation on 218-219 MHz Service licensees and places an undue burden on the agency. Further, such a requirement is unprecedented for a personal radio service, and would serve no regulatory purpose in light of our proposals regarding permissible uses of this spectrum.[111] We therefore deny NAB's request.

VI. NOTICE OF PROPOSED RULEMAKING

28. *Background.* We initiate this rulemaking on our own motion and in response to the issues raised by the Petitioners. On our own motion, we address the transfer restriction that applies to lottery-won licenses in the 218-219 MHz Service, partitioning and disaggregation in the 218-219 MHz Service, and the applicability of Part 1 standardized auction rules to future auctions of 218-219 MHz Service licenses. In their September 4, 1996 filing, Petitioners request that the Commission amend Section

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[104] *See* Section VI.A., *infra.*

[105] *Mobility Report and Order*, 11 FCC Rcd at 6615.

[106] *Id.*

[107] *See* 47 C.F.R. Part 68.

[108] NAB Petition for Partial Reconsideration at 9.

[109] EON Comments at 6.

[110] EON Comments at 6; ITV/IALC Comments at 7.

[111] *See* Section VI.A., *infra.*

95.811(d) of its rules to extend the term of a 218-219 MHz Service station license from five to ten years.[112] Petitioners further request that we allow 218-219 MHz Service licensees that qualify for installment payments to extend the installment payment period over the new ten-year license term.[113]

29. In their January 28, 1997 amendment, Petitioners also request the following: (1) a reamortization plan consisting of interest-only payments for the first five years, followed by principal and interest payments over the final five years;[114] (2) elimination of the construction benchmarks set forth in Section 95.833;[115] (3) elimination of Section 95.813(b)(1), which precludes one 218-219 MHz Service licensee from having any financial interest in the other 218-219 MHz Service license in the same market;[116] (4) grant of the then-pending petition for reconsideration of the *Mobility Report and Order* with regard to elimination of the 100 milliwatt ERP limit on mobile RTU operation;[117] (5) elimination of Section 95.863(a), the duty cycle limitations;[118] and (6) elimination of Section 95.859(a)(2), the height and power limitations for CTS antennas located beyond a boundary line 10 miles outside the predicted Grade B contour of a TV Channel 13 station.[119]

30. Petitioners added three requests in their supplement filed on February 26, 1997: (1) elimination of the prohibition on RTU-to-RTU communications; (2) an additional spectrum allocation; and (3) clarification of several engineering issues in demonstrating compliance with construction benchmarks.[120] Finally, Petitioners supplemented their Petition for Rulemaking on March 13, 1998 with the following requests: (1) clarification that one-way transmission from two or more RTUs to a CTS is a permissible communication that would satisfy any construction requirements; (2) modification of Section 95.855 to delete the word "automatic" from the power control rule; (3) clarification of Section 95.861(c) concerning notification of potential interference from 218-219 MHz Service systems; and (4) the opportunity to choose among "work out" options for making installment payments that would include an amnesty component.[121]

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[112] Petition for Rulemaking at 2-9.

[113] *Id.* at 9-10.

[114] Letter Amendment at 1.

[115] *Id.* at 3-4.

[116] *Id.* at 4-5.

[117] *Id.* at 1.

[118] *Id.* at 2.

[119] *Id.* at 3.

[120] Second Letter Amendment (attaching Letter of James J. Keller, Myers Keller Communications Law Group, to Herbert Zeiler, Private Wireless Division, Wireless Telecommunications Bureau (Feb. 11, 1997)).

[121] Third Letter Amendment (attachment). In the *Order* portion of this document, we addressed Petitioners' additional request that the Commission forego acting on the pending grace period requests and waive the late payment fee and automatic cancellation provisions of the new grace period rule for 218-219 MHz Service licensees until resolution of the proposals set forth in the *Notice* in an initial Report and Order. *See* Section IV, *supra*.

31. *Discussion.* Our decision to postpone the February 1997 auction of RSA and defaulted MSA licenses was guided by our concern that our assessment to date regarding the principal uses and regulatory structure of the 218-219 MHz Service may not accurately reflect the breadth of services being developed in the 218-219 MHz band. We have observed the evolution of the wireless telecommunications industry since our *1992 Allocation Report and Order*, and we agree with Petitioners that it is appropriate to reexamine the current and future uses of, and demand for, the 218-219 MHz band, and to determine the appropriate regulatory models to be used for future licensing and regulation of this spectrum. Therefore, in this *Notice*, we seek to examine our rules to determine whether they should be modified to provide for maximum flexibility for 218-219 MHz Service licensees, and a regulatory structure that will enable these licensees to meet the public's current and future needs through the most technically and economically efficient use of this spectrum practicable.

A. Regulatory Status and Permissible Communications

32. *Background.* In the *1992 Allocation Report and Order*, we classified the 218-219 MHz band as a private radio service regulated under Part 95 of our rules (*i.e.*, Personal Radio Services), primarily because the proposed uses were to provide services "of a personal nature and offered on a subscription basis."[122] With the recent addition of mobile services as permissible communications, licensees can provide a variety of mobile, fixed, point-to-point, point-to-multipoint, and multipoint-to-point services.[123]

33. *Discussion.* We believe that in order to fully accommodate the wide array of service offerings emerging in the 218-219 MHz Service, and those contemplated for future development, we should change our approach to determining the regulatory status of 218-219 MHz Service licensees. Specifically, we propose to redesignate the 218-219 MHz Service from a strictly private radio service to a service that can be used for both common carrier and private operations, depending on the services offered by the licensee.[124] This is consistent with Commission precedent, in which we have concluded that authorizing a wide variety of services comports with our statutory authority and serves the public interest by fostering the provision of a mix of services.[125] In our regulation of other bands designated for both common carrier and private operations, we permit licensees to elect common carrier or private status

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[122] *1992 Allocation Report and Order*, 7 FCC Rcd at 1637.

[123] *Mobility Report and Order*, 11 FCC Rcd 6610.

[124] For example, as a common carrier, a 218-219 MHz Service licensee would be allowed to interconnect with the PSN or CMRS providers for other than internal control purposes. *See* Section V.D.2, *supra*. Similarly, RTU-to-RTU communication would be permissible. *See* Second Letter Amendment at 1. The proposed redesignation would also eliminate any ambiguity as to whether one-way communication constitutes a permissible use in the 218-219 MHz Service. *See* Third Letter Amendment (attachment at 2). *Accord* IIAP Letter at 2 (Commission should allow license holders to use the frequency for any purpose that would present a good business model).

[125] *See, e.g.*, Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, CC Docket No. 92-297, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 12545, 12636 (1997) (*LMDS Second Report and Order*); Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, ET Docket No. 94-32, *Second Report and Order*, 11 FCC Rcd 624, 630-35 (1995) (*GWCS Second Report and Order*). *Cf.* Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service, GN Docket No. 96-228, *Report and Order*, 12 FCC Rcd 10785, 10798-800 (1997) (*WCS Report and Order*).

in a manner that allows for a broad range of uses.[126] Similarly, for the 218-219 MHz Service, we propose to rely on applicants and licensees to specifically identify the type of service or services they intend to provide within the technical parameters of the spectrum allocation, and to require that they include sufficient detail to enable the Commission to determine whether the service will be offered as CMRS, private mobile radio services (PMRS), a common carrier fixed service, or a private fixed service. We propose that 218-219 MHz Service mobile service providers elect regulatory status as commercial mobile or private land mobile based on the three-prong statutory definition of CMRS,[127] as interpreted by the Commission in the *CMRS Second Report and Order*,[128] and for fixed operations, elect common carrier or private status based on the nature of their service offerings under the definitions set forth in Section 3 of the Communications Act of 1934, as amended ("Communications Act").[129] The regulatory status that the provider elects would determine the extent to which the applicant or licensee is subject to common carrier regulation.[130] We also propose to apply regulatory fees and license application requirements consistent with the election of common carrier or private status made by the licensee.

34. This approach should allow us to carry out our regulatory responsibilities without imposing an unnecessary regulatory limitation upon licensees. We note that our final determination of permissible communications in the 218-219 MHz Service will depend on our conclusions after reviewing the record in this proceeding. We seek comment on these proposals, or any alternatives, that will ensure that licensees can design their service offerings in response to market demand.

B. License Term

35. *Background.* Under our current rules, the term of each system or CTS licensed to operate in the 218-219 MHz Service is five years.[131] We adopted this license term in the *1992 Allocation Report and Order* in the context of awarding licenses by lottery "to reduce any potential for trafficking in licenses by persons who have no real interest in constructing," and as "consistent with the license term used in

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[126] *See, e.g.*, *LMDS Second Report and Order*, 12 FCC Rcd at 12638; *WCS Report and Order*, 12 FCC Rcd at 10845-47.

[127] 47 U.S.C. § 332(d) (service provided for profit; interconnected service; service available to the public).

[128] *CMRS Second Report and Order*, 9 FCC Rcd at 1425-48. We note here that we are addressing similar concerns in regard to regulatory status in the CMRS. *See* Amendment of the Commission's Rules to Permit Flexible Service Offerings for the Commercial Mobile Radio Services, WT Docket No. 96-6, *First Report and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd 8965 (1996).

[129] 47 U.S.C. § 153(10), (43), (44) & (46).

[130] If a service offering falls within the statutory definition that encompasses common carrier status, the application and subsequent license would be subject to Title II and the common carrier licensing requirements of Title III of the Communications Act and our rules. Otherwise, services would be provided on a non-common carriage basis, and the application and the license would be subject to Title III and certain other statutory and regulatory requirements, depending on the specific characteristics of the service. Any interested party would be able to challenge the regulatory status granted a 218-219 MHz Service licensee. *See, e.g.*, *WCS Report and Order*, 12 FCC Rcd at 10847.

[131] 47 C.F.R. § 95.811(d).

most other private radio services."[132] To support their request for a ten-year license term, Petitioners note that (1) in services with similar technologies and market areas, the license term is ten years;[133] (2) the use of auctions to award licenses negates the original intent of the five-year term (*i.e.*, discouraging trafficking of lottery-won licenses);[134] and (3) awarding licenses by auction requires a longer license term in which licensees (many of whom are small businesses) may secure adequate financing, develop viable services, and eventually recoup their initial investment.[135] Petitioners also contend that the extension of the license term would trigger a reamortization of the installment payments over the longer license term,[136] and request that the Commission offer 218-219 MHz Service licensees a choice of (i) fulfilling payment obligations with any changes thereto associated with adjustments adopted through this *Notice*; (ii) amnesty; or (iii) payment through a royalty-based schedule as an alternative to auction payments.[137]

1. Extension of the License Term

36. *Discussion.* We agree with Petitioners that auctionable service licensees should have consistent license terms. We continue to believe that licenses in the 218-219 MHz Service can attract small businesses interested in opportunities to participate in the provision of spectrum-based services.[138] In this regard, a five-year term is particularly burdensome on small businesses paying for licenses using installment payments; to date, we have held auctions in four other wireless services in which certain designated entities were eligible for installment payment plans, and each of those services has a ten-year

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[132] *1992 Allocation Report and Order*, 7 FCC Rcd at 1641. The five year license term conforms to the five-year license term of the General Mobile Radio Service, 47 C.F.R. § 95.105, the Personal Radio Service under which the 218-219 MHz Service is classified, 47 C.F.R. § 95.1(c).

[133] Petition for Rulemaking at 3-4.

[134] *Id.* at 4. *See also One-Year Construction Report and Order*, 11 FCC Rcd at 2473.

[135] Petition for Rulemaking at 4-7.

[136] *Id.* at 9.

[137] *See* Third Letter Amendment (attachment at 3-4); *cf.* MKS Petition at 5 (requesting that all licensees in good standing be allowed to return their licenses to the Commission for a full refund). We choose to not seek comment on Petitioners' option of making royalty payments in lieu of installment payments for the same reasons that we explicitly rejected royalties as an auction payment mechanism in the past. *See Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2393; Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Notice of Proposed Rule Making*, 8 FCC Rcd 7635, 7645 (1993); *see also* Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, *Second Report and Order*, 8 FCC Rcd 7700, 7838 (1993). Specifically, the Commission stated, *inter alia*, that a royalty program would require adoption of complex, intrusive accounting rules for identifying the share of a firm's revenues that is attributable to a particular license, and send an erroneous message to bidders that the government (taxpayers) is better able to bear risk than the firm (shareholders). Furthermore, the Commission said that a royalty program making government revenues dependent on the success of a regulated service may give rise to conflicts of interest.

[138] 47 U.S.C. § 309(j)(4)(D). *See Competitive Bidding Fourth Report and Order*, 9 FCC Rcd at 2337; *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2357.

license term.[139] Therefore, we propose to amend Section 95.811(d) of the Commission's rules to extend the term of 218-219 MHz Service licenses to ten years from the date of license grant. In doing so, we note that a ten-year license term comports with our proposal to redesignate the 218-219 MHz Service from a private radio service (generally licensed for a five-year term) to a service that can also provide common carrier services (generally licensed for a ten-year term).[140] Since all 218-219 MHz Service licensees will face the same competitive setting and opportunity costs going forward under the regulatory flexibility we propose today (irrespective of whether they acquired their licenses by auction or lottery), we propose to extend the license term of all licenses in the 218-219 MHz Service to ten years to ensure regulatory parity. We seek comment on these proposals.

2. Reamortization of Installment Payment Debt and Financing Options

37. We also tentatively conclude that it is in the public interest to permit reamortization of principal and interest installment payments for non-defaulted 218-219 MHz Service licensees in conjunction with the extension of the license term from five to ten years, an approach that is consistent with our general auction rules.[141] Therefore, we propose reamortization of installment payment terms for 218-219 MHz Service licensees to allow for two years of interest-only payments, followed by payments consisting of interest and principal over the remaining eight years of the license term, an approach that is also consistent with our general auction rules.[142] Based on our structure of installment payment plans in other services in which we have limited the interest-only period to two years, we believe that the two-year interest-only period currently applicable to 218-219 MHz Service licensees provides small businesses with the appropriate level of U.S. government assisted financing.[143] Our proposal here is inextricably tied to the requested extension of the license term from five to ten years, in contrast to prior requests to extend payment terms beyond the five year license term based on market considerations, which we denied.[144]

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[139] 47 C.F.R. § 24.15 (narrowband and broadband Personal Communications Services (PCS)); 47 C.F.R. § 90.149 (900 MHz Specialized Mobile Radio (SMR)); 47 C.F.R. § 21.929 (Multipoint Distribution Service (MDS)).

[140] *See* Section VI.A, *supra*. For the same reason, we do not seek comment on extending the license term beyond ten years. *See* IIAP Letter at 2.

[141] 47 C.F.R. § 1.2110(f)(3)(ii) (as amended by the *Part 1 Third Report and Order*, 13 FCC Rcd at 521) ("[a]llow installment payments for the full license term").

[142] 47 C.F.R. § 1.2110(f)(3)(iii-iv) (as amended by the *Part 1 Third Report and Order*, 13 FCC Rcd at 521) ("[b]egin with interest-only payments for the first two years; and [ ] [a]mortize principal and interest over the remaining term of the license"). In contrast, Petitioners' proposal for interest-only payments for the first five years, followed by principal and interest over the final five years, does not comport with our general auction rules for installment payments. *See* Letter Amendment at 1; *see also* Elliot Application at 2.

[143] *See* Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, *Report and Order*, 11 FCC Rcd 7824, 7845-46 (1996), *recon. pending on other grounds*.

[144] *See IVDS Omnibus Order*, 11 FCC Rcd at 1283, *recon. denied*, Interactive Video and Data Service (IVDS) Licenses, Various Requests by Auction Winners, *Memorandum Opinion and Order*, 11 FCC Rcd 12994, 12997-98 (1996).

38. To ensure that all 218-219 MHz Service licensees that are not currently in default can take advantage of the proposed reamortization of installment payments, we propose to grant all properly filed grace period requests as of the effective date of reamortization. At that time, we would recalculate every non-defaulting licensee's installment payment obligations as reamortized, and credit all payments already received under the revised schedule, with any additional funds held in reserve for application against future payments. With regard to interest calculations for 218-219 MHz Service licensees, we note that Section 95.816(d)(2) of our rules requires the fixing of such calculations at the time of licensing at a rate equal to the rate for five-year U.S. Treasury obligations.[145] If we adopt our proposal to reamortize the 218-219 MHz Service installment payments over a ten-year license term, then we would impose an interest rate for those plans based on the rate for ten-year U.S. Treasury obligations at the time of licensing. All Suspension Interest (*i.e.*, interest payments back-due from September 30, 1995 and December 31, 1995)[146] would be submitted in eight equal payments over a two-year period, due and payable with each of the first eight scheduled installment payments, as reamortized.[147]

39. We understand that this proposal may trigger the payment of back due amounts, including accrued interest, earlier than expected for some 218-219 MHz Service licensees. Therefore, we propose to offer licensees two financing options, with such election to be made on a license-by-license basis 90 days from the release date of any Report and Order promulgating the proposed reamortization. First, licensees may choose to continue making installment payments by submitting a payment consisting of all accrued interest and principal (as reamortized) due and owing as of that date. At that time, if necessary, licensees would be able to utilize the 180-day late payment period in our revised installment payment rules, subject to the applicable late payment fees, before their licenses would automatically cancel as being in default. Alternatively, per Petitioners' request, licensees may surrender any licenses they choose to the Commission for reauction and, in return, have all of the outstanding debt on those licenses forgiven (*i.e.*, an amnesty option much like that offered to broadband PCS C block licensees).[148] For each license returned under the amnesty option, the licensee would choose either to (1) receive no credit for its down payment but remain eligible to bid on the surrendered licenses in the reauction, with no restriction on after-market acquisitions; or (2) obtain credit for 70 percent of its down payment and forego for a period of two years from the start date of the reauction eligibility to reacquire the licenses surrendered through either reauction or any other secondary market transaction. Under either option, all installment payments made on surrendered licenses, plus the 70 percent credit under the second option, would be applied to previously accrued interest for retained markets, with any excess installment payments (but not down payments) refunded, subject to applicable federal debt collection laws. Every licensee electing to continue making installment payments would be required to execute appropriate loan documentation, that may include a note and security agreement, as a condition of the reamortization of its installment payment plan under the revised ten-year term, pursuant to Section 1.2110(f)(3) of the Commission's rules.[149] Licensees that fail to elect a financing option on a timely basis, and licensees who do not complete the requisite loan

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[145] 47 C.F.R. § 95.816(d)(2).

[146] *See* paragraph 9, *supra*.

[147] *Accord PCS Second Report and Order*, 12 FCC Rcd at 16450.

[148] *See, e.g.*, Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345, 8358-60 (1998).

[149] 47 C.F.R. § 1.2110(f)(3) (as amended by the *Part 1 Third Report and Order*, 13 FCC Rcd at 521).

documentation, would be held to the original five-year payment schedule. We believe that providing this choice would substantially increase licensees' flexibility to make market driven decisions regarding their licenses and enable them to revise their business plans to make them more attractive to lenders and investors. We seek comment on these proposals.

C. Service and Construction Requirements

40. *Background.* Section 95.831 of the Commission's rules provides that 218-219 MHz Service licensees make service available to at least 50 percent of the population or land area located within the service area.[150] To accomplish this service level requirement, we set construction benchmarks as follows: service to at least 10 percent of the population or geographic area within the license service area within one year of the grant of the license; 30 percent within three years; and, 50 percent within five years.[151] Under our rules, failure to meet these build-out requirements results in automatic cancellation of the 218-219 MHz Service system license.[152] For purposes of this benchmark, service is provided by a CTS when two associated RTUs are placed in operation.[153] Each 218-219 MHz Service system licensee must file a progress report at the conclusion of each benchmark period to inform the Commission of the construction status of the system.[154]

41. These rules were crafted in the *1992 Allocation Report and Order* in the context of awarding licenses by lottery, and were intended "to reduce the filing of speculative applications by entities that have no real intention of implementing [218-219 MHz Service] systems."[155] We eliminated the one-year construction benchmark in early 1996, at the request of several licensees that won their licenses in the July 1994 auction.[156] At that time, we stated that the use of auctions to award licenses reduces the incentives for speculation, and therefore, concluded that the one-year benchmark was unnecessary.[157] We further stated that "eliminating the one-year construction requirement will provide licensees with greater flexibility in selecting service options, obtaining financing, selecting equipment, and other considerations related to

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[150] 47 C.F.R. § 95.831.

[151] *1992 Allocation Report and Order*, 7 FCC Rcd at 1640-41, 1648.

[152] 47 C.F.R. § 95.833(a).

[153] *Id.*

[154] 47 C.F.R. § 95.833(b).

[155] *1992 Allocation Report and Order*, 7 FCC Rcd at 1640.

[156] *One-Year Construction Report and Order*, 11 FCC Rcd 2472; 47 C.F.R. § 95.833 (as revised). The Bureau had previously granted waivers of the one-year deadline for 17 of the 18 licenses granted pursuant to lotteries. *See* Interactive Video and Data Service (IVDS) Licenses – Requests by Lottery Winners to Extend Construction Deadline, *Order*, 10 FCC Rcd 4014 (WTB 1995); Interactive Video and Data Service (IVDS) Licenses – Additional Requests by Lottery Winners to Extend Construction Deadline, *Order*, 10 FCC Rcd 4546 (WTB 1995). The eighteenth lottery licensee withdrew its requested waiver of the one-year benchmark and filed a one-year benchmark showing pursuant to Section 95.833(b) of the Commission's rules (received March 28, 1995).

[157] *One-Year Construction Report and Order*, 11 FCC Rcd at 2473.

construction of their systems."[158] More recently, the Bureau waived the three-year construction benchmark date for all licenses because it would have been unreasonable and contrary to the public interest to enforce the benchmark while relevant Commission policy was subject to review in this rulemaking proceeding.[159]

42. *Discussion.* Section 309(j)(3) of the Communications Act states, in part, that when designing competitive bidding systems, "the Commission shall include safeguards to protect the public interest in the use of the spectrum . . . ."[160] In addition, Section 309(j)(4)(B) provides that the Commission shall promote investment in, and rapid deployment of, new technologies and services by means of performance requirements, such as deadlines and penalties for performance failures.[161] We have previously found that these provisions could be satisfied through construction requirements.[162]

43. We continue to seek to provide 218-219 MHz Service licensees with optimal flexibility in selecting service options, obtaining financing, selecting equipment, and other considerations regarding construction of systems. This interest must be balanced, however, by the mandate of Section 309(j) of the Communications Act. Given our belief that many of the service offerings that could be provided by 218-219 MHz Service licensees could also be provided by licensees of other services, we believe it is appropriate to revisit the service and construction requirements in the 218-219 MHz Service to ensure that 218-219 MHz Service licensees are subject to consistent policies. Although we disagree with Petitioners that all construction benchmarks should be eliminated,[163] we believe that strict construction requirements are not the most suitable and effective means of addressing these statutory obligations given that the 218-219 MHz Service spectrum may be used to offer a variety of fixed and mobile services that may compete with capabilities of other wireless services.

44. Balancing these factors, we tentatively conclude that 218-219 MHz Service licensees should be subject to construction requirements consistent with those presently used in other services.[164]

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[158] *Id.*

[159] *See* Requests by Interactive Video and Data Service Auction Winners to Waive the January 18, 1998, and February 28, 1998, Construction Deadlines, *Order*, 13 FCC Rcd 756 (WTB 1998); Requests by Interactive Video and Data Service Lottery Winners to Waive the March 28, 1997 Construction Deadline, *Order*, 12 FCC Rcd 3181 (WTB 1997).

[160] 47 U.S.C. § 309(j)(3).

[161] *See* 47 U.S.C. § 309(j)(4)(B).

[162] *See, e.g.*, Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532, 5570 (1994); 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, 9659-60 (1995); *GWCS Second Report and Order*, 11 FCC Rcd at 669-70.

[163] Letter Amendment at 1.

[164] *See, e.g.*, 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*, 12 FCC Rcd 2732, 2766-67 (1997) (*Paging Second Report and Order*); Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901

Specifically, we propose to eliminate the three-year and five-year construction benchmarks currently provided in our rules, and instead require that 218-219 MHz Service licensees provide "substantial service" to their service areas within five years of license grant. In past Orders, we have defined "substantial service" as "service that is sound, favorable, and substantially above a level of mediocre service, which would barely warrant renewal,"[165] and we have provided safe harbor examples of substantial service showings, such as licensees offering specialized or technologically sophisticated service that does not require a high level of coverage to be of benefit to customers, or licensees providing a niche service to businesses or focusing on serving populations outside of areas currently serviced by other licensees.[166] We seek comment on whether this definition or some other articulable standard should be adopted to define substantial service for the 218-219 MHz Service.

45. If we amend our rules to extend 218-219 MHz Service licenses to a ten-year term,[167] we further propose to require that all 218-219 MHz Service licensees either make service available to at least 20 percent of the population or land area, or demonstrate substantial service, within ten years of license grant. Licensees would demonstrate compliance with the construction requirements by basing their calculations on signal field strengths that ensure reliable service for the technology utilized, using any service radius contour formula developed or generally used by industry, provided that such formula is based on the technical characteristics of their systems.[168] In the alternative, under a ten-year license term scenario, we ask whether, in lieu of establishing benchmarks, we should require licensees to provide substantial service to their service area within ten years of license grant as a condition of renewal.[169] Finally, under a ten-year license term scenario, we propose to assess compliance of incumbent 218-219 MHz Service licensees with the five-year substantial service benchmark five years from the effective date of such rules promulgated pursuant to this *Notice*, and the ten-year requirement at the end of their ten-year license term. Under any of these proposals, licensees will be required to file supporting documentation showing compliance with the construction requirements. Failure to meet the benchmark would result in automatic termination of the license, which is consistent with our current rules for this service.[170]

MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-553, *Second Order on Reconsideration and Seventh Report and Order*, 11 FCC Rcd 2639, 2651-52 (1995).

[165] *Paging Second Report and Order*, 12 FCC Rcd at 2767. *See also WCS Report and Order*, 12 FCC Rcd at 10843-44; *LMDS Second Report and Order*, 12 FCC Rcd at 12660.

[166] *See, e.g.*, *LMDS Second Report and Order*, 12 FCC Rcd at 12660; Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-553, *Third Order on Reconsideration*, 11 FCC Rcd 1170, 1170 (1995).

[167] *See* Section VI.B.1., *supra*.

[168] *See* Second Letter Amendment (attachment).

[169] *See, e.g.*, *LMDS Second Report and Order*, 12 FCC Rcd at 12659-61; *WCS Report and Order*, 12 FCC Rcd at 10843-45.

[170] 47 C.F.R. § 95.833(a)-(b).

46. We believe that a substantial service construction requirement can promote efficient use of the spectrum and encourage broad deployment of service.[171] We further believe that this approach will permit a variety of service offerings, facilitate market development, provide a clear and expeditious accounting of spectrum use by licensees, and ensure that meaningful service is being provided without unduly restricting service offerings. We seek comment on these tentative conclusions and proposals, and any alternatives thereto.

D. License Transferability

47. We adopted a restriction on 218-219 MHz block license transferability in the *1992 Allocation Report and Order* as an anti-trafficking rule governing the award of licenses by lottery.[172] Under the rule, 218-219 MHz Service licensees may not transfer, assign, sell, or give the licenses to any other entity until the five year (50 percent coverage) construction benchmark has been met.[173] In the *Competitive Bidding Fourth Report and Order*, we specifically amended the rule to exclude its application to licenses acquired through auction.[174] Thus, the transferability restriction applies only to the 18 licenses won in the September 1993 lottery. We seek comment on whether this transfer restriction should be retained. Further, assuming the rule is retained, we seek comment on determining whether and when a lottery-won license may be transferred in light of our proposed changes to the service and construction rules,[175] and our proposal to permit partitioning and disaggregation of 218-219 MHz Service licenses.[176]

E. Spectrum Aggregation

48. *Background.* In establishing rules for the 218-219 MHz band, we concluded that the best way to promote competition in the developing marketplace would be "to make at least two facilities available in each market."[177] Therefore, our cross-ownership rule prohibits an entity from holding or having an interest in the licenses for both frequency segment A (218.0-218.5 MHz) and frequency segment B (218.5-219 MHz) in the same service area.[178]

49. *Discussion.* Petitioners seek elimination of the cross-ownership rule, stating, *inter alia*, that competing services with larger bandwidth and greater capitalization provide the necessary competition to alleviate any concern that a 218-219 MHz Service licensee would exert monopoly power by aggregating one megahertz of spectrum, and that a full one megahertz of spectrum would enhance spectrum flexibility

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[171] *WCS Report and Order*, 12 FCC Rcd at 10843.

[172] *1992 Allocation Report and Order*, 7 FCC Rcd at 1641.

[173] 47 C.F.R. § 95.819(b).

[174] *Competitive Bidding Fourth Report and Order*, 9 FCC Rcd at 2335, 2343; *see also* 47 C.F.R. § 95.819(a) (transferability of auction-won licenses governed by Section 1.2111 of the Commission's rules).

[175] *See* Section VI.C., *supra*.

[176] *See* Section VI.F., *infra*.

[177] *Allocation Notice*, 6 FCC Rcd at 1371.

[178] 47 C.F.R. § 95.813(b)(1).

through expanded applications and services.[179] In 1996, we denied a request for rulemaking on this issue.[180] In deciding not to grant the petition for rulemaking, we observed that the "*interactive television marketplace* is in a relatively early state of competition," and that "allowing a single entity to acquire both licenses in a service area would limit the opportunity for other potential competitors to emerge."[181] That notwithstanding, restricting the competitive analysis of the 218-219 MHz band to the *interactive television marketplace* is inconsistent with the myriad of services evolving in the 218-219 MHz Service.[182] We believe that the new regulatory environment we seek to establish with our proposals in this *Notice* will broaden the field of potential competitors providing services similar to those in the 218-219 MHz Service. Therefore, it is now appropriate to reexamine the cross-ownership prohibition.

50. We seek comment on whether we should allow licensees to aggregate spectrum in the 218-219 MHz Service without restriction.[183] Would removal of the current cross-ownership prohibition pose a risk of significant competitive harm in some markets? Our goal in managing spectrum efficiently and fostering competition is to license the maximum number of commercially *viable* competitors per region. Commenters should address whether the 500 kilohertz spectrum capacity limit of one license per market renders these licenses not commercially viable, and why. What other technologies provide, or may in the future provide, comparable services to those currently provided or proposed for this spectrum? We also seek comment on whether it would be appropriate to include 218-219 MHz in the calculation of spectrum aggregation limits, given our proposal to expand service options to common carrier or CMRS operations.[184]

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[179] Letter Amendment at 4-5; *accord* MKS Petition at 5; IIAP Letter at 2.

[180] *Competitive Bidding Sixth MO&O/Further Notice*, 11 FCC Rcd at 19363.

[181] *Id.* (emphasis added).

[182] *See* Section V.A., *supra.*

[183] Management and leasing agreements, evaluated under the *de facto* control guidelines established by the Commission in *Intermountain Microwave*, 24 Rad. Reg. (P&F) 983 (1963), would also be permitted. *See* Letter Amendment, Exhibit 5 (request for clarification regarding leasing arrangements and Section 95.813(b)(1)). However, in light of the fact that permitting aggregation would double the bandwidth available to any licensee per market, we do not seek comment on requests for an additional or substitute spectrum allocation at this time. *See* Second Letter Amendment at 1; *see also* IIAP Letter at 2; Elliot Application at 3; Letter from Dee Ann Wunschel to A. Jerome Fowlkes, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, at 2 (received Feb. 23, 1998); Letter from Dee Ann Wunschel to A. Jerome Fowlkes, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, at 2 (received Dec. 5, 1997). Since the industry evolving in the 218-219 MHz band is still in its relative infancy, it would be premature to consider expanding or moving the spectrum allocation.

[184] *See* Section VI.A., *supra.*

F. Partitioning and Disaggregation

51. In the *Partitioning Report and Order*, we expanded our rules to permit geographic partitioning and spectrum disaggregation for broadband PCS licensees.[185] Consistent with these broadband PCS rules, we propose to permit partitioning and disaggregation for the 218-219 MHz Service. We tentatively conclude that a flexible approach to partitioned areas, similar to the one we adopted for broadband PCS, is appropriate for the 218-219 MHz Service. We therefore propose to permit partitioning of 218-219 MHz Service licenses based on any area defined by the parties within the licensee's service area. We seek comment on this proposal, and in particular on whether there are any technical or other issues unique to the 218-219 MHz Service that might impede the adoption of such a flexible approach. With regard to disaggregation, we note that even if we permit ownership of both licenses in a market by one entity as proposed above,[186] there would still be only one megahertz of spectrum to disaggregate. Given this relatively narrow frequency segment, and the propagation and technological limitations of the 218-219 MHz band, we seek comment on the feasibility of spectrum disaggregation in the 218-219 MHz Service, and particularly, whether minimum disaggregation standards are necessary. Commenters should provide technical justifications and other relevant support in responding to this issue. We tentatively conclude that combined partitioning and disaggregation should also be permitted for the 218-219 MHz Service. This approach would afford parties optimal flexibility to respond to market forces and demands for service relevant to their particular locations and service offerings. Further, we propose to authorize a partitionee and disaggregatee to hold its license for the remainder of the original licensee's term, with renewal expectancy. We believe that this approach would prevent licensees from using partitioning and disaggregation to circumvent our established license term rules. Additionally, by limiting the license term of the partitionee or disaggregatee, we ensure that there will be maximum incentive for parties to pursue available spectrum as quickly as practicable, thus expediting the delivery of service to the public. We seek comment on these proposals and tentative conclusions.

52. In the *Partitioning Report and Order*, the Commission concluded that allowing partitioning and disaggregation would help to (1) remove potential barriers to entry, thereby increasing competition; (2) encourage parties to use spectrum more efficiently; and (3) speed service to unserved and underserved areas.[187] Similarly, we believe that such an approach for the 218-219 MHz Service would result in the same public interest benefits. We note that small businesses may face certain barriers to entry into the provision of spectrum-based services, which we believe may be addressed by our partitioning and disaggregation proposals.[188] Providing licensees with the flexibility to partition and disaggregate would create smaller areas that could be licensed to small businesses, including those entities that previously may not have had the resources to participate successfully in spectrum auctions. We seek comment on these tentative conclusions. In particular, commenters are invited to address whether partitioning and disaggregation will help eliminate market entry barriers for small businesses consistent with Section 257

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[185] Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, WT Docket No. 96-148, *Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 21831 (1996) (*Partitioning Report and Order*). "Partitioning is the assignment of geographic portions of the [ ] license along geopolitical or other boundaries. Disaggregation is the assignment of discrete portions or 'blocks' of spectrum licensed to a geographic licensee or qualifying entity." *Id.* at 21833 n.2.

[186] *See* Section VI.E., *supra*.

[187] *Partitioning Report and Order*, 11 FCC Rcd at 21843.

[188] *See, e.g.*, *id.* at 21876.

of the Communications Act.[189] We further invite comment as to the exact mechanisms for apportioning and paying the remaining government obligation between the parties, and whether there are any unique circumstances that would make devising such a scheme for the 218-219 MHz Service more difficult than for broadband PCS.

53. In this *Notice*, we seek comment on a new set of construction requirements for 218-219 MHz Service licensees.[190] In other wireless services, we have allowed licensees the flexibility to negotiate which party will be responsible for meeting the applicable construction requirements.[191] In each of those cases, our goals have been to ensure that licensees had the flexibility to structure their business plans while ensuring that partitioning and disaggregation not be used as a vehicle to circumvent the applicable construction requirements, and that service be offered over the relevant population, even if not on the entire spectrum. We propose that parties to partitioning and disaggregation in the 218-219 MHz Service have comparable flexibility in meeting construction requirements. Parties to partitioning would be allowed to choose between both parties satisfying build-out requirements within their respective service areas, or having the partitionor build-out the entire market. Parties to disaggregation would choose whether one or both parties would be obligated to satisfy build-out requirements within the geographic service area. Non-performing licensees' authorizations would be subject to cancellation at the end of the license term. We seek comment on these proposals.

G. Technical Standards

54. In light of the fact that our primary goal in this rulemaking is to provide additional flexibility for 218-219 MHz Service licensees, we must also seek to reexamine the technical restrictions currently applicable to the 218-219 MHz Service to determine whether we can enhance the technical flexibility of these licensees, particularly in light of the proposals contained in this *Notice*. The technical restrictions, including rules requiring automatic power control capability,[192] antenna height and transmitter power limitations,[193] duty cycle limitations,[194] and other interference protection standards, were based on an agreement between TV Answer and the Association for Maximum Service Television that IVDS (as proposed by TV Answer) and TV Channel 13 operations could co-exist.[195] Interference was of particular concern since the RTU proposed for use by TV Answer was planned to be co-located with the subscriber/viewer's television set. However, the potential applications for the 218-219 MHz Service go

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[189] 47 U.S.C. § 257.

[190] *See* Section VI.C., *supra*.

[191] *See, e.g.*, Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, CC Docket No. 92-297, *Fourth Report and Order*, 13 FCC Rcd 11655, 11664-66 (1998); *Partitioning Report and Order*, 11 FCC Rcd at 21857.

[192] 47 C.F.R. § 95.855(a). Automatic power controls are explained at footnote 56, *supra*.

[193] 47 C.F.R. §§ 95.855, 95.859.

[194] 47 C.F.R. § 95.863. For further explanation and discussion of duty cycle limitations, see footnote 57 and Section V.C., *supra*.

[195] *1992 Allocation Report and Order*, 7 FCC Rcd at 1632.

far beyond the service envisioned by TV Answer when these rules were designed. We also note that other services are authorized to transmit in frequencies adjacent to or nearby 218-219 MHz with higher power levels than allowed at 218-219 MHz and no duty cycle restrictions,[196] and that we have not received any complaints of interference to TV Channel 13 from any of these operations.

55. These facts prompt us to seek comment as to whether we should relax some or all of the following technical restrictions, as requested by Petitioners: (a) automatic power control in RTUs with power in excess of 100 milliwatts;[197] (b) limits on transmitter effective radiated power, including the 100 milliwatt power limitation on mobile RTUs;[198] (c) CTS antenna height and transmitter power ratios, whether or not the CTS is located beyond a boundary line 10 miles outside the Grade B contour of a TV Channel 13 station;[199] and (d) duty cycle limitations.[200] We also note that we have received various requests for waiver of these technical standards that we choose to address in the larger context of this rulemaking, and therefore invite comment on these proposed operations in conjunction with the comments addressing the issues raised in this *Notice*.[201] We request that commenters provide empirical data and analysis of the expected effect on interference of changes they recommend. Commenters suggesting specific limits are urged to provide support for their choices, recognizing that we are seeking to provide technical flexibility to coincide with the regulatory flexibility we propose. Alternatively, comments are sought on whether the interference provisions of Section 95.861 of our rules, which require 218-219 MHz Service licensees to resolve interference problems to television broadcast reception or discontinue operation, are sufficient to protect broadcast reception.[202] We tentatively conclude that the evolution

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[196] *See generally* 47 C.F.R. Part 80 (Automated Maritime Telecommunications Systems, operating at 216-218 MHz -- adjacent to TV Channel 13); 47 C.F.R. Part 95, Subpart G (Low Power Radio Service); 47 C.F.R. Part 90, Subpart T (220-222 MHz band).

[197] 47 C.F.R. § 95.855(a). *See* Third Letter Amendment (attachment at 2). *Cf.* Phoenix Data Communication, Inc., Request for Waiver of Section 95.855 of the Commission's Rules, *Order*, DA 98-972 (Pub. Safety & Priv. Wireless Div., released May 21, 1998) (discussing waiver of the RTU automatic power control requirement, filed in conjunction with an application for type acceptance of its proposed equipment).

[198] 47 C.F.R. § 95.855. *See* Letter Amendment at 1; *accord* IIAP Letter at 2. For further discussion of mobile RTU power limitations, see Section V.B., *supra*.

[199] 47 C.F.R. § 95.859(a)(1)-(2). *See* Letter Amendment at 3. *Cf.* Requests for Waiver of Section 95.859(a)(2), Concerning Interactive Video and Data Service (IVDS) Transmitter Power Limits, *Order*, 11 FCC Rcd 4669 (WTB 1996) (discussing waiver of 47 C.F.R. § 95.859(a)(2) to permit use of specific CTS technology programmed to transmit only during the TV Channel 13 horizontal blanking interval).

[200] 47 C.F.R. § 95.863. *See* Letter Amendment at 2; *accord* MKS Petition at 5; IIAP Letter at 2.

[201] *See* Jay M. Lieberman and Michael R. Walton, dba J & M Partnership Request for Waiver (July 14, 1997) (seeking waiver of the antenna height and power ratios, 47 C.F.R. § 95.859(a)); Ronald E. Dowdy Request for Waiver (July 9, 1997) (same); Raveesh K. Kumra Request for Waiver (Apr. 17, 1997) (seeking waiver of the antenna height and power ratios, 47 C.F.R. § 95.859(a), and the duty cycle limitations, 47 C.F.R. § 95.863(a)). These waiver requests will be incorporated into the record of this proceeding, and will also be available for public inspection at the Public Safety and Private Wireless Division, Room 8010, 2025 M Street, N.W., Washington, D.C. 20554.

[202] 47 C.F.R. § 95.861. *But see* Third Letter Amendment (attachment at 2-3) (seeking clarification that the notification requirements of Section 95.861(c) would not apply to licensees providing one-way emergency transmission to receive-only CTSs); *accord* MKS Petition at 5 (requesting elimination of the notification procedures).

toward precise digital technology, both within the evolving 218-219 MHz Service industry,[203] and on the part of the broadcast industry,[204] will further reduce interference potential, and we seek comment on this tentative conclusion.[205] Commenters should also address any other technical standards that could be reexamined in this rulemaking that inhibit flexible use of the spectrum and technological innovation.

H. Incorporation by Reference of Part 1 Standardized Auction Rules

56. *Background.* In the *Part 1 Third Report and Order*, the Commission streamlined its auction procedures by adopting general competitive bidding rules applicable to all auctionable services.[206] These procedures, set forth in Part 1, subpart Q of the Commission's rules, supersede previously-adopted service-specific rules, unless the Commission determines that with regard to particular matters, the retention or adoption of service-specific rules is warranted.[207]

57. *Discussion.* We propose to conduct all future auctions for licenses in the 218-219 MHz Service (both auctions of initial licenses and reauctions of defaulted licenses) in conformity with the general competitive bidding rules set forth in Part 1, subpart Q of the Commission's rules. Specifically, we propose to employ the Part 1 rules governing designated entities,[208] application issues,[209] payment issues,[210] competitive bidding design, procedure and timing issues,[211] and anti-collusion.[212] In this regard, consistent with our decision in the *Part 1 Third Report and Order*, we would no longer offer installment

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For further discussion of Section 95.861, see Section V.D.1., *supra*.

[203] For example, in presentations to Bureau staff, current licensees of 218-219 MHz Service systems have indicated that the marketable uses of systems in the band appear to use digital emission types of equipment, utilizing much lower transmitter power than is presently authorized, and that digital emissions produce imperceptible (or no) interference to TV Channel 13 when the RTU transmitting antenna is at least three feet away from the TV receiver. Applications where the RTU antenna would be removed by at least this distance in a typical environment, such as vending machine, utility and fire alarm monitoring, ATM transactions, and downloading data to RTUs associated with personal computers, for example, have been suggested by these licensees.

[204] *See generally, e.g.*, Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, MM Docket No. 87-268, *Fifth Report and Order*, 12 FCC Rcd 12809 (1997).

[205] *See also* Section V.C., *supra*.

[206] *Part 1 Third Report and Order,* 13 FCC Rcd at 381-469.

[207] *See id.* at 382.

[208] *Id.* at 386-409.

[209] *Id.* at 410-23.

[210] *Id.* at 423-47.

[211] *Id.* at 447-62.

[212] *Id.* at 463-69.

payments as a means of financing small business participation in the 218-219 MHz Service auction.[213] Instead, we would retain the two tiers of small business size standards currently set for 218-219 MHz Service licensees,[214] and utilize the standard schedule of bidding credits set forth in the *Part 1 Third Report and Order* as applied to those two tiers of small businesses, which would allow for somewhat higher bidding credits in light of the suspension of installment payment financing.[215] We seek comment on these proposals and on whether any of our Part 1 rules would be inappropriate in an auction for this service.

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[213] *See id.* at 398 (Commission will not offer installment payments until further notice). In eliminating installment payments, we stated that:

> . . . Congress did not require the use of installment payments in all auctions, but rather recognized them as one means of promoting the objectives of Section 309(j)(3) of the Communications Act. The Commission continues to experiment with different means of achieving its obligations under the statute, and has offered installment payments to licensees in several auctioned wireless services. Installment payments are not the only tool available to assist small businesses. Indeed, we have conducted auctions without installment payments. Moreover, Section 3007 of the Balanced Budget Act requires that the Commission conduct certain future auctions in a manner that ensures that all proceeds from such bidding are deposited in the U.S. Treasury not later than September 30, 2002. . . . [W]e believe that Section 3007 may require that these auctions be conducted without offering long-term installment payments.

Id. at 399-400 (footnotes omitted). This conclusion was based on the record in the Part 1 proceeding, the record developed on installment financing for broadband PCS C block licensees, and on recent decisions eliminating installment payment financing for the Local Multipoint Distribution Service and 800 MHz Specialized Mobile Radio. *See id.* at 396-98. *See also* Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, CC Docket No. 92-297, *Second Order on Reconsideration*, 12 FCC Rcd 15082, 15088-92 (1997); 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, *Memorandum Opinion and Order on Reconsideration*, 12 FCC Rcd 9972, 10014 (1997). The Commission has explained that elimination of installment payments better serves the public interest because obligating licensees to pay for their licenses as a condition of receipt requires greater financial accountability from applicants. *See, e.g.*, *Part 1 Third Report and Order*, 13 FCC Rcd at 398.

[214] 47 C.F.R. § 95.816(d)(4)(i)-(ii) ("small business" is an entity with average gross revenues not exceeding $15 million for the preceding three years; "very small business" is an entity with average gross revenues not exceeding $3 million for the preceding three years). Licensees would also be subject to the uniform rules of ownership disclosure and definitions for attribution of gross revenues of investors and affiliates, as promulgated in WT Docket No. 97-82. *See Part 1 Third Report and Order*, 13 FCC Rcd at 417-21 (disclosure rules) and 476-78 (seeking further comment on attribution rules).

[215] *Compare Part 1 Third Report and Order*, 13 FCC Rcd at 404 (establishing standard bidding credits of 35% for businesses with average gross revenues not exceeding $3 million for the preceding three years, and 25% for businesses with average gross revenues not exceeding $15 million for the preceding three years) *with* 47 C.F.R. § 95.816(d)(1) (service-specific bidding credits of 15% for businesses with average gross revenues not exceeding $3 million for the preceding three years, and 10% for businesses with average gross revenues not exceeding $15 million for the preceding three years).

VII. CONCLUSION

58. We adopt this *Order, MO&O and Notice* to initiate a comprehensive examination of our regulations governing the licensing and use of frequencies in the 218-219 MHz band. These actions are intended to establish a flexible regulatory framework for the 218-219 MHz Service that will encourage spectrum efficiency, technical innovation, and competition by these licensees in the wireless marketplace, and serve the ultimate goal of ensuring that the spectrum at 218-219 MHz provides the greatest benefit to the public.

VIII. PROCEDURAL MATTERS

A. *Ex Parte* Rules — Non-Restricted Proceeding

59. This is a non-restricted notice and comment rulemaking proceeding. *Ex Parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

B. Initial Regulatory Flexibility Analysis

60. As required by the Regulatory Flexibility Act of 1980, Pub. L. No. 96-354, 94 Stat. 1164, as amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847, 5 U.S.C. § 603, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix A. Written public comments are requested with respect to the IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the rest of this *Notice*, but they must have a separate and distinct heading, designating the comments as responses to the IRFA. The Office of Public Affairs, Reference Operations Division, shall send a copy of this *Notice*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with the Regulatory Flexibility Act.

C. Initial Paperwork Reduction Act of 1995 Analysis

61. This *Notice* contains either a proposed or modified information collection. As part of the Commission's continuing effort to reduce paperwork burdens, we invite the general public, the Office of Management and Budget (OMB), and other agencies to take this opportunity to comment on the information collections contained in this *Notice*, as required by the Paperwork Reduction Act of 1995, Pub L. No. 104-13. Public and agency comments are due at the same time as other comments on this *Notice*; OMB comments are due 60 days after the publication of this *Notice* in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to *both* of the following: Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, D.C. 20554, or via the Internet to jboley@fcc.gov, and Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 17th Street, N.W., Washington, D.C. 20503, or via the Internet to fain_t@al.eop.gov.

D. Notice and Comment Provisions

62. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before October 30, 1998, and reply comments on or before November 25, 1998. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998).

63. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply.

64. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 1919 M St. N.W., Room 222, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center of the Federal Communications Commission, Room 239, 1919 M Street, N.W., Washington, DC 20554.

IX. ORDERING CLAUSES

65. Authority for issuance of this *Order, Memorandum Opinion and Order and Notice of Proposed Rulemaking* is contained in Sections 4(i), 257, 303(b), 303(g), 303(r), 309(j), and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 257, 303(b), 303(g), 303(r), 309(j), and 332(a).

66. Accordingly, IT IS ORDERED that this *Order, Memorandum Opinion and Order and Notice of Proposed Rulemaking* is adopted. It is further ordered that the Commission's Office of Public Affairs, Reference Operations Division, shall send a copy of this *Order, Memorandum Opinion and Order and Notice of Proposed Rulemaking*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

67. IT IS FURTHER ORDERED that all references to "Interactive Video and Data Service" in 47 C.F.R. Parts 1, 2, 20, 95, and 97 are to be removed and, in their place, the words "218-219 MHz Service" are to be substituted. Pursuant to 47 C.F.R. § 0.331(d), we hereby instruct the Wireless Telecommunications Bureau to make conforming edits to the Code of Federal Regulations consistent with this Ordering Clause.

68. IT IS FURTHER ORDERED that the request of the Petitioners for general waiver of Section 1.2110(f)(4) of the Commission's rules, as amended by the *Part 1 Third Report and Order*, IS DENIED. However, a suspension of the application of Section 1.2110(f)(4)(i)-(iv), limited to those 218-219 MHz

Service licensees that have remitted adequate installment payments as of March 16, 1998, will remain in effect pending Commission resolution of the issues raised in the *Notice of Proposed Rulemaking* in an initial Report and Order.

69. IT IS FURTHER ORDERED that the Miscellaneous Payment Relief Requests ARE DENIED to the extent that they are inconsistent with the actions and proposals described above.

70. IT IS FURTHER ORDERED that NOTICE IS HEREBY GIVEN of the proposed amendments to Parts 20 and 95 of the Commission's rules, 47 C.F.R. Parts 20 and 95, in accordance with the proposals in this *Notice of Proposed Rulemaking*, and that COMMENT IS SOUGHT regarding such proposals. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before October 30, 1998, and reply comments on or before November 25, 1998.

71. IT IS FURTHER ORDERED that the Petition for Rulemaking and associated amendments filed by Euphemia Banas, *et al.* IS GRANTED in part to the extent described above and IS DENIED in all other respects.

72. IT IS FURTHER ORDERED that, as described above, the Petition for Reconsideration filed by Euphemia Banas, *et al.* IS DISMISSED.

73. IT IS FURTHER ORDERED that, to the extent described above, WE CLARIFY issues raised in the Petition for Partial Reconsideration filed by NAB and the Request for Clarification filed by ITV/IALC.

74. IT IS FURTHER ORDERED that the Petition for Partial Reconsideration of NAB IS DISMISSED or DENIED in all other respects.

75. IT IS FURTHER ORDERED that WT Docket No. 95-47 IS TERMINATED.

76. For further information concerning this proceeding, contact Howard Griboff at (202) 418-0660 (Auctions & Industry Analysis Division) or James Moskowitz at (202) 418-0680 (Public Safety & Private Wireless Division), Wireless Telecommunications Bureau.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

APPENDIX A

INITIAL REGULATORY FLEXIBILITY ANALYSIS

Notice of Proposed Rulemaking

As required by the Regulatory Flexibility Act of 1980, Pub. L. No. 96-354, 94 Stat. 1164, as amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847, 5 U.S.C. § 603,[1] the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this *Notice of Proposed Rulemaking*, Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service (*Notice*). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadline for comments on the *Notice*, as described *supra* in Section VIII.D. The Commission will send a copy of the *Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). *See* 5 U.S.C. § 603(a). In addition, the *Notice* and IRFA (or summaries thereof) will be published in the Federal Register. *See id.*

I. Need for, and Objectives of, the Proposed Rules:

This rulemaking proceeding was initiated to secure public comment on proposals to maximize the efficient and effective use of spectrum in the 218-219 MHz band, allocated in 1992 to the Interactive Video and Data Service (IVDS) in the Personal Radio Services, now redesignated as the 218-219 MHz Service. In attempting to maximize the use of the 218-219 MHz band, we continue our efforts to improve the efficiency of spectrum use, reduce the regulatory burden on spectrum users, facilitate technological innovation, and provide opportunities for development of competitive new service offerings. The proposals advanced in the *Notice* are also designed to implement Congress' goal of giving small businesses the opportunity to participate in the provision of spectrum-based services in accordance with Section 309(j) of the Communications Act of 1934, as amended (the Communications Act).[2]

II. Legal Basis:

This action, including publication of proposed rules, is authorized under Sections 4(i), 257, 303(b), 303(g), 303(r), 309(j), and 332(a) of the Communications Act, 47 U.S.C. §§ 154(i), 257, 303(b), 303(g), 303(r), 309(j), and 332(a).

III. Description and Estimate of the Number of Small Entities to which the Proposed Rules Will Apply:

The Regulatory Flexibility Act directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The Regulatory Flexibility Act generally defines the term "small entity " as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term

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[1] Subtitle II of the Contract with America Advancement Act is "The Small Business Regulatory Enforcement Fairness Act of 1996" (SBREFA), codified at 5 U.S.C. § 601, *et seq.*

[2] 47 U.S.C. §§ 257, 309(j).

"small business" has the same meaning as the term "small business concern" under the Small Business Act, unless the Commission has developed one or more definitions that are appropriate for its activities.[3] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[4] A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[5] Nationwide, as of 1992, there were approximately 275,801 small organizations.[6] "Small governmental jurisdiction" generally means "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000."[7] As of 1992, there were approximately 85,006 such jurisdictions in the United States.[8] This number includes 38,978 counties, cities, and towns; of these, 37,566, or 96 percent, have populations of fewer than 50,000.[9] The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, we estimate that 81,600 (91 percent) are small entities. Below, we further describe and estimate the number of small entity licensees and regulatees that may be affected by the proposed rules, if adopted.

There are three ways that may be applicable to define small entities for these proposed rules: (1) the U.S. Small Business Administration's (SBA) size standards under the SBA's Standard Industrial Classifications (SIC), 13 C.F.R. § 121.201; (2) the Small Business Act's definition of small entities under 15 U.S.C. § 632(a); and (3) the Commission's refined definition of small business for a particular service for the purposes of competitive bidding.

The proposals in the *Notice* would affect a number of small entities who are either licensees, or who may choose to become applicants for licenses, in the 218-219 MHz Service. Such entities fall into two categories: (1) those using the 218-219 MHz Service for providing interactivity capabilities in conjunction with broadcast services; and (2) those using the 218-219 MHz Service to operate other types of wireless communications services with a wide variety of uses, such as commercial data applications and two-way telemetry services. Theoretically, an entity could fall into both categories. The spectrum uses in the two categories differ markedly.

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[3] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[4] Small Business Act, 15 U.S.C. § 632 (1996).

[5] 5 U.S.C. § 601(4).

[6] 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

[7] 5 U.S.C. § 601(5).

[8] U.S. Dept. of Commerce, Bureau of the Census, "1992 Census of Governments."

[9] *Id.*

With respect to the first category, the provision of interactivity capabilities in conjunction with broadcast services could be described as a wireless provider of subscription television service. The SBA's rules applicable to subscription television services define small entities as those with annual gross revenues of $11 million or less.[10] In the *Competitive Bidding Tenth Report and Order*, we extended special competitive bidding provisions to small businesses with annual gross revenues that are not more than $15 million, and additional benefits to very small businesses with annual gross revenues that are not more than $3 million.[11] On January 6, 1998, the SBA approved of the small business size standards established in the *Competitive Bidding Tenth Report and Order.*

The Commission's estimate of the number of small business entities operating in the 218-219 MHz band for interactivity capabilities with television viewers begins with the 1992 Bureau of Census report on businesses listed under SIC Code 4841, subscription television services, which is the most recent information available. The total number of entities under this category is 1,788.[12] There are 1,463 companies in the 1992 Census Bureau report which are categorized as small businesses providing cable and pay TV services.[13] We know that many of these businesses are cable and television service businesses, rather than businesses operating in the 218-219 MHz band. We also know that, to date, we have issued 612 licenses in the 218-219 MHz Service. Therefore, the number of small entities currently providing interactivity capability to television viewers in the 218-219 MHz Service which will be subject to the rules will be less than 612.

With respect to the second category, neither the Commission nor the SBA has developed a specific definition of small entities applicable to 218-219 MHz band licensees that would provide wireless communications services other than that described above. Generally, the applicable definition of a small entity in this instance appears to be the definition under the SBA rules applicable to establishments primarily engaged in furnishing telegraph and other message communications, SIC Code 4822. This definition provides that a small entity is an entity with annual receipts of $5 million or less.[14] The 1992 Census data, which is the most recent information available, indicates that of the 286 firms under this

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[10] 13 C.F.R. § 121.201, SIC Code 4841.

[11] Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Tenth Report and Order*, 11 FCC Rcd 19974, 19981-85 (1996) (*Competitive Bidding Tenth Report and Order*), *recon. pending.*

[12] U.S. Small Business Administration 1992 Economic Census Industry and Enterprise Report, Table 2D, SIC Code 4841 (Bureau of the Census data adapted by the Office of Advocacy of the U.S. Small Business Administration).

[13] The Census table divides those companies by the amount of annual receipts. There is a dividing point at companies with annual receipts of $10 million. The next increment is annual receipts of $17 million, a category that greatly exceeds the SBA definition of small businesses that provide subscription television services. However, there are 17 firms in this category, with revenues between $10-$17 million. Approximately 1,480 SIC Code 4841 category firms have annual gross receipts of $15 million or less. Only a small fraction of those 1,480 firms provide IVDS.

[14] 13 C.F.R. § 121.201, SIC Code 4822.

category, 247 had annual receipts of $4.999 million or less.[15] We seek comment on whether the appropriate definition for such licensees in the 218-219 MHz Service is SIC Code 4822, or whether we should conclude, for purposes of the FRFA in this matter, that the appropriate definition for all providers of services in the 218-219 MHz Service is the Commission's definition of small businesses for the purposes of competitive bidding in this service.

The first auction of 218-219 MHz spectrum resulted in 170 entities winning licenses for 594 Metropolitan Statistical Area (MSA) licenses. Of the 594 licenses, 557 were won by entities qualifying as a small business. For that auction, we defined a small business as an entity, together with its affiliates, that has no more than a $6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than $2 million in annual profits each year for the previous two years.[16] We cannot estimate, however, the number of licenses that will be won by entities qualifying as small or very small businesses under our rules in future auctions of 218-219 MHz spectrum. Given the success of small businesses in the previous auction, and the above discussion regarding the prevalence of small businesses in the subscription television services and message communications industries, we assume for purposes of this IRFA that in future auctions, all of the licenses may be awarded to small businesses, which would be affected by the rule changes we propose.

IV. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements:

The proposed rules under consideration in this *Notice* include the possibility of altered reporting and recordkeeping requirements for a number of small business entities. Specifically, under the proposals contained in the *Notice*: (1) 218-219 MHz Service licensees and applicants will be required to elect regulatory status (common carrier, private, commercial mobile radio service, private mobile radio service) and file appropriate documentation coincident with the regulatory status elected; (2) 218-219 MHz Service licensees will not be required to file a license renewal application after five years from the date of grant of the license, but will be required to file a license renewal application after ten years after the date of grant of the license; (3) non-defaulting 218-219 MHz Service licensees currently participating in the installment payment plan will be required to elect either to continue making payments as reamortized under the revised ten-year term or surrender any licenses it chooses to the Commission for reauction; (4) 218-219 MHz Service licensees electing to continue making installment payments will be required to execute a note and security agreement as a condition of the reamortization of its installment payment plan under the revised ten-year term; (5) 218-219 MHz Service licensees will not be required to file a construction report after the third year of being licensed, but will be obligated to file construction reports in accordance with the benchmarks to be adopted under the proposals herein; and (6) acquisitions by partitioning or disaggregation will be treated as assignments of a license and parties will be required to comply with construction requirements, and to submit a certification to that effect. We request comment on how these requirements can be modified to reduce the burden on small entities and still meet the objectives of the proceeding.

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[15] 1992 Economic Census Industry and Enterprise Receipts Size Report, U.S. Bureau of the Census, U.S. Department of Commerce, Table 2D, SIC Code 4822 (industry data prepared by the Census Bureau under contract to the U.S. SBA Office of Advocacy).

[16] Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Fourth Report and Order*, 9 FCC Rcd 2330, 2336 (1994).

V. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered:

The *Notice* solicits comment on a variety of proposals, some of which are described below. Rather than having a significant economic impact on small entities, the *Notice* is written toward maximizing opportunities for participation by, and growth of, small businesses in providing wireless services. We have requested comment regarding the appropriate definition of small business to be applied under the expanded nature of the 218-219 MHz Service we propose in the *Notice*. The Commission expects that its proposals in this *Notice* regarding extension of license terms from five to ten years, with a corresponding reamortization of installment payment debt, and allowing partitioning and disaggregation of licenses, will specifically assist small businesses. We also believe that our proposals regarding permissible uses of 218-219 MHz Service, liberalization of construction requirements and technical restrictions, and elimination of the cross-ownership restriction, will make expansion of 218-219 MHz Service operations easier, and this flexibility assists all licensees, including small business licensees. We tentatively conclude that a flexible approach to regulation of the 218-219 MHz Service will afford all providers, including small businesses, the ability to respond to market forces and demands for service relevant to their particular locations and service offerings. The regulatory burdens we propose are necessary in order to ensure that the public receives the benefits of innovative new services in a prompt and efficient manner. We seek comment on, and will consider, any significant alternatives that are consistent with the objectives set forth in the *Notice*.

VI. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules:

None.

APPENDIX B

PROPOSED RULES

Parts 20 and 95 of Chapter I of Title 47 of the Code of Federal Regulations are proposed to be amended as follows:

A. PART 20 — COMMERCIAL MOBILE RADIO SERVICES

1. The authority citation for Part 20 would be revised to read as follows:

AUTHORITY: Secs. 4, 251, 252, 303, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 251, 252, 303, and 332, unless otherwise noted.

2. Section 20.9 would be amended by redesignating paragraph (a)(12) as (a)(13), redesignating (a)(13) as (a)(14), and inserting a new paragraph (a)(12) as follows:

§ 20.9 Commercial mobile radio services.

(a) * * *

(12) Mobile operations in the 218-219 MHz Service (part 95, subpart F of this chapter) that provide for-profit interconnected service to the public;

* * * * *

B. PART 95 — PERSONAL RADIO SERVICES

1. The authority citation for Part 95 would be revised to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted.

2. Section 95.1, paragraph (b) would be amended to read as follows:

§ 95.1 The General Mobile Radio Service (GMRS).

(a) * * *

(b) The 218-219 MHz Service is a two-way radio service authorized for system licensees to provide communication service to subscribers in a specific service area. The rules for this service are contained in subpart F of this part.

* * * * *

3. Section 95.803, paragraphs (a) and (b) would be revised to read as follows:

§ 95.803 218-219 MHz Service description.

(a) The 218-219 MHz Service is a two-way radio service authorized for system licensees to provide communication service to subscribers in a specific service area.
(b) The components of each 218-219 MHz Service system are its administrative apparatus, its response transmitter units (RTUs), and one or more cell transmitter stations (CTSs). RTUs may be used in any location within the service area.
(c) * * *

4. Section 95.805 would be revised to read as follows:

§ 95.805 Permissible communications.

A 218-219 MHz Service system may provide any fixed or mobile communications service to subscribers within its service area on its assigned spectrum, consistent with the Commission's rules and the regulatory status of the system to provide services on a common carrier or private basis.

5. A new Section 95.807 would be added to read as follows:

§ 95.807 Requesting regulatory status.

(a) Authorizations for systems in the 218-219 MHz Service will be granted to provide services on a common carrier basis or a private basis, or on both a common carrier and private basis in a single authorization.
(1) *Initial applications.* An applicant will specify on FCC Form 601 if it is requesting authorization to provide services on a common carrier basis, a private basis, or on both a common carrier and private basis.
(2) *Amendment of pending applications.* Any pending application may be amended to: (i) change the carrier status requested; or (ii) add to the pending request in order to obtain both common carrier and private status in a single license.
(3) *Modification of license.* A licensee may modify a license to: (i) change the carrier status authorized; or (ii) add to the status authorized in order to obtain both common carrier and private status in a single license. Applications to change, or add to, carrier status in a license must be submitted on FCC Form 601 in accordance with § 1.1102 of this chapter.
(b) An applicant or licensee may submit a petition at any time requesting clarification of the regulatory status required to provide a specific communications service.

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6. Section 95.811, paragraph (d) would be removed, and paragraphs (b) and (c) would be revised to read as follows:

§ 95.811 License requirements.

(a) * * *
(b) Each CTS that is in the vicinity of certain receiving locations (*see* § 1.923(f) of this chapter), or that may have significant environmental effect (*see* part 1, subpart I of this chapter), or that requires

notification to the Federal Aviation Administration (*see* part 17, subpart B of this chapter), or that has an antenna that exceeds 6.1 meters (m) (20 feet) above ground or an existing man-made structure (other than an antenna structure), must be individually licensed to the 218-219 MHz Service licensee for the service area in which the CTS is located. All other CTSs are authorized under the 218-219 MHz Service system license.

(c) Each component RTU in a 218-219 MHz Service system is authorized under the system license or if associated with an individually licensed CTS, under that CTS license.

7. A new Section 95.812 would be added to read as follows:

§ 95.812 License term.

(a) The term of each 218-219 MHz Service system license is ten years from the date of original issuance or renewal.

(b) Licenses for individually licensed CTSs will be issued for a period running concurrently with the license of the associated 218-219 MHz Service system with which it is licensed.

8. Section 95.813, paragraph (c) would be removed, and paragraph (b) would be amended to read as follows:

§ 95.813 Eligibility.

(a) * * *

(b) An entity that loses its 218-219 MHz Service authorization due to failure to meet the construction requirements specified in § 95.833 may not apply for a 218-219 MHz Service system license for three years from the date the Commission takes final action affirming that the 218-219 MHz Service license has been canceled.

9. Section 95.815, paragraph (a) would be amended to read as follows:

§ 95.815 License application.

(a) In addition to the requirements of part 1, subpart F of this chapter, each application for a 218-219 MHz Service system license must include a plan showing how the applicant intends to minimize co-channel interference and interference to adjacent channel users and a showing that the proposed system will meet the service requirements set forth in § 95.831 of this part.

(b) * * *

10. Section 95.816, would be amended by revising paragraphs (a), (b), (c), and (d) to read as follows:

§ 95.816 Competitive bidding proceedings.

(a) Mutually exclusive initial applications for 218-219 MHz Service system licenses are subject to competitive bidding. The procedures set forth in part 1, subpart Q, of this chapter will apply unless otherwise provided in this part.

(b) The Wireless Telecommunications Bureau will select competitive bidding designs and mechanisms in accordance with §§ 1.2103 and 1.2104 of this chapter.

(c) The specific procedures applicable to auctioning particular 218-219 MHz Service licenses will be set forth by Public Notice. Generally, the following competitive bidding procedures will be used to auction mutually exclusive 218-219 MHz Service licenses.

(1) *Forms.*

(i) *Short-form application. See* § 1.2105 of this chapter.

(ii) *Long-form application. See* § 1.2107(c) and (d) of this chapter.

(2) *Upfront payments.* Each applicant to participate in a 218-219 MHz Service auction will be required to submit an upfront payment of $9,000 per Metropolitan Statistical Area license and $2,500 per Rural Service Area license for the maximum number of licenses on which it intends to bid pursuant to § 1.2106 of this chapter and procedures specified by Public Notice.

(3) *Down payments. See* § 1.2107(b) of this chapter.

(4) *Full payment. See* § 1.2109(a) of this chapter.

(5) *Default or disqualification. See* §§1.2104(g)(2) of this chapter.

(d) *Designated entities.* Designated entities are small businesses and very small businesses, as defined in 95.816(d)(4) of this section, and businesses owned by members of minority groups and/or women, as defined in § 1.2110(b) of this chapter.

(1) *Bidding credits.*

(i) A winning bidder that qualifies as a small business (as defined in 95.816(d)(4)(i) of this section) may use a bidding credit of 25 percent to lower the cost of its winning bid.

(ii) A winning bidder that qualifies as a very small business (as defined in 95.816(d)(4)(i)(ii) of this section) may use a bidding credit of 35 percent to lower the cost of its winning bid.

(iii) The bidding credits referenced in paragraphs (1) and (2) of this subsection are not cumulative.

(2) *Installment payments. See* § 1.2110(f) of this chapter.

NOTE TO PARAGRAPH (d)(2): Each 218-219 MHz Service system licensee already utilizing an installment payment plan as of the effective date of these rules will be notified by the Commission of the revised terms of its installment payment plan. The Commission may require that such licensee execute appropriate loan documentation, that may include promissory notes, security agreements, and other related agreements as a condition of the revised installment payment plan.

(3) *Audits. See* § 1.2110(l) of this chapter.

(4) * * *

* * * * *

11. Section 95.819 would be revised to read as follows:

§ 95.819 License transferability.

(a) A 218-219 MHz Service system license acquired through competitive bidding procedures (including licenses obtained in cases of no mutual exclusivity), together with all of its component CTS licenses, may be transferred, assigned, sold, or given away only in accordance with the provisions and procedures set forth in § 1.2111 of this chapter.

(b) A 218-219 MHz Service system license obtained through random selection procedures, together with all of its component CTS licenses, may be transferred, assigned, sold, or given away to any other entity once the five year construction benchmark (substantial service) has been met, in accordance with the provisions of § 1.948 of this chapter.

(c) If the transfer, assignment, sale, or gift of a license is approved, the new licensee is held to the original construction requirements set forth in § 95.833 of this subpart.

* * * * *

12. A new Section 95.823 would be added to read as follows:

§ 95.823 Geographic partitioning and spectrum disaggregation.

(a) *Eligibility.* Parties seeking Commission approval of geographic partitioning or spectrum disaggregation of 218-219 MHz Service system licenses shall request an authorization for partial assignment of license pursuant to § 1.948 of this chapter.

(b) *Technical standards.*

(1) *Partitioning.* In the case of partitioning, requests for authorization of 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 seconds 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, 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 the 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 maybe disaggregated in any amount.

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

(c) *Provisions applicable to designated entities.*

(1) *Unjust Enrichment. See* § 1.2111(e) of this chapter.

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

(i) When a winning bidder that elected to pay for its license through an installment payment plan 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 § 1.2111(e)(3) of this chapter.

(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 cancellation of the grant of the partial assignment application.

(iii) The partitionor or disaggregator 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 partitionor's or disaggregator'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(f)(3)(i) of this chapter at the time of the grant of the initial license in the market, shall continue to be applied to the partitionor's or disaggregator's portion of the remaining government obligation.

(iv) A default on the partitionor's or disaggregator's payment obligation will affect only the partitionor's or disaggregator'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.

(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 its *pro rata* portion of the balance due (including accrued and unpaid interest), as apportioned according to § 1.2111(e)(3) of this chapter, based upon the installment payment terms for which it qualifies 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(f)(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 its portion of the partitioned market.

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

(iv) Partitionees or 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 remainder in installments as set forth in § 1.2110(f) of this chapter.

(d) *Construction Requirements.*

(1) *Partitioning.* Partial assignors and assignees for license partitioning have two options to meet construction requirements. Under the first option, the partitionor and partitionee would each certify that they will independently satisfy the applicable construction requirements set forth in § 95.833 for their respective partitioned areas. If either licensee failed to meet its § 95.833 requirement, only the non-performing licensee's renewal application would be subject to dismissal. Under the second option, the partitionor certifies that it has met or will meet the § 95.833 requirement for the entire market. If the partitionor fails to meet the § 95.833 requirement, however, only its renewal application would be subject to forfeiture at renewal.

(2) *Disaggregation.* Partial assignors and assignees for license disaggregation have two options to meet construction requirements. Under the first option, the disaggregator and disaggregatee would certify that they each will share responsibility for meeting the applicable construction requirements set forth in § 95.833 for the geographic service area. If parties choose this option and either party fails to do so, both licenses would be subject to forfeiture at renewal. The second option would allow the parties to agree that either the disaggregator or the disaggregatee would be responsible for meeting the § 95.833 requirement for the geographic service area. If parties choose this option, and the party responsible for meeting the construction requirement fails to do so, only the license of the nonperforming party would be subject to forfeiture at renewal.

(3) All applications requesting partial assignments of license for partitioning or disaggregation must include the above-referenced certification as to which of the construction options is selected.

(4) Responsible parties must submit supporting documents showing compliance with the respective construction requirements within the appropriate construction benchmarks set forth in § 95.833.

* * * * *

13. Section 95.831 would be revised to read as follows:

§ 95.831 Service requirements.

Subject to the initial construction requirements of § 95.833 of this subpart, each 218-219 MHz Service system licensee must either demonstrate that it provides substantial service, or make service available to at least 20 percent of the population or land area located within the service area. "Substantial service" means service that is sound, favorable, and substantially above a level of mediocre service that would barely warrant renewal.

14. Section 95.833 would be revised to read as follows:

§ 95.833 Construction requirements.

(a) Each 218-219 MHz Service system licensee must demonstrate that it provides substantial service to its service area within five years of license grant.

NOTE TO PARAGRAPH (a): Each 218-219 MHz Service system licensed as of the effective date of these rules must demonstrate that it provides substantial service to its service area within five years of the effective date of these rules.

(b) Each 218-219 MHz Service system licensee must make service available to at least 20 percent of the population or land area within the service area within ten years of grant of the 218-219 MHz Service system license. As an alternative to the coverage requirement of this paragraph, the 218-219 MHz Service system licensee may demonstrate that it provides substantial service to its service area within ten years of license grant.

(c) In demonstrating compliance with the construction requirements set forth in this section, licensees must base their calculations on signal field strengths that ensure reliable service for the technology utilized. Licensees may use any service radius contour formula developed or generally used by industry, provided that such formula is based on the technical characteristics of their system.

(d) Failure to meet the construction requirements set forth in this section will result in automatic cancellation of the 218-219 MHz Service system license, and will result in the licensee's ineligibility to apply for 218-219 MHz Service licenses for three years from the date the Commission takes final action affirming that the 218-219 MHz Service license has been canceled. *See* 47 CFR § 95.813(b). For the purposes of this section, a CTS is not considered as providing service unless that CTS and two associated RTUs are placed in operation.

(e) Each 218-219 MHz Service system licensee must file a progress report at the conclusion of each of the two benchmark periods to inform the Commission of the construction status of the system. The report must include:

(1) A showing of how the system meets the benchmark; and

(2) A list, including addresses, of all component CTSs constructed.

* * * * *

15. Section 95.853, paragraph (a) would be amended to read as follows:

§ 95.853 Frequency segments.

(a) There are two frequency segments available for assignment to the 218-219 MHz Service in each service area. * * *

(b) * * *

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