

provide co-channel protection to all incumbent licensees, including incumbent mobile telephone service providers operating on the 150 MHz and 450 MHz bands.¹⁹⁸

51. We will not, however, grant Consolidated's request that incumbent mobile telephone service providers be permitted to obtain additional site licenses on a secondary basis. In the *Second Report and Order*, we permitted BETRS operators to obtain site licenses on a secondary basis.¹⁹⁹ We noted that BETRS primarily serves rural, mountainous, and sparsely populated areas where it would be impractical to provide wireline telephone service.²⁰⁰ We also stated that if any geographic area licensee subsequently notifies the BETRS licensee that a secondary facility must be shut down because it may cause interference to the paging licensee's existing or planned facilities, the BETRS licensee must discontinue use of the particular channel at that site no later than six months after such notice.²⁰¹ While we are generally aware that two-way incumbent mobile telephone service providers serve rural areas in the western part of the country,²⁰² Consolidated provides no information at all for determining whether to permit incumbent mobile telephone service providers to operate facilities on a secondary basis. We therefore deny Consolidated's request.

D. Shared Channels

52. **Background.** In the *Notice*, we sought comment on whether to use geographic area licensing for the shared PCP channels in the 152-158 MHz, 462 MHz, and 465 MHz bands.²⁰³ Specifically, we sought comment on whether we should: (1) convert lower band shared PCP channels to exclusive use and implement geographic area licensing; (2) issue only a certain number of licenses per shared channel and use competitive bidding to choose among mutually exclusive applications once the limit is reached; or (3) retain the *status quo*.²⁰⁴

53. Most commenters who responded to this issue in the *Notice* were opposed to geographic area licensing for the shared channels and sought to retain the *status quo*.²⁰⁵ In the *Second Report and Order and Further Notice*, we found that the cost and disruption caused by converting shared channels to exclusive channels and subjecting them to competitive bidding would outweigh the benefits.²⁰⁶ We did not impose a limit or "cap" on the number of licensees for each of the shared channels, as we found that capacity limits of paging channels are based primarily on use and not the number of licensees. Thus,

¹⁹⁸ See *Second Report and Order and Further Notice*, 12 FCC Rcd at 2769, ¶ 69.

¹⁹⁹ *Id.* at 2753, ¶ 34.

²⁰⁰ *Id.* at 2749 & 2753, ¶¶ 26 & 34.

²⁰¹ *Id.* at 2753-54, ¶ 35.

²⁰² *Id.* at 2754, ¶ 36.

²⁰³ *Notice*, 11 FCC Rcd at 3115, ¶ 31.

²⁰⁴ *Id.* at 3115, ¶ 32.

²⁰⁵ *Second Report and Order and Further Notice*, 12 FCC Rcd at 2754-55, ¶ 38.

²⁰⁶ *Id.* at 2756, ¶ 40.

"capping" the number of licensees would not necessarily ensure efficient spectrum use.²⁰⁷ We also determined in the *Second Report and Order* that pending the resolution of issues related to consumer fraud addressed in the *Further Notice*, we would retain our interim licensing rules, which limited applications to incumbents seeking to expand their systems. We did, however, eliminate the 40-mile requirement for new sites, allowing incumbents to file for new sites at any location.²⁰⁸ Finally, noting that we would not grant applications proposing operations on a commercial basis, we allowed new applicants to file applications for private, internal-use systems,²⁰⁹ and we reiterated that Special Emergency Radio Service providers would remain exempt from the licensing freeze and could continue to file applications on shared channels.²¹⁰

54. **Discussion.** Preferred Networks and Teletouch oppose granting new applicants licenses for private, internal-use systems.²¹¹ Preferred Networks alleges that allowing new applications would encourage speculative applications.²¹² Teletouch argues that allowing new applications would result in harmful congestion on the shared PCP channels.²¹³ As a remedy, Preferred Networks and Teletouch urge us to retain our interim rules, which limit the filing of new applications primarily to incumbents.²¹⁴ In the alternative, Preferred Networks and Teletouch suggest that we: (1) require new applicants to perform channel loading analyses; (2) restrict their emission to digital pages; and (3) adopt and enforce channel sharing arrangements requiring new applicants to accept reasonable sharing arrangements with incumbents.²¹⁵ TSR Paging also requests that the Commission limit applications filed on the 929 MHz shared channels to incumbent licensees.²¹⁶ Preferred Networks and Teletouch further urge the Commission to limit incumbents' expansion applications to sites that are within 75 miles of an existing facility, in lieu of the 40-mile requirement that we have eliminated, to deter incumbents from filing speculative applications.²¹⁷ Finally, Preferred Networks and Teletouch ask that the Commission permit applications

²⁰⁷ *Id.* at 2757, ¶ 42.

²⁰⁸ *Id.* at 2757, ¶ 43.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 2757-58, ¶ 43.

²¹¹ Preferred Networks, Inc. Petition for Reconsideration (Preferred Networks Petition) at 3-5; Teletouch Licenses, Inc. Petition for Reconsideration (Teletouch Petition) at 7-10; *see* AirTouch Comments on Petitions for Reconsideration at 20-21; and Metrocall Response to Petitions for Reconsideration at 17-18.

²¹² Preferred Networks Petition at 3, 5.

²¹³ Teletouch Petition at 8-9.

²¹⁴ Preferred Networks Petition at 3; Teletouch Petition at 7; *see* AirTouch Petition at 20 (generally supporting the request of Preferred Network and Teletouch "to limit the further sharing of *all* shared frequencies").

²¹⁵ Preferred Networks Petition at 4; *see* Teletouch Petition at 9, n.6.

²¹⁶ TSR Paging at 2-5.

²¹⁷ Preferred Networks Petition at 5-6; Teletouch Petition at 3-7.

from public safety and medical services providers for shared channels only upon certification that no public safety channels are available to meet those providers' needs.²¹⁸

55. We do not believe that eliminating the opportunity for new licensees to establish service on shared channels serves the public interest because it does not promote efficient use of spectrum. As we stated in the *Second Report and Order and Further Notice*, the capacity limits on paging channels are based primarily on use and not the number of licensees.²¹⁹ We do not believe that concerns about speculation or congestion on shared channels are sufficient at this time to warrant additional burdens on new applicants. We have no evidence, and Preferred Network has provided no evidence, that speculative applications have created problems in connection with private, internal-use systems. Moreover, Teletouch bases its arguments about congestion on hypothetical situations.²²⁰ Our goal is to increase the use of these shared channels, not to unduly restrict access to them. After reviewing the record, therefore, we affirm our previous decision and decline to impose limits on the number of licensees for each channel in a particular area. We will take further action if we find that the transition of the exclusive channels to geographic area licensing results in congestion and interference problems on the shared channels, causing overall service to the public to be reduced. We also decline to adopt a certification requirement for public safety providers. Because petitioners once again base their arguments on hypothetical situations, we find it inappropriate to impose additional requirements on public safety providers at this time. Finally, we will be removing our interim licensing rules on all the shared paging channels.²²¹ Accordingly, we decline to impose any mileage limitations on expansion applications to provide service on shared paging channels.

56. AirStar contends that the Commission should reconsider its decision not to subject the five 929 MHz non-exclusive channels to competitive bidding.²²² AirStar argues that a geographic area license on a shared 929 MHz channel would be more valuable than a geographic area license for an exclusive channel because the geographic area licensee on a shared channel would receive the right to serve the entire geographic area, whereas geographic area licensees on exclusive channels only receive the right to build out in unserved area.²²³ AirStar further explains that the geographic area licensee would have a greater incentive to make the investment in equipment necessary to support efficient time sharing if it does not have to plan against the possibility of an unlimited number of additional entrants in the market.²²⁴ We decline to reconsider our decision not to subject shared channels to competitive bidding. AirStar's arguments to include shared channels in competitive bidding are effectively a request to limit the number

²¹⁸ Preferred Network Petition at 4; Teletouch Petition at 9-10; see Metrocall Response to Petitions for Reconsideration at 18.

²¹⁹ *Second Report and Order and Further Notice*, 12 FCC Rcd at 2757, ¶ 42.

²²⁰ Teletouch Petition at 8-9.

²²¹ See *infra* at ¶ 167.

²²² AirStar Paging Inc. Petition for Clarification and Reconsideration (AirStar Petition) at 8.

²²³ *Id.* at 9. AirStar states that a geographic area licensee of a non-exclusive channel would receive the last right to time-share throughout the entire region covered by the license. *Id.*

²²⁴ *Id.* at 10.

of licensees authorized to operate on shared channels. As previously stated, we decline to impose limits on the number of licensees for each channel in a particular area.²²⁵

57. Metrocall requests that we adopt specific interference rules for shared frequencies, and provide shared frequency licensees with some form of exclusivity protection.²²⁶ In the *Second Report and Order and Further Notice*, we found that shared channels are heavily used by incumbent systems, many of whom have entered into time-sharing or interconnection agreements to avoid interference with one another.²²⁷ We believe the imposition of specific interference requirements at this time could jeopardize the viability of some of these existing relationships. Each licensee who chooses to operate on these shared channels is aware that these channels are, by definition, not for exclusive use and should expect that such private agreements may be necessary. In fact, we noted in the *Second Report and Order and Further Notice* that several commenters had pointed out in response to the *Notice* that incumbents would not benefit from receiving interference protection for their existing service areas, because systems on shared channels have not developed based on a protected service area model.²²⁸ Metrocall has not provided any information that indicates otherwise. We therefore decline to adopt interference rules, as Metrocall requests.

E. Coordination with Canada

58. **Background.** In the *Second Report and Order and Further Notice*, we indicated that geographic area licensees will have to file site-specific applications with the Commission, if such filing is necessary for coordination with Canada.²²⁹ Currently, certain paging facilities north of line A or east

²²⁵ In addition, in the *Second Report and Order and Further Notice*, we eliminated finders' preferences immediately for paging services, dismissed all pending finder's preference requests, and stated that we would no longer accept finders' preference requests upon adoption of the *Second Report and Order*. *Second Report and Order and Further Notice*, 12 FCC Rcd at 2745, ¶ 18. AirStar's petition requests that the Commission process its finder's preference request pending at the time the *Second Report and Order* was adopted. AirStar Petition at 4-8. However, AirStar and Nationwide Paging Inc. subsequently sought withdrawal of AirStar's finder's preference request pursuant to a settlement agreement. Letter from Frederick M. Joyce, Attorney for Nationwide Paging, Inc. to Steve Weingarten, Acting Chief, Commercial Wireless Division of 3/20/98. The withdrawal request and issues raised in AirStar's petition regarding its finder's preference request will be disposed of in a separate order.

²²⁶ Metrocall Petition at 19-22.

²²⁷ *Second Report and Order and Further Notice*, 12 FCC Rcd at 2756, ¶ 40.

²²⁸ *Id.* at 2756, ¶ 41.

²²⁹ *Id.* at 2745 n.52, 2748 n.70 & 2749 n.73. As we also indicated, licensees must file applications with the Commission when coordination with Mexico is required. No comments were submitted seeking clarification of the filing procedures for sites in the U.S./Mexico border area.

of Line C on certain channels are coordinated on a site-by-site basis with Industry Canada.²³⁰ The licensee files an application with the Commission and the Commission obtains clearance from Industry Canada.²³¹

59. **Discussion.** Blooston requests clarification regarding whether a geographic area licensee must submit a Form 600 to install a transmitter north of Line A on those channels that require Canadian coordination.²³² Blooston also requests clarification regarding whether an incumbent licensee must file a Form 600 before it can implement fill-in transmitters and permissive relocations north of Line A on those channels that require Canadian coordination. Blooston requests that the Commission establish an expedited procedure for coordination with Canada.²³³

60. The Commission is bound by international agreement to coordinate with the Canadian government (Industry Canada) stations using certain frequencies north of Line A or east of Line C. Incumbent and geographic area licensees on the lower paging channels must submit a Form 600 (or Form 601) to obtain authorization to operate stations north of Line A or east of Line C because the lower paging channels are subject to the *Above 30 Megacycles per Second Agreement* with Industry Canada.²³⁴ The *U.S.-Canada Interim Coordination Considerations for the Band 929-932 MHz, as amended*, assigns specific 929 and 931 MHz frequencies to the United States for licensing along certain longitudes above Line A, and assigns other specific 929 and 931 MHz frequencies to Canada for licensing along certain longitudes along the U.S.-Canada border. As a result, frequency coordination with Canada is not required for the 929 and 931 MHz frequencies that U.S. licensees are permitted to use north of Line A pursuant to that agreement.²³⁵ In addition, the 929 and 931 MHz frequencies assigned to Canada are unavailable for use by U.S. licensees above Line A as set out in the agreement.²³⁶ Finally, we agree with Blooston's suggestion that the Commission take steps to expedite the coordination of applications with Industry Canada. To this end, we are implementing electronic filing and automated coordination procedures to the extent practical and allowable under our agreements with Canada.²³⁷

²³⁰ See 47 C.F.R. §§ 1.923, 22.531(e). Industry Canada is the Canadian agency that regulates telecommunications services and their providers in Canada. The Commission uses Line A and Line C as a coordination point with Canadian authorities in the assignment of paging channels. Line A and Line C are defined in section 2.1 of our rules, 47 C.F.R. § 2.1.

²³¹ See 47 U.S.C. § 90.175(c).

²³² Blooston Petition at 18.

²³³ *Id.*

²³⁴ Canada Telecommunication: Coordination and Use of Radio Frequencies Above 30 Megacycles per Second, October 24, 1962, as amended, June 24, 1965, U.S.-Canada.

²³⁵ Interim Coordination Considerations for the Band 929-931 MHz, Sept. 14, 1983, as amended, Further Interim Coordination for the Shared 931-931 MHz, Feb. 10, 1987, as amended, Letter from Robert W. McCaughern, Deputy Director General, Engineering Programs Branch, DOC, to Bruce Franca, Deputy Chief Engineer, Office of Engineering and Technology, FCC of July 22, 1992; see 47 C.F.R. § 22.531(e).

²³⁶ *Id.*

²³⁷ See *ULS Report and Order*, 13 FCC Rcd 21027 (1998).

F. Power Requirements

61. **Background.** To establish technical parity between 929 MHz and 931 MHz licensees, in the *Second Report and Order and Further Notice* the Commission eliminated the Part 90 height and power limitations on 929 MHz stations and increased the maximum permitted effective radiated power (ERP) for 929 MHz stations to 3500 watts.²³⁸ The Commission determined that paging systems operating on the 929 MHz band are virtually identical to the paging systems operating on the 931 MHz band and should be subject to the same height and power rules.²³⁹ In addition, the Commission noted that conforming these rules allows paging licensees to design their systems in the most efficient manner, especially when integrating two systems where one operates in the 931 MHz band and the other operates in the 929 MHz band.²⁴⁰

62. **Discussion.** Petitioners request clarification as to whether incumbent 929 MHz licensees must file a modification application to increase the current ERP for their base stations up to the maximum permissible, 3500 watts.²⁴¹ In the *First Report and Order*, we allowed 929 MHz and 931 MHz licensees to make internal system changes without filing an application with the Commission so long as they did not expand the composite interference contour of their existing stations as determined by Table E-2.²⁴² Similarly, we will not require 929 MHz licensees to file a modification application to increase the ERP for base stations at any location, including exterior base stations, as long as they do not expand their current composite interference contour. Thus, licensees may modify power levels without filing a modification application only to the extent that their composite interference contour, as determined by Table E-2, remains constant or decreases.²⁴³ Again, we restate that, pursuant to the *First Report and Order*, an incumbent licensee is not permitted to increase its composite interference contour.²⁴⁴

G. Coverage Requirements

63. **Background.** In the *Second Report and Order and Further Notice*, we stated that coverage requirements are needed as performance requirements to deter speculation, promote prompt service to the public, prevent warehousing, promote rapid deployment of new technologies and services,

²³⁸ *Second Report and Order and Further Notice*, 12 FCC Rcd at 2773-74, ¶ 78.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ Metrocall Petition at 23; Morris Petition at 11-12; Nationwide Petition at 11-12.

²⁴² *First Report and Order*, 11 FCC Rcd at 16587, ¶ 35.

²⁴³ The *Second Report and Order and Further Notice* adopted the fixed distances in Tables E-1 and E-2 in section 22.537 for the exclusive 929 MHz and 931 MHz channels. *Second Report and Order and Further Notice*, 12 FCC Rcd at 2769-70, ¶ 69. Therefore, a base station that is less than 177 meters can increase its ERP to 3500 watts without increasing its interference contour as defined by Table E-2. However, a base station above 177 meters that increases its ERP may increase its interfering contour, as well, as defined by Table E-2; see 47 U.S.C. § 22.537.

²⁴⁴ *First Report and Order*, 11 FCC Rcd at 16587, ¶ 35.

and promote service to rural areas.²⁴⁵ We concluded that for each MTA or EA the geographic area licensee must provide coverage to one-third of the population of the entire area within three years of the license grant, and to two-thirds of the population of the entire area within five years of the license grant; or in the alternative, the MTA or EA licensee may provide substantial service to the geographic license area within five years of license grant.²⁴⁶ In addition, we concluded that failure to meet our coverage requirements would result in automatic termination of the geographic area license.²⁴⁷ We stated that we would reinstate any licenses that were authorized, constructed, and operating at the time of termination of the geographic area license.²⁴⁸

64. **Discussion.** PageNet advocates requiring the geographic area licensee to provide coverage to one-third of the market area within one year, and two-thirds within three years.²⁴⁹ PageNet states that paging carriers have been able to construct substantial systems in under twelve months.²⁵⁰ Com-Nav, Ventures in Paging, and OTC argue, however, that small companies will have difficulty meeting PageNet's suggested coverage requirements, especially if they must construct in rugged areas with low population density to cover two-thirds of the population.²⁵¹ Ventures in Paging suggests that if the Commission chooses to follow PageNet's suggestion, it should permit an exemption for small businesses or create an exception for EAs that contain a significant number of rural communities.²⁵²

65. We decline to adopt PageNet's proposal. We believe that our previously adopted coverage requirements adequately promote prompt service to the public without being unduly burdensome on licensees that require a reasonable amount of time to complete construction. We find that areas which are currently unserved have remained so in spite of the fact that paging service has existed for many years and is extremely competitive in some markets. This finding suggests that providers of service in these areas may face unusual difficulties. Moreover, we find that overly stringent coverage requirements would unfairly favor incumbents by erecting a formidable barrier to entry.

²⁴⁵ *Second Report and Order and Further Notice*, 12 FCC Rcd at 2766-67, ¶ 63.

²⁴⁶ *Id.* "Substantial service" is defined as service that is sound, favorable, and substantially above a level of mediocre service, which would barely warrant renewal. *Id.* at 2766-67, ¶ 63.

²⁴⁷ *Id.* at 2767, ¶ 64.

²⁴⁸ *Id.*

²⁴⁹ PageNet Petition at 10.

²⁵⁰ *Id.*

²⁵¹ Letter from Com-Nav, Inc. d/b/a Radio Telephone of Maine to William F. Caton, Acting Secretary, Federal Communications Commission of 5/8/97; Letter from Ventures in Paging, L.C., to William F. Caton, Acting Secretary, Federal Communications Commission of 5/8/97; Letter from Oregon Telephone Corporation to William F. Caton, Acting Secretary, Federal Communications Commission of 5/9/97, at 2.

²⁵² Letter from Ventures in Paging, L.C. to William F. Caton, Acting Secretary, Federal Communications Commission of 5/8/97.

66. Petitioners argue that the "substantial service" alternative should be eliminated because it will encourage speculation, greenmail and anti-competitive conduct.²⁵³ However, in some MEAs or EAs, an incumbent licensee may already serve more than one-third of the population. The elimination of the substantial service alternative would prevent a potential co-channel licensee other than the incumbent (*e.g.*, a licensee in an adjacent market) from bidding in these markets because the five-year coverage requirement could only be satisfied by the incumbent. The option of providing a showing of substantial service allows those MEA and EA licensees who cannot meet the three-year and five-year coverage requirements because of the existence of incumbent co-channel licensees to satisfy a construction requirement. Moreover, we recognize that the unserved areas of many MEAs and EAs are rural areas that may be more difficult to serve than urban areas. We think it is in the public interest to encourage build-out in rural areas by allowing licensees to make a substantial service showing. Further, the substantial service option enables licensees to use spectrum flexibly to provide new services without being concerned that they must meet a specific percentage of coverage benchmark or lose their license. Elimination of the substantial service alternative would be inconsistent with promoting competition and opportunities for new entrants.²⁵⁴ We also note that our approach here is consistent with the coverage requirements imposed on geographic area licensees in the 220 MHz service.²⁵⁵ Finally, any party relying on "substantial service" in lieu of the three-year and five-year coverage requirements must demonstrate that level of service or will automatically lose the geographic area license.

67. Blooston and AirTouch argue that the substantial service option is used in other market area licensing situations to facilitate the provision of "niche" services in areas where an incumbent does not operate, but that this option should not be employed in the paging context.²⁵⁶ Blooston contends that unlike new services on relatively unlicensed spectrum (*e.g.*, PCS), paging has little room for "niche" services.²⁵⁷ Blooston also contends that with only 25 kHz of spectrum, paging carriers have relatively little

²⁵³ See AirTouch Comments on Petitions for Reconsideration at 9-11; Blooston Petition at 6-8; Metrocall Petition at 16; Metrocall Response to Petitions for Reconsideration at 16; PageNet Petition at 7-9; PCIA Petition at 7-10; ProNet Petition at 21-22.

²⁵⁴ Section 309(j) of the Communications Act requires the Commission to promote economic opportunity and competition and ensure that new and innovative technologies are readily accessible to the public by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants. 47 U.S.C. § 309(j)(3)(B).

²⁵⁵ See Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-22 MHz Band by the Private Land Mobile Service, *Third Report and Order and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 10943, 11019-21, ¶¶ 160-163 (1997) (*220 MHz Third Report and Order*); 47 C.F.R. § 90.767. We note that in the 220 MHz service, the "substantial service" option may only be satisfied by geographic area licensees who offer either fixed services as part of their system or have one or more incumbent co-channel licensees authorized in their geographic area. 47 C.F.R. § 90.767(2)(b). This is not the case for the paging service. See also 47 C.F.R. § 90.685 (800 MHz EA licensees must provide service to one-third of the population of the geographic area within three years, and two-thirds of the population of the geographic area within five years of initial license grant; or, alternatively, demonstrate substantial service within five years); *id.* § 90.665 (MTA 900 MHz SMR licensees must provide service to one-third of the population of the geographic area within three years, and two-thirds of the population of the geographic area within five years of initial license grant; or, alternatively, demonstrate substantial service within five years).

²⁵⁶ Blooston Petition at 7; AirTouch Comments on Petitions for Reconsideration at 9-10.

²⁵⁷ Blooston Petition at 7.

flexibility in what services they can offer, and that wide-area coverage is preferable to coverage of isolated niche markets.²⁵⁸ AirTouch adds that niche services "have not emerged or been proposed by any commenter and would not promote continued development of wide-area systems."²⁵⁹ We believe, however, that market forces, not regulation, should dictate whether serving a niche market would be viable for a paging provider.

68. Advanced, AirTouch, Blooston, Metrocall, and ProNet argue that the vagueness of the definition of "substantial service" will result in an abundance of litigation.²⁶⁰ ProNet suggests that substantial service could be defined as coverage of fifty percent at three years, and seventy-five percent at five years, of the geographic area that is not served by co-channel incumbent licensees.²⁶¹ ProNet also suggests that the Commission could require licensees to show a specified level of infrastructure investment by the three- and five-year deadlines.²⁶² AirTouch suggests that the Commission provide specific examples of what construction levels would satisfy the substantial service test, as provided in the *WCS Report and Order*.²⁶³

69. We decline to adopt specific coverage requirements as the sole means of defining "substantial service," as suggested by ProNet. As already noted, the unserved area of an MEA or EA license (*i.e.*, the area not served by co-channel incumbent licensees at the time the MEA or EA license is granted) may consist largely of spectrum in rural areas. We believe that imposing strict coverage requirements to define "substantial service" in the unserved area would discourage new entrants from attempting to acquire licenses to serve rural areas. Nonetheless, we find that an objective criterion, similar to ProNet's suggestions, would be beneficial in determining substantial service in the unserved areas of an MEA or EA. Therefore, we will presume that the substantial service coverage requirement is satisfied if an MEA or EA licensee provides coverage to two-thirds of the population in the unserved area of the MEA or EA within five years of license grant.

70. At the same time, we recognize the need for flexibility in areas where stringent coverage requirements would discourage provision of any service. Therefore, we clarify that an MEA or EA licensee may be able to satisfy the substantial service requirement even if it does not provide coverage to two-thirds of the population in the unserved area within five years of license grant. AirTouch correctly points out that we offered guidance to WCS licensees with regard to factors that we would consider in

²⁵⁸ *Id.*

²⁵⁹ AirTouch Comments on Petitions for Reconsideration at 10.

²⁶⁰ Advanced Petition at 11; AirTouch Petition at 9; Blooston Petition at 6; Metrocall Petition at 17-18; Metrocall Response to Petitions for Reconsideration at 17; ProNet Petition at 21; *see, e.g.*, AirTouch Comments on Petitions for Reconsideration at 9 ("This vague concept will spawn volumes of litigation at the five-year mark when parties attempt to determine whether a geographic area licensee has satisfied its construction obligation and should retain its license.").

²⁶¹ ProNet Petition at 22.

²⁶² *Id.*

²⁶³ AirTouch Comments on Petitions for Reconsideration at 10 n.14 (citing *WCS Report and Order*, 12 FCC Rcd at 10843-44, ¶ 113). The rules adopted in the *WCS Report and Order* are found at 47 C.F.R. §§ 27.1-27.325 (1997).

evaluating whether the substantial service requirement has been met, and we now apply this additional guidance to our paging licensees.²⁶⁴ Thus, the Commission may consider such factors as whether the licensee is offering a specialized or technologically sophisticated service that does not require a high level of coverage to be of benefit to customers, and whether the licensee's operations serve niche markets. A licensee may also demonstrate that it is providing service to unserved or underserved areas without meeting a specific percentage, as we permitted SMR providers in the 800 MHz band to do.²⁶⁵ Because the substantial service requirement can be met in a variety of ways, the Wireless Telecommunications Bureau will review licensees' showings on a case-by-case basis.

71. PCIA and AirTouch request clarification as to whether licensees who fail to meet coverage requirements will be permitted to retain licenses for those facilities authorized, constructed, and operating at the time the geographic area license is cancelled, or only those authorized, constructed, and operating at the time of grant of the geographic area license.²⁶⁶ PCIA states that adopting the latter approach would discourage "cherry picking," or providing service to only the most lucrative markets, in geographic service areas. Moreover, PCIA believes that if the Commission were to allow a geographic area licensee to retain the facilities it constructed, despite failure to comply with the requirements associated with a grant of the geographic area license, speculators would be encouraged to participate in the market knowing that they could partially comply with applicable obligations without placing their investment at risk.²⁶⁷ However, OTC states that geographic area licensees should not have to face the possibility of a stranded investment because of PCIA's "all or nothing" approach.²⁶⁸

72. We agree with petitioners' argument that licenses reinstated after termination of the geographic area license should be limited to the sites authorized, constructed, and operating at the time the geographic area license was granted. In other words, the right to use channels any place in the geographic area will be forfeited, but any licenses for which individual sites were constructed and operating prior to the grant of the geographic area license will be reinstated. This is consistent with our rules for other services such as 900 MHz SMR service,²⁶⁹ and most recently for the 220 MHz service.²⁷⁰ Further, we believe that this approach properly balances our overarching goal of ensuring, to the extent possible, continuous service to the public and our policy of discouraging speculation and spectrum warehousing. Moreover, we are not convinced that this approach would result in a stranded investment,

²⁶⁴ *WCS Report and Order*, 12 FCC Rcd at 10843-44, ¶ 113 n.279 (citing the use of the substantial service test in SMR and PCS services, as well as WCS).

²⁶⁵ *See 800 MHz Second Report and Order*, 12 FCC Rcd at 19094-95, ¶ 34.

²⁶⁶ PCIA Petition at 24-25; AirTouch Comments on Petitions for Reconsideration at 19.

²⁶⁷ PCIA Petition at 24-25.

²⁶⁸ Letter from Oregon Telephone Corporation to William F. Caton, Acting Secretary, Federal Communications Commission of 5/9/97, at 2.

²⁶⁹ *See Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, Second Order on Reconsideration and Seventh Report and Order*, 11 FCC Rcd 2639, 2649-53, ¶¶ 27-34 (1995).

²⁷⁰ *See 220 MHz Third Report and Order*, 12 FCC Rcd at 11019-21, ¶¶ 160-165.

as OTC argues, since the licensee may choose to meet the substantial service coverage requirement. A licensee unable to demonstrate "service that is sound, favorable, and substantially above a level of mediocre service, which would barely warrant renewal" after five years could not have made a significant investment in paging facilities. Accordingly, we amend section 22.503(k) to provide that licensees who fail to meet their coverage requirements will be permitted to retain licenses only for those facilities authorized, constructed, and operating at the time the geographic area license was granted.²⁷¹ In such instances, incumbent licensees will have the burden of showing when their facilities were authorized, constructed, and operating, and they should retain necessary records of these sites until they have fulfilled their construction requirements.

H. Geographic Licensing for Nationwide Channels

1. In General

73. **Background.** In the *Notice*, we proposed to exclude from competitive bidding the three 931 MHz channels already designated under our rules for nationwide network paging use, and all 929 MHz channels for which the licensees had met the construction requirements for nationwide exclusivity as of February 8, 1996, the adoption date of the *Notice*.²⁷² The Commission specifically sought comment on whether a licensee who had obtained nationwide exclusivity on a paging channel should be given a single nationwide license for use of the channel instead of continuing under site-specific authorizations.²⁷³

74. The *Second Report and Order and Further Notice* awarded nationwide geographic area licenses on the 931 MHz channels and to the eighteen licensees who had constructed sufficient stations to obtain nationwide exclusivity on 929 MHz channels under our rules as of February 8, 1996.²⁷⁴ In addition, we granted nationwide geographic area licenses to four licensees on the 929 MHz band that had sufficient authorizations, as of February 8, 1996, to qualify for nationwide exclusivity on a conditional basis, but had not completed build-out at that time. As stated in the *Second Report and Order and Further Notice*, these four licensees had constructed the required number of transmitters to earn nationwide

²⁷¹ See 47 C.F.R. § 22.503(k).

²⁷² *Notice*, 11 FCC Rcd at 3114, ¶ 26. The three 931 MHz channels, 931.8875 MHz, 931.9125 MHz, and 931.9375 MHz, were designated as nationwide channels in 1982. Amendments of Parts 2 and 22 of the Commission's Rules to Allocate Spectrum in the 928-941 MHz Band and to Establish Other Rules, Policies, and Procedures for One-Way Paging Stations in the Domestic Public Land Mobile Radio Service, *First Report and Order*, 89 F.C.C.2d 1337 (1982), *on reconsideration*, 93 F.C.C.2d 908 (1983); see 47 C.F.R. §§ 22.531(b), 22.551 (1995). Licensees on the 929 MHz channels could earn nationwide exclusivity under former section 90.495 of our rules by constructing networks that consisted of 300 transmitters or more in the continental U.S., Alaska, Hawaii, and Puerto Rico, provided service to at least 50 urban markets listed in our rules, including 25 of the top 50 markets, and provided service to two markets in each of the seven regions modeled on Regional Bell Operating Company regions. *PCP Exclusivity Order*, 8 FCC Rcd at 8322-23, ¶ 13; and 47 C.F.R. § 90.495(a)(3) (1996).

²⁷³ *Notice*, 11 FCC Rcd at 3114, ¶ 26.

²⁷⁴ *Second Report and Order and Further Notice*, 12 FCC Rcd at 2761, ¶ 50.

exclusivity on these channels.²⁷⁵ We also granted nationwide exclusivity to Nationwide 929.8875 LLC (Nationwide) on 929.8875 MHz based on showings that it had met the criteria for nationwide exclusivity as of February 8, 1996, under section 90.495(a)(3) of our rules.²⁷⁶ In excluding these channels from competitive bidding, we stated that it would not serve the public interest or be fair to take away exclusivity rights that licensees earned before the commencement of this proceeding. We also indicated that the licensees on these channels had developed successful and efficient nationwide networks under our pre-existing rules, and that we did not believe that competitive bidding was necessary to further the goal of developing competitive nationwide paging networks on these channels.²⁷⁷

75. **Discussion.** Advanced and Blooston argue that the exemption for nationwide licensees is arbitrary and capricious because it results in similarly situated licensees being treated in a disparate manner.²⁷⁸ According to Advanced, incumbents that have met their five-year coverage requirement are similar to nationwide licensees that met our previous build-out requirements to qualify for exclusivity.²⁷⁹ Blooston contends that most nationwide licensees compete directly with other paging licensees, including wide-area 931 MHz and regional 929 MHz licensees, for regional and local customers and that it is "grossly unfair to allow 26 competitors in each market to forgo the costs and delays associated with auctions."²⁸⁰ Blooston further contends that other paging licensees had the same expectation that the

²⁷⁵ *Id.* The four licensees that conditionally qualified as of February 8, 1996 were Tri-State Radio Co, Inc. (929.2125 MHz), AirTouch (929.4875 MHz), PageMart II, Inc. (929.7625 MHz), and Communications Innovations Corp. (CIC) (929.8125 MHz). On March 26, 1997, American Paging Inc. (API) filed a petition for partial reconsideration, contending that AirTouch was not entitled to a nationwide geographic area license on 929.4875 MHz. On April 20, 1998, TSR Wireless LLC (TSR Wireless) notified the Commission and other parties in this proceeding that TSR Paging Inc. had merged with API and its subsidiaries to form a new entity, TSR Wireless; thus, API and TSR Paging were replaced in this proceeding by TSR Wireless. On October 22, 1998, TSR Wireless filed a petition of withdrawal of the petition for partial reconsideration filed by API. Withdrawal of Petition for Partial Reconsideration, filed by TSR Wireless LLC, October 22, 1998.

On March 26, 1997, PSWF Corporation filed a petition for partial reconsideration contending that CIC had not in fact constructed sufficient base stations to qualify for nationwide exclusivity. PSWF Petition for Partial Reconsideration, filed March 26, 1997. This matter was pending before the Enforcement Division. However, on November 5, 1998, the Commercial Wireless Division, Wireless Telecommunications Bureau, released an order, which in part, dismissed PSWF's petition for partial reconsideration, as requested by both PSWF and CIC. See PSWF Corporation and Communications Innovations Corporation, *Order*, DA 98-2254, (Nov. 5, 1998).

²⁷⁶ In the *Second Report and Order and Further Notice*, we noted that Nationwide was jointly owned and controlled by AirTouch and Arch, who were in the process of securing Commission consent to assign their respective regional exclusive system licenses to Nationwide. *Second Report and Order and Further Notice*, 12 FCC Rcd at 2761-62, ¶ 52. We also noted that AirTouch and Arch had regional exclusivity on 929.8875 MHz for four regional systems, and were parties to an agreement to operate their 929.8875 MHz facilities on an integrated basis to provide nationwide service. We further noted that prior to the *Notice*, AirTouch and Arch filed a nationwide exclusivity request on 929.8875 MHz for their combined systems, and certified that they had more than 300 transmitters in over 40 states as of February 8, 1996, to meet the criteria for nationwide exclusivity under section 90.495(a)(3). *Id.*

²⁷⁷ *Id.* at 2761, ¶ 50.

²⁷⁸ Advanced Petition at 4-5; Blooston Petition at 5-6; Blooston Reply at 2-7.

²⁷⁹ Advanced Petition at 4-5.

²⁸⁰ Blooston Petition at 5-6.

nationwide licensees had of a reasonable opportunity to expand their systems incrementally in response to consumer demand.²⁸¹

76. Several petitioners support the exclusion of nationwide licenses from competitive bidding. AirTouch supports this exclusion because nationwide licensees had a reasonable expectation that the channels on which they had been granted exclusivity would be excluded from the auction.²⁸² Arch argues that the Commission's auction authority is limited to only those situations where mutually exclusive applications are accepted for filing, and no competing applications can be filed for nationwide channels, precluding mutual exclusivity.²⁸³ Metrocall, PageMart, and PageNet argue that the exemption of nationwide licenses does no more than recognize the validity of licenses granted prior to this rulemaking proceeding.²⁸⁴ PageMart further argues that the regulatory framework, and therefore the expectations, for nationwide exclusive licensees and site-specific incumbents were radically different. PageMart explains that in contrast to nationwide licensees, the incumbent non-nationwide licensees "were never *entitled* to additional coverage."²⁸⁵ PageNet asserts its argument that including nationwide licenses in competitive bidding would constitute retroactive rulemaking and a taking in violation of the Fifth Amendment of the United States.²⁸⁶ Blooston responds that "white space" on nationwide frequencies will not be used in many parts of the country for the foreseeable future and should be auctioned; there is no mutual exclusivity on many of the non-nationwide channels in much of the country; nationwide licensees did not pay for their spectrum and thus have no greater reliance interest in the right to expand than non-nationwide licensees; and the use of auctions for nationwide frequencies would be no more of a denial of due process than the use of auctions for other paging channels.²⁸⁷

77. Contrary to Advanced's and Blooston's contention, we do not believe that our decision to exempt nationwide licensees from competitive bidding discriminates against other paging systems. We agree with PageMart, PageNet, and MetroCall that this decision merely recognizes licenses granted prior to this rulemaking proceeding. Our exclusivity rules provided nationwide licensees with the right to continue to build out anywhere in the country on their designated channels, whereas non-nationwide paging licensees have been afforded no right to expand their service area beyond their interference contours. Thus, there are no areas available for auction on the channels on which nationwide geographic area licensees operate, while there are available areas on the channels on which non-nationwide licensees operate. Finally, our rules make clear that licenses will be subject to auction only if mutually exclusive applications are accepted for filing. We therefore affirm our decision in the *Second Report and Order*

²⁸¹ *Id.* at 5.

²⁸² AirTouch Comments on Petitions for Reconsideration at 7-9.

²⁸³ Arch Opposition at 5; Arch Reply at 3-4.

²⁸⁴ Metrocall Response to Petitions for Reconsideration at 6-10; PageMart, Inc. Partial Opposition to Petition for Reconsideration (PageMart Opposition) at 3; PageNet Opposition at 1-2.

²⁸⁵ PageMart Opposition at 3-4.

²⁸⁶ PageNet Opposition at 3-8.

²⁸⁷ Blooston Reply at 1-7.

to grant nationwide geographic area licenses without competitive bidding to those licensees that met the exclusivity criteria established under our previous rules.²⁸⁸

2. MTel's Request for a Nationwide Geographic Area License

78. **Background.** In the *Notice*, we sought comment on whether 931.4375 MHz, a channel licensed extensively to MTel, should be redesignated as a nationwide channel.²⁸⁹ We noted that this channel was allocated as a local paging channel and had not been reallocated as a nationwide channel.²⁹⁰ In the *Second Report and Order*, we declined to extend nationwide exclusivity rights to MTel on 931.4375 MHz.²⁹¹ We concluded that MTel had no expectation that substantial build-out of its system would result in nationwide rights on this channel.²⁹²

79. **Discussion.** MTel argues that denying it a nationwide grant on 931.4375 MHz is inconsistent with the Commission's grant of nationwide geographic area licenses to paging carriers in the 929 MHz band because its system, which consists of over 800 transmitters, meets the nationwide exclusivity criteria established for 929 MHz licensees.²⁹³ Thus, MTel contends that it is similarly situated with the 929 MHz licensees that earned nationwide exclusivity, and reasonably expected to be treated similarly.²⁹⁴ We disagree. In the *Second Report and Order*, we granted nationwide geographic area licenses to those 929 MHz carriers that, as of February 8, 1996, the adoption date of the *Notice*, either met the construction requirements for nationwide exclusivity or had sufficient authorizations to conditionally qualify for nationwide exclusivity. We recognize that MTel is extensively licensed on 931.4375 MHz with over 800 transmitters in various locations throughout the United States. In addition, several other 931 MHz channels are extensively licensed by one carrier. But these 931 MHz channels, including 931.4375 MHz, have never been designated as nationwide channels.²⁹⁵ We did not establish

²⁸⁸ *Second Report and Order and Further Notice*, 12 FCC Rcd at 2761-62, ¶¶ 50-54.

²⁸⁹ *Notice*, 11 FCC Rcd at 3114, ¶ 27.

²⁹⁰ *Id.*

²⁹¹ *Second Report and Order and Further Notice*, 12 FCC Rcd at 2762, ¶ 53.

²⁹² *Id.*

²⁹³ *Mobile Telecommunication Technologies, Corp. Petition for Reconsideration (MTel Petition)* at 9-10.

²⁹⁴ *Id.* at 10.

²⁹⁵ In 1982, well before commencement of this rulemaking proceeding, three 931 MHz channels (931.8875, 931.9125 and 931.9375 MHz) were designated for nationwide use. See Amendment of Parts 2 and 22 of the Commission's Rules to Allocate Spectrum in the 928-941 MHz Band and to Establish Other Rules, Policies, and Procedures for One-Way Paging Stations in the Domestic Public Land Mobile Radio Services, *First Report and Order*, 89 F.C.C.2d 1337, on reconsideration (*Part 1*), 92 F.C.C.2d 631 (1982), on reconsideration (*Part 2*), 93 F.C.C.2d 908 (1983), *aff'd sub nom.*, *NARUC v. FCC*, 737 F.2d 1095 (D.C.Cir. 1984); Amendment of Parts 2 and 22 of the Commission's Rules to Allocate Spectrum in the 928-941 MHz Band and to Establish Other Rules, Policies, and Procedures for One-Way Paging Stations in the Domestic Public Land Mobile Radio Services, *Third Report and Order*, 97 F.C.C.2d 900 (1984). The remaining thirty-seven other channels were made available for regional and local one-way paging service.

rules for a licensee to earn nationwide exclusivity on the thirty-seven channels in the 931 MHz band reserved for local and regional paging, as we did for the thirty-five exclusive 929 MHz channels, so MTel could not reasonably have expected to be granted nationwide status.

80. We also reject MTel's contention that denying nationwide exclusivity to it on 931.4375 MHz is contrary to the public interest because it prevents MTel from providing for its customers' expanding coverage needs.²⁹⁶ Our decision does not prevent MTel from expanding its system, since it may acquire MEA and EA licenses for this frequency in areas where it wishes to expand through competitive bidding. Previously, MTel obtained licenses on this channel on a transmitter-by-transmitter basis, with no assurance that its applications would be granted because they would be subject to competing applications. A geographic area licensee, however, will receive exclusive rights to the unserved area of the geographic area. We reaffirm our decision to deny MTel a nationwide geographic area license on the 931.4375 MHz channel.

I. Competitive Bidding Procedures

1. Auction Sequence

81. **Background.** In the *Notice*, we sought comment on how paging licenses should be grouped for competitive bidding purposes and on possible license groupings.²⁹⁷ A number of commenters suggested that the Commission should form at least two groups—the 929 MHz and 931 MHz licenses and the lower band licenses—and auction them separately, while some proposed that the 900 MHz licenses be auctioned first. In the *Second Report and Order and Further Notice*, we concluded that grouping interdependent licenses for simultaneous bidding promotes our goal of awarding licenses to bidders that value them most.²⁹⁸ We reserved discretion, however, to determine specific license groupings based on administrative considerations.²⁹⁹

82. **Discussion.** PCIA suggests that the Commission conduct auctions for the lower band frequencies before it conducts auctions for the 929 MHz exclusive and 931 MHz frequencies. PCIA argues that this sequence of auctions would reduce the economic hardship of the many small carriers on the lower bands that will be subject to an application freeze pending the start of any auctions.³⁰⁰ This is precisely the sort of issue that we believe the Bureau should consider in exercising its discretion, under the *Second Report and Order and Further Notice*, to determine the sequence of the paging auctions.³⁰¹ Moreover, as the Commission noted in the *Part 1 Third Report and Order and Second Further Notice*,³⁰²

²⁹⁶ MTel Petition at 19.

²⁹⁷ *Notice*, 11 FCC Rcd at 3125, ¶ 79.

²⁹⁸ *Second Report and Order and Further Notice*, 12 FCC Rcd at 2781-82, ¶ 97.

²⁹⁹ *Id.*

³⁰⁰ PCIA Petition at 18-19.

³⁰¹ *Second Report and Order and Further Notice*, 12 FCC Rcd at 2781-82, ¶ 97.

³⁰² *See Part 1 Third Report and Order and Second Further Notice*, 13 FCC Rcd at 447-49, ¶¶ 124-125.

the Balanced Budget Act of 1997³⁰³ provides that "before the issuance of bidding rules," the Commission must provide adequate time for parties to comment on proposed auction procedures.³⁰⁴ In response to this statutory requirement, the Commission directed the Bureau, under its existing delegated authority,³⁰⁵ to seek comment prior to the commencement of each auction on a variety of auction-specific operational issues.³⁰⁶ Since that time, it has been the Bureau's practice to issue a Public Notice seeking comment on these issues, and on the establishment of minimum opening bids or reserve prices, well in advance of the application deadline for each auction.³⁰⁷ We therefore conclude that the Bureau, under its existing delegated authority and in accordance with the Balanced Budget Act of 1997, should seek further comment on license groupings and auctions sequence, among other auction-specific issues (e.g., minimum opening bids), prior to the start of the paging auctions.

2. Stopping Rule

83. **Background.** In the *Second Report and Order and Further Notice*, we noted that most commenters preferred a stopping rule based on licenses, frequencies, or markets, but that a few strongly favored a simultaneous stopping rule.³⁰⁸ For the paging service auctions, we adopted a new hybrid simultaneous/license-by-license stopping rule to reduce the risk of prolonged auctions, while still "preserving most of the efficiency benefits of a simultaneous stopping rule."³⁰⁹ This new rule, which we have not used in prior auctions, features three phases. Phase I would last one month or 100 rounds, whichever is later, and would employ the standard simultaneous stopping rule (i.e., bidding would remain open on all licenses until bidding stops on all licenses). During Phase II, the Bureau would have the discretion to employ a license-by-license stopping rule if it determines that the use of back-up strategies is minimal. If the Bureau chooses to employ license-by-license stopping in Phase II, bidding on a license would close whenever 10 consecutive rounds pass with no new valid bids for that license, while remaining licenses would close according to the standard simultaneous stopping rule. Phase III would begin after two months and 100 rounds. Thus, if it takes more than two months to complete 100 rounds, the auction would move directly from Phase I to Phase III. In Phase III, the Bureau would employ the license-by-

³⁰³ See Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3002, 111 Stat. 251 (1997) (codified as amended at 47 U.S.C. § 309(j)(3)(E)(i)).

³⁰⁴ See *Part 1 Third Report and Order and Second Further Notice*, 13 FCC Rcd at 447, ¶ 123 (citing Balanced Budget Act of 1997, § 3002(a)(1)(B)(iv)).

³⁰⁵ See 47 C.F.R. §§ 0.131(c), 0.331, and 0.332; see also Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures, *Order, Memorandum Opinion and Order, and Notice of Proposed Rule Making*, 12 FCC Rcd 5686, 5697, ¶ 16 (1997).

³⁰⁶ See *Part 1 Third Report and Order and Second Further Notice*, 13 FCC Rcd at 448, ¶ 125.

³⁰⁷ See, e.g., Location and Monitoring Service Spectrum Auction Scheduled for December 15, 1998; Comment Sought on Reserve Prices or Minimum Opening Bids and Other Auction Procedural Issues, *Public Notice*, 13 FCC Rcd 15501 (1998); 156-162 MHz VHF Public Coast Station Spectrum Auction Scheduled for December 3, 1998; Comment Sought on Reserve Prices or Minimum Opening Bids and Other Auction Procedural Issues, *Public Notice*, 13 FCC Rcd 17612 (1998).

³⁰⁸ *Second Report and Order and Further Notice*, 12 FCC Rcd at 2783-84, ¶ 102.

³⁰⁹ *Id.* at 2784; ¶ 103.

license stopping rule described above. As we explained in the *Second Report and Order and Further Notice*, this approach "balances concerns about the time to complete the paging auction and the benefits of preserving back-up strategies which give bidders the flexibility to acquire licenses that are consistent with their business plans."³¹⁰ The Commission would retain the discretion in Phase III to declare after 200 rounds that the auction will end after some specified number of additional rounds, in which case bids would be accepted only on licenses for which the high bid increased in the three preceding rounds. We reserved discretion not to employ the hybrid stopping rule in future paging auctions based on our experience in the first paging auction.³¹¹

84. **Discussion.** Although two petitioners³¹² now request reconsideration of the hybrid simultaneous/license-by-license stopping rule adopted in the *Second Report and Order and Further Notice*, we will maintain it for the paging auctions. As discussed in the preceding section, the Commission directed the Bureau in the *Part 1 Third Report and Order and Second Further Notice* to seek comment prior to the commencement of each auction on a variety of auction-specific operational issues, including stopping rules.³¹³ By providing potential bidders with an opportunity to comment on the most appropriate stopping rule for specific inventories of paging licenses (*i.e.*, for each paging auction), we believe that this approach is consistent with the Balanced Budget Act of 1997 and the Commission's goal of increasing the efficiency of the competitive bidding process.³¹⁴ We retain discretion in the Bureau, however, to utilize another stopping rule (*e.g.*, our standard simultaneous stopping rule) after seeking further comment on this issue in the pre-auction process, consistent with the Balanced Budget Act of 1997.³¹⁵

3. Limiting Information Available to Bidders During the Auctions

85. **Background.** The *Second Report and Order and Further Notice* provided for the release of a public notice prior to the auctions announcing precisely what information would be available to

³¹⁰ *Id.* at 2785, ¶ 103.

³¹¹ *Id.*

³¹² Metrocall asserts that such a stopping rule is unnecessarily complex, and renews its comments in favor of a market-by-market stopping approach. This approach would close bidding on a particular license if, after a certain number of additional rounds (*e.g.*, five or ten), there are no new bids or proactive waivers. Metrocall alternatively suggests that if the Commission maintains the hybrid approach, it should begin the auction in Phase II so that the Bureau could sooner exercise its discretion to stop bidding in particular markets. Finally, Metrocall suggests that the Commission permit requests from high bidders to close bidding on those licenses if no new bids are received during a certain number of rounds. The Bureau would announce the request and specify that bidding would close if no new bids were received during an additional period of time. *See Metrocall Petition* at 24-25. PageNet argues that a license-by-license stopping rule would focus the bidding on the most valuable spectrum, speed the auction, and deter speculation. Specifically, PageNet reiterates its suggestion that bidding close on any license for which new bids were not received after five rounds. *PageNet Petition* at 14-15.

³¹³ *See supra* notes 305 and 307 and accompanying text.

³¹⁴ *See Part 1 Third Report and Order and Second Further Notice*, 13 FCC Rcd at 376, ¶ 1 (1998).

³¹⁵ *See* 47 C.F.R. § 1.2104(e) ("The Commission may establish stopping rules before or during multiple round auctions in order to terminate auctions within a reasonable time").

bidders, but indicated that this information "may be limited to the high bids (no identities of bidders)."³¹⁶ The Commission noted that withholding bidder identities is likely to speed the pace of the auctions by reducing opportunities for strategic gaming practices and by reducing the time needed to report and analyze information at the end of each round.³¹⁷ We also noted that little loss of efficiency would result from withholding the identities of likely winners of adjacent licenses, because in the paging service, as opposed to broadband PCS, there is no roaming and little uncertainty about the technology.³¹⁸

86. **Discussion.** Metrocall, PageNet, and PCIA seek reconsideration of the Commission's decision to: 1) limit generally the information available to bidders during the paging auctions; and 2) leave to a later Public Notice the announcement of whether bidder identities in particular will be withheld.³¹⁹ Specifically, petitioners state that withholding bidders' identities would ensure that bidders would not have equal access to information, because well-established paging companies would be easily identified by bidding on licenses for spectrum on which they are incumbents, while newcomers, that might be speculators, would not be similarly identifiable.³²⁰ Thus, petitioners argue that withholding bidders' identities would encourage speculation, deny bidders information necessary to participate effectively in the auctions, and impair the efficiency of resulting license assignments.³²¹

87. We retain discretion in the Bureau, pursuant to its existing delegated authority, to limit the information disclosed to bidders in the paging auctions. Consistent with the Balanced Budget Act of 1997,³²² the Bureau will issue a Public Notice seeking further comment on auction-related procedural issues, including what information should be available to bidders. This will provide the Bureau with an opportunity to weigh, in the unique context of the paging auctions, the benefits and disadvantages of limiting information such as bidder identities and related data. After seeking further comment on this issue, the Bureau will announce the precise information that will be available to bidders during the auctions.

4. Short-form Applications and Upfront Payments

88. **Background.** Currently, applicants have the option to check "all markets" on their short-form applications but submit an upfront payment to cover only those licenses on which they intend to bid in any one round. Permitting the selection of "all markets" gives bidders the flexibility to pursue back-up

³¹⁶ See *Second Report and Order and Further Notice*, 12 FCC Rcd at 2786, ¶ 106.

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ Metrocall Petition at 18-19; PageNet Petition at 12-14; PCIA Petition at 13-15.

³²⁰ Metrocall Petition at 18-19; PageNet Petition at 12-13; PCIA Petition at 14. Petitioners refer to Commission statements made in the context of other rulemakings that revealing bidder identities provides important information on the value of the spectrum and permits more informed bidding strategies that ensure licenses are won by bidders that value the spectrum most highly.

³²¹ Metrocall Petition at 18-19; PageNet Petition at 12-14; PCIA Petition at 13-15.

³²² See *supra* notes 305 and 307 and accompanying text.

strategies in the event they are unable to obtain their first choice of licenses.³²³ In the *Second Report and Order and Further Notice*, we emphasized the importance of the "all markets" box in enabling the use of back-up strategies and noted that, absent the ability to pursue such strategies, the true value of the licenses might not be reflected in the final bid prices.³²⁴

89. **Discussion.** Several petitioners assert that permitting bidders to check the "all markets" box creates artificial mutual exclusivity contrary to the requirements of Section 309(j)(6)(E) of the Communications Act.³²⁵ They also contend that, since bidders' upfront payments need only correspond to the "largest combination of activity units on which the bidder anticipates being active in any single round,"³²⁶ the ability to check the "all markets" box encourages the participation of speculators in the auctions.³²⁷ In turn, they argue, sincere bidders, including incumbents seeking to obtain geographic area licenses in their existing service areas, may expend greater amounts to obtain licenses than if the Commission required auction applicants to indicate each license on which they intend to bid.³²⁸ To deter speculation, they suggest that the Commission should require each bidder to (1) specify the licenses on which it seeks to bid, and (2) submit an upfront payment corresponding to the total number of licenses specified.

90. In the *Second Report and Order and Further Notice*, the Commission expressly rejected identical arguments made by commenters that opposed use of the "all markets" box.³²⁹ A bidder must submit an upfront payment sufficient to meet the eligibility requirements for any combination of licenses on which it might wish to bid in a round. This rule forces bidders to make a payment that reflects their level of interest and protects against speculation. Moreover, we continue to believe that bidders should have the flexibility to pursue back-up strategies if they are unable to obtain their first choice of licenses. As has been demonstrated by all recent auctions, providing bidders flexibility is crucial to an efficient auction and optimum license assignment.³³⁰ Since petitioners do not raise any arguments that have not been previously considered and rejected by the Commission, we will retain the current rules, which permit use of the "all markets" box and require an upfront payment for each license.

91. Petitioners' claim that our current rules may require sincere bidders to pay more for geographic area licenses than if we implemented their proposal is, we feel, more closely related to the issue of minimum opening bids. The Commission is required to establish minimum opening bids for each

³²³ *Second Report and Order and Further Notice*, 12 FCC Rcd at 2793-94, ¶ 126.

³²⁴ *Id.*

³²⁵ PageNet Petition at 10; PCIA Petition at 12; Priority Petition at 6; *see also* 47 U.S.C. § 309(j)(6)(E).

³²⁶ *Second Report and Order and Further Notice*, 12 FCC Rcd at 2796, ¶ 136.

³²⁷ Arch Petition at 5, 7-8; PageNet Petition at 10-12; PCIA Petition at 10-13; *see also* Advanced Petition at 3 n.1.

³²⁸ *See* Advanced Petition at 8-9; PageNet Petition at 12; PCIA Petition at 12.

³²⁹ *Second Report and Order and Further Notice*, 12 FCC Rcd at 2793, ¶ 126.

³³⁰ *Id.*

auctionable license absent a finding that to do so would contravene the public interest.³³¹ We do not find circumstances here to convince us that establishing minimum opening bids for the paging auctions is contrary to the public interest objectives contained in section 309(j) of the Communications Act.³³² We note, however, that issues such as incumbency levels, limited available spectrum, and interference protection requirements, among others, will likely lead to modest minimum opening bids for many paging geographic area markets.³³³ We further note that minimum opening bids are reducible at the Bureau's discretion.³³⁴ These factors, we believe, adequately address petitioners' concerns regarding the risk of excessive bid amounts.

5. Bid Withdrawal

92. **Background.** In the *Second Report and Order and Further Notice*, we concluded that the Part 1 general bid withdrawal rule would apply in the paging auctions.³³⁵ The general bid withdrawal rule requires a bidder that withdraws a high bid during the course of an auction to make a payment equal to the difference between the withdrawn bid amount and the amount of the winning bid the next time the license is offered by the Commission.³³⁶ This payment amount is deducted from any upfront payments or down payments that the withdrawing bidder has deposited with the Commission.³³⁷ In response to some commenters' concerns about reducing the possibility of mistaken bids, we noted that we had recently implemented a new software feature designed to warn bidders of mistaken bids, and that this feature would be employed in the paging auctions.³³⁸

93. **Discussion.** Blooston requests that the Commission modify its rules to allow bid withdrawal without liability where it is demonstrated that the withdrawn bid was a typographical or

³³¹ See, e.g., 47 U.S.C. § 309(j)(4)(F).

³³² These objectives include: fostering the rapid development and deployment of new technologies, products, and services; promoting competition by avoiding excessive concentration and disseminating licenses among a wide variety of applicants; recovering for the public a portion of the value of the spectrum resource and avoidance of unjust enrichment; fostering efficient use of electromagnetic spectrum; and scheduling auctions so that potential bidders have adequate time to develop business plans and assess the market; see 47 U.S.C. § 309(j)(3); see also Auction of 800 MHz SMR Upper 10 Band; Minimum Opening Bids or Reserve Prices, *Order*, 12 FCC Rcd 16354 (1997).

³³³ See *Part 1 Third Report and Order and Second Further Notice*, 13 FCC Rcd at 456, ¶ 141 ("Among other factors, the Bureau should consider the amount of spectrum being auctioned, levels of incumbency, the availability of technology to provide service, the size of the geographic service areas, issues of interference with other spectrum bands, and any other relevant factors that could reasonably have an impact on valuation of the spectrum being auctioned.")

³³⁴ *Id.* at 455, ¶ 140.

³³⁵ *Second Report and Order and Further Notice*, 12 FCC Rcd at 2798, ¶ 143.

³³⁶ See 47 C.F.R. § 1.2104(g).

³³⁷ See 47 C.F.R. § 1.2106(e).

³³⁸ *Second Report and Order and Further Notice*, 12 FCC Rcd at 2799, ¶ 146.

clerical error, and the Commission was notified before other bidders relied on the information for bids placed in subsequent rounds. Blooston reasons that, in the paging auctions, the opportunities for errors will be increased because these auctions will involve some of the telecommunications industry's smallest businesses, many of which would be first-time participants in a spectrum auction and would, at the same time, be trying to serve their customers with small staffs.³³⁹

94. We will apply our Part 1 general bid withdrawal rule, as stated in the *Second Report and Order and Further Notice*. Most of Petitioners' concerns have been addressed by modifications to the auction software that permit bid removal during a round. In addition, the auction software has been reconfigured to provide for incremental bidding. To place a bid on a license, a bidder simply enters a number between 1 and 9 in the "Bid Increment Multiplier" field. The software multiplies this number by the pre-established minimum bid increment and adds the result to the high bid amount. Thus, bidders may place a bid that exceeds the standing high bid by between one and nine times the bid increment. For example, to bid the minimum acceptable bid, which is generally equal to one bid increment, a bidder will enter "1" in the "Bid Increment Multiplier" field and press submit. We believe that these software modifications provide adequate protection against the possibility of mistaken bids and also simplify the bidding process for inexperienced auction participants.

6. The Anti-Collusion Rule

95. **Background.** In the *Second Report and Order and Further Notice*, the Commission rejected commenters' requests for safe harbors for certain discussions when the anti-collusion rule is in effect.³⁴⁰ We concluded that we lacked the record necessary to create these safe harbors and emphasized that the anti-collusion rule prohibits discussions of the substance of bids or bidding strategies.

96. **Discussion.** A number of petitioners request reconsideration of this conclusion. These petitioners assert that because established paging carriers are likely to participate in the auctions, the lack of safe harbors will disrupt normal business relationships during the auctions and inhibit discussions among incumbent carriers on such issues as intercarrier agreements and mergers or consolidations which, they argue, are aimed at providing better service to customers.³⁴¹

97. We will apply the Part 1 general anti-collusion rule in the paging auction. A similar proposal to create safe harbors was considered and dismissed in the *Part 1 Third Report and Order and Second Further Notice*, and we deny petitioners' requests for the reasons stated therein.³⁴² We continue to believe that bidders are in the best position to determine when their discussions may give rise to a potential violation of the rule. We note, however, that to the extent that discussions concerning normal business relationships do not directly or indirectly convey in any manner the substance of bids or bidding

³³⁹ Blooston Petition at 20-21.

³⁴⁰ *Second Report and Order and Further Notice*, 12 FCC Rcd at 2802, ¶ 156; *see also* 47 C.F.R. § 1.2105(c) (the anti-collusion rule).

³⁴¹ Blooston Petition at 18-19; PageNet Petition at 15; PCIA Petition at 23-24; ProNet Petition at 25-26.

³⁴² *Part 1 Third Report and Order and Second Further Notice*, 13 FCC Rcd at 466-67, ¶ 162.

strategies, such discussions are not prohibited by the anti-collusion rule.³⁴³ We further note that the anti-collusion rule was amended in the *Part 1 Third Report and Order and Second Further Notice* to permit holders of non-controlling attributable interests in one applicant for a particular license(s) to obtain an ownership interest in, or enter into a consortium arrangement with, a second applicant for a license in the same geographic area, provided the original applicant has withdrawn from the auction, is no longer placing bids, and has no further eligibility.³⁴⁴ Thus, we clarify that the modified Part 1 anti-collusion rule will apply in the paging auctions.

7. Small Business Definition

98. **Background.** In the *Second Report and Order and Further Notice*, the Commission adopted tiered bidding credits based on small business size.³⁴⁵ Specifically, entities with average gross revenues of not more than \$3 million would be eligible for a fifteen percent bidding credit, while entities with average gross revenues of not more than \$15 million would be eligible for a ten percent bidding credit.³⁴⁶ We concluded that this approach furthered our mandate under Section 309(j) of the Communications Act to disseminate licenses to a variety of applicants.

99. **Discussion.** Blooston requests a number of clarifications with respect to the rules for qualifying as a "small business."³⁴⁷ In particular, Blooston seeks (1) confirmation that "gross revenues of all controlling principals"³⁴⁸ does not refer to personal income (so as to avoid public disclosure of personal financial information and "double counting" where salaries are paid by the applicant to principals);³⁴⁹ (2) specification of the equity requirement (*i.e.*, what constitutes "significant equity") or elimination of an equity requirement altogether; and (3) clarification that intercarrier agreements do not constitute affiliation for purposes of the small business definition.

100. In the context of competitive bidding for broadband PCS C and F blocks, the Commission issued a number of orders refining the definition of "small business"³⁵⁰ by providing exceptions that govern which entities or persons are included for the purpose of aggregating gross revenues and total assets

³⁴³ See 47 C.F.R. § 1.2105(c); see also Wireless Telecommunications Bureau Provides Guidance on the Anti-Collusion Rule for D, E and F Block Bidders, *Public Notice*, 11 FCC Rcd 10134 (1996).

³⁴⁴ *Id.* at 465-66, ¶ 160; see also 47 C.F.R. § 1.2105(c)(4)(iii).

³⁴⁵ *Second Report and Order and Further Notice*, 12 FCC Rcd at 2811-12, ¶¶ 178-181.

³⁴⁶ These small business size standards have been approved by the Small Business Administration. Letter from Aida Alvarez, Administrator, Small Business Administration to Amy J. Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau of 12/2/98.

³⁴⁷ Blooston Petition at 21-22.

³⁴⁸ *Second Report and Order and Further Notice*, 12 FCC Rcd at 2812, ¶ 180.

³⁴⁹ Blooston Petition at 21.

³⁵⁰ 47 C.F.R. § 24.720(b).

counted in determining eligibility for small business treatment.³⁵¹ In response to petitions seeking relaxation of the \$40 million personal net worth cap for members of the control group of a designated entity, attributable investors, and affiliates who are individuals, the Commission decided to eliminate the personal net worth cap altogether.³⁵² Personal net worth has been defined as "the market value of all assets (real and personal, tangible and intangible) owned by an individual, less all liabilities (including personal guarantees) owed by the individual in his individual capacity or as a joint obligor."³⁵³ The Commission concluded that "the affiliation rules make the personal net worth rules largely unnecessary since most wealthy individuals are likely to have their wealth closely tied to ownership of another business."³⁵⁴ The same principles apply in the paging context. Personal income is treated as an element of personal net worth, and thus is not attributable. This approach also alleviates Blooston's "double counting" and privacy concerns.

101. To determine whether an applicant meets the eligibility size standards adopted for the paging service in the *Second Report and Order and Further Notice*, gross revenues are calculated by aggregating the gross revenues of the applicant, its affiliates, and controlling principals.³⁵⁵ The broadband PCS rules mentioned above define an applicant's control group (the gross revenues and total assets of which were to be counted) as a group of qualifying investors holding an equity interest of at least 15 percent.³⁵⁶ Under the paging rule, no equity requirement is imposed on controlling principals of applicants meeting the small business definition, but those principals whose gross revenues are counted must maintain control of the applicant.³⁵⁷ We indicated in the *Second Report and Order and Further Notice* that guidance on the concept of control could be found in the definition of affiliation,³⁵⁸ which was derived in part from the affiliation rules of the U.S. Small Business Administration.³⁵⁹

102. We said in the *Second Report and Order and Further Notice* that while specific equity requirements will not be employed, "the absence of significant equity could raise questions about whether

³⁵¹ *Id.*; see also Implementation of Section 309(j) of the Communications Act—Competitive Bidding, PP Docket No. 93-253, *Fifth Report & Order*, 9 FCC Rcd 5532, 5608-09, ¶¶ 175-176 (1994); Implementation of Section 309(j) of the Communications Act—Competitive Bidding, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403, 420-21, ¶¶ 28-30, 435-56, ¶¶ 58-96 (1994) (*Competitive Bidding Fifth Memorandum Opinion and Order*) (modified by *Erratum*, 10 FCC Rcd 10659 (Jan 10, 1995)); *Sixth Report & Order*, 11 FCC Rcd 136, 143-50, ¶¶ 13-23 (1995).

³⁵² *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 421, ¶ 30.

³⁵³ See former Narrowband PCS rules, 47 C.F.R. § 24.320(e) (1995).

³⁵⁴ *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 421, ¶ 30.

³⁵⁵ See 47 C.F.R. § 22.223(b)(2).

³⁵⁶ 47 C.F.R. § 24.709(b).

³⁵⁷ *Second Report and Order and Further Notice*, 12 FCC Rcd at 2812, ¶ 180.

³⁵⁸ 47 C.F.R. § 22.223(d); see also *Second Report and Order and Further Notice*, 12 FCC Rcd at 2812, ¶ 180.

³⁵⁹ See, e.g., 13 C.F.R. § 121.103.

the applicant qualifies as a *bona fide* small business.³⁶⁰ The Commission is concerned only with the lack of significant equity, and this is but one of several factors that are evaluated when determining *de facto* control. The Commission did not create a bright-line equity test because of the desire to afford businesses the flexibility to structure themselves in ways they deem most viable.

103. In this *Memorandum Opinion and Order*, we clarify the paging size attribution rules as adopted in the *Second Report and Order and Further Notice* to enable qualified small businesses to attract adequate financing. We also provide a definition of "controlling interest" to clarify the application of the controlling interest threshold in determining whether an entity qualifies to bid as a small business. Thus, in calculating gross revenues for purposes of small business eligibility, applicants will be required to count the gross revenues of the controlling interests of the applicant and their affiliates.³⁶¹ This approach is consistent with our proposal in the *Part 1 Third Report and Order and Second Further Notice*,³⁶² and is similar to the attribution rules we applied in the 800 MHz SMR, LMDS, and VHF Public Coast auction proceedings.³⁶³

104. A "controlling interest" includes individuals or entities with *de jure* and *de facto* control of the applicant. *De jure* control is 50.1 percent of the voting stock of a corporation or, in the case of a partnership, the general partners. *De facto* control is determined on a case-by-case basis, and includes the criteria set forth in *Ellis Thompson*.³⁶⁴ The "controlling interest" definition also provides specific guidance on calculation of various types of ownership interests. For purposes of calculating equity held in an applicant, the definition provides for full dilution of certain stock interests, warrants, and convertible

³⁶⁰ *Second Report and Order and Further Notice*, 12 FCC Rcd at 2812, ¶ 180.

³⁶¹ See, e.g., Baker Creek Communications, LP, *Memorandum Opinion and Order*, 13 FCC Rcd 18709 (1998).

³⁶² See *Part 1 Third Report and Order and Second Further Notice*, 13 FCC Rcd at 387-89, ¶¶ 16-19.

³⁶³ See *800 MHz Second Report and Order*, 12 FCC Rcd at 19169, ¶ 275; Amendment of 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, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 12545, 12692-93, ¶ 352 (1997); Amendment of the Commission's Rules Concerning Maritime Communications, *Third Report and Order and Memorandum Opinion and Order*, 13 FCC Rcd 19853, 19886, ¶ 67 (1998).

³⁶⁴ See *Ellis Thompson Corp.*, 76 Rad. Reg. 2d (P&F) 1125 (1994) (*Ellis Thompson*) (in which the Commission identified factors used to determine control of a business. Specifically, the Commission identified the following indicia of control:

- (1) use of facilities and equipment;
- (2) control of day-to-day operations;
- (3) control of policy decisions;
- (4) personnel responsibilities;
- (5) control of financial obligations; and
- (6) receipt of monies and profits.

Id. at 1127-28; see also *Intermountain Microwave*, 24 Rad. Reg. (P&F) 983 (1963); Stephen F. Sewell, *Assignments and Transfers of Control of FCC Authorizations Under Section 309(d) of the Communications Act of 1934*, 43 FED. COMM. L.J. 277 (1991).

debentures.³⁶⁵ In addition, the definition provides for attribution of partnership and other ownership interests, including stock interests held in trust, non-voting stock, and indirect ownership through intervening corporations. Once individuals or entities with a controlling interest are determined under the definition, only the revenues of those individuals or entities and their affiliates will be counted for small business eligibility.

105. When an applicant cannot identify controlling interests under the definition, the revenues of all interest holders in the applicant and their affiliates will be counted. For example, if a company is owned by four entities, each of which has 25 percent voting equity and no shareholders' agreement or voting trust gives any one of them control of the company, the revenues of all four entities must be counted. Treating such a corporation in this way is similar to our treatment of a general partnership—all general partners are considered to have a controlling interest. This rule, we believe, looks to substance over form in assessing eligibility for small business status.

106. We note that our intent here is to provide flexibility that will enable legitimate small businesses to attract passive financing in a highly competitive and evolving telecommunications marketplace. We believe that this controlling interest threshold will function effectively to ensure that only those entities truly meriting small business status are eligible for small business provisions. In particular, we believe that the *de jure* and *de facto* concepts of control used to determine controlling interest in an applicant and the application of our affiliation rules will effectively prevent larger firms from illegitimately seeking status as a small business.

107. Finally, Blooston requests that the Commission clarify that intercarrier agreements and other recognized arrangements between otherwise independent paging carriers do not constitute affiliations.³⁶⁶ Blooston describes "intercarrier agreements" as arrangements between licensees to allow coordinated operation in overlapping areas, "so that the 'no man's land' required for interference protection becomes unnecessary."³⁶⁷ Section 22.223(d)(2)(ii) of the Commission's rules states that for purposes of affiliation, "[c]ontrol can arise through . . . contractual or other business relations . . ."³⁶⁸ Section 22.223(d)(9) is more explicit, stating that affiliation "arises where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control, or potential control, of the other concern."³⁶⁹ Thus, affiliation will arise whenever a business or contractual relationship, including intercarrier agreements as defined by Blooston, demonstrates that level of control. We believe that our existing rule provides sufficient guidance on the concept of control for purposes of affiliation.³⁷⁰

³⁶⁵ See 47 C.F.R. § 1.2110(b)(4)(v). Compare 47 C.F.R. § 24.709(b)(7).

³⁶⁶ Blooston Petition at 22.

³⁶⁷ *Id.* at 19.

³⁶⁸ 47 C.F.R. § 22.223(d)(2)(ii).

³⁶⁹ *Id.* § 22.223(d)(9).

³⁷⁰ See *id.* § 22.223(d); see also *Part 1 Third Report and Order and Second Further Notice*, 13 FCC Rcd at 392, ¶ 27.

8. Bidding Credits and Installment Payment Plans for Designated Entities

108. **Background.** In the *Notice*, we sought comment on the type of designated entity provisions that should be incorporated into our competitive bidding rules for paging services.³⁷¹ Although many commenters supported adopting bidding credits and allowing installment payments, some commenters argued that numerous designated entities currently compete in the paging industry and need no special encouragement or assistance to participate.³⁷² In the *Second Report and Order and Further Notice*, we rejected those arguments and adopted bidding credits for two tiers of small businesses and provided for installment payments.³⁷³

109. **Discussion.** Several petitioners have renewed those arguments. Three petitioners object to the availability of bidding credits and installment payments in the context of competitive bidding for paging licenses.³⁷⁴ PCIA reasons that such provisions are not necessary because (1) many of the established paging carriers are small businesses; (2) many licenses will cover relatively small service areas, making special assistance to small businesses unnecessary; (3) paging requires less capital than other services that have been subject to competitive bidding; and (4) partitioning will provide adequate opportunity for participation of small businesses in the paging industry.³⁷⁵ PageNet asserts that bidding credits and installment payments are unnecessary and unfair in the context of paging because of the large number of operating incumbents.³⁷⁶ PageNet argues that with these preferences, non-incumbents may be able to pay a lower price for spectrum than an incumbent that has substantially built-out its service area.³⁷⁷ PageNet also questions why such new entrants should be given preferences when the level of incumbency would prevent meeting construction benchmarks and providing wide-area service.³⁷⁸ A number of established paging carriers express concern that competitive bidding for paging licenses will put them at the mercy of speculators who will acquire spectrum and "greenmail" those incumbents that need additional spectrum to expand their existing networks to better serve their customers.³⁷⁹ Arch does not object to auctioning paging licenses generally but does object to the availability of bidding credits and installment payments, similarly arguing that such provisions would encourage speculation and unfairly disadvantage incumbents.³⁸⁰

³⁷¹ *Notice*, 11 FCC Rcd at 3132, ¶ 117.

³⁷² *Second Report and Order and Further Notice*, 12 FCC Rcd at 2805, ¶ 166.

³⁷³ *Id.* at 2811, ¶ 178, 2813, ¶ 184.

³⁷⁴ Arch Petition at 5-6; PageNet Petition at 16; PCIA Petition at 21-23.

³⁷⁵ PCIA Petition at 22.

³⁷⁶ PageNet Petition at 16.

³⁷⁷ *Id.*

³⁷⁸ *Id.*

³⁷⁹ Advanced Petition at 6-8; Metrocall Petition at 16; Preferred Networks Petition at 1, 5-6.

³⁸⁰ Arch Petition at 5-6.

110. In contrast, one petitioner believes that the bidding credits and installment payments, as adopted, do not do enough to assist small businesses. Specifically, CCTS suggests that the provisions for bidding credits, installment payments, and partitioning, which are designed to facilitate participation by designated entities, are inadequate to achieve that goal in the paging auctions. CCTS further argues that such provisions do not overcome the barriers that will be faced by small and rural paging companies that do not qualify as designated entities and do not have the resources to bid for licenses defined by Economic Areas. According to CCTS, EAs, which include urban areas and their suburban and rural surroundings, do not conform to the geographic areas served by small and rural companies,³⁸¹ and the availability of partitioning does not help small and rural companies, which may be at a disadvantage in attempting to negotiate with larger, better capitalized geographic licensees.³⁸²

111. The Commission concluded in the *Part 1 Third Report and Order and Second Further Notice* that installment payments should not be offered in auctions in the immediate future, including the paging auctions.³⁸³ 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, 2002.³⁸⁴

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.³⁸⁵ In addition, 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.³⁸⁶ Thus, consistent with (and for the reasons set forth in) the *Part*

³⁸¹ Consolidated Petition at 5-6; *see also* Blooston Petition at 2-3.

³⁸² Consolidated Petition at 6.

³⁸³ *See Part 1 Third Report and Order*, 13 FCC Rcd at 401, ¶ 43.

³⁸⁴ *Id.* at 398-99, ¶ 40 (footnotes omitted).

³⁸⁵ *See Part 1 Third Report and Order and Second Further Notice*, 13 FCC Rcd at 396, 397 ¶ 35, 398, ¶ 38 & n.91; *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, *Second Order on Reconsideration*, 12 FCC Rcd 15082, 15088-92, ¶¶ 9-12 (1997); *800 MHz Memorandum Opinion and Order*, 12 FCC Rcd at 10014, ¶ 130.

³⁸⁶ *See, e.g., Part 1 Third Report and Order and Second Further Notice*, 13 FCC Rcd at 397-98, ¶ 38; *see also Fresno Mobile Radio, Inc. v. FCC*, No. 978-1459 (D.C. Cir. Feb. 5, 1999) (After thoroughly considering the competing statutory objectives set forth under 47 U.S.C. § 309(j)(3), the Commission's decision to rescind its

1 Third Report and Order and Second Further Notice, we will not allow installment payment financing in the paging service auctions.

112. Petitioners have raised no arguments regarding bidding credits that were not previously considered and rejected by the Commission. We stated in the *Second Report and Order* that although bidding credits do not guarantee the success of small businesses, we believe that they provide such bidders with an opportunity to successfully compete against larger, well-financed bidders.³⁸⁷ We also noted that adopting tiered bidding credits furthers our mandate under Section 309(j) of the Communications Act to disseminate licenses to a variety of applicants.³⁸⁸ Moreover, the tiered bidding credit structure we adopted achieves a reasonable compromise between the arguments of those advocating greater bidding credits and those advocating against the use of bidding credits.³⁸⁹ In response to petitioners' arguments that the availability of bidding credits will facilitate speculation and "greenmail," we are confident that our unjust enrichment rule provides adequate protection against such practices. As we noted in the *Second Report and Order*, this rule was established specifically to deter speculation and participation in the licensing process by those who do not intend to offer service to the public, or intend to use our provisions to obtain a license at a lower cost than they otherwise would have to pay, and later to sell it for a profit.³⁹⁰ Under the rule, if a licensee that utilized bidding credits seeks to make any change in ownership structure that would render the licensee ineligible for bidding credits, or eligible only for a lower bidding credit, the licensee must first seek Commission approval, and then reimburse the government for the amount of the bidding credit, or the difference between the original bidding credit and the one for which it is eligible after the change.³⁹¹

113. To balance the impact on small businesses of eliminating installment payments, we amend our rules to increase the tiered bidding credits available to paging bidders, consistent with the schedule of bidding credits adopted in the *Part 1 Third Report and Order and Second Further Notice*.³⁹² Thus, an entity that, together with its affiliates and controlling interests, has average gross revenues for the preceding three years not to exceed \$3 million will qualify for a 35 percent bidding credit. An entity that, together with its affiliates and controlling interests, has average gross revenues for the preceding three years not to exceed \$15 million will qualify for a 25 percent bidding credit. Based on our past auction experience, we believe that these bidding credit levels will provide adequate opportunities for small businesses of varying sizes to participate in the paging auction(s).

114. We will not adopt separate bidding credits for rural telephone companies ("rural telcos"). As we observed in the *Fifth Memorandum Opinion and Order*, rural telcos' existing benefits allow them

installment payment plan for small businesses in the 800 MHz SMR auction was reasonable).

³⁸⁷ *Second Report and Order and Further Notice*, 12 FCC Rcd at 2811, ¶ 178.

³⁸⁸ *Id.*

³⁸⁹ *Id.* at 2811, ¶ 179.

³⁹⁰ *Id.* at 2818, ¶ 195 (citing *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2394, ¶¶ 258-59).

³⁹¹ 47 C.F.R. § 22.217(b)(2).

³⁹² *Part 1 Third Report and Order and Second Further Notice*, 13 FCC Rcd at 403-04, ¶ 47.

to compete effectively for licenses that serve rural territories.³⁹³ In addition to partitioning, rural telcos may qualify for financial benefits from the Rural Electrification Administration and the Universal Service Fund.³⁹⁴ These benefits compensate for lack of a bidding credit. The Commission has also noted in the past that rural telcos may be able to benefit from the use of their existing infrastructure in the provision of some services, and that such economies of scale give rural telcos an advantage in bidding for licenses.³⁹⁵

115. The paging rules provide that winning bidders have ten (10) business days to make timely payment following notification that their authorizations are ready to be awarded.³⁹⁶ We will permit auction winners to make their final payments within ten (10) business days after the applicable deadline, provided that they also pay a late fee of five percent of the amount due, without being considered in default. This change will conform our paging rules with the generally-applicable Part 1 rules.³⁹⁷ As we stated in the *Part 1 Third Report and Order and Second Further Notice*, we believe that in establishing this additional ten business day period during which winning bidders will not be considered in default, we provide an adequate amount of time to permit winning bidders to adjust for any last-minute problems in arranging financing and making final payment.³⁹⁸ We decline to provide a lengthier late payment period because we believe that extensive relief from initial payment obligations could threaten the integrity, fairness and efficiency of the auction process. A late fee of five percent is consistent with general commercial practice and provides some recompense to the federal government for the delay and administrative or other costs incurred. In addition, we believe that a five percent fee is large enough to deter winning bidders from making late payments and yet small enough so as not to be punitive. Therefore, winning bidders that do not submit the required final payment and five percent late fee within the 10 business days late payment period will be declared in default and will be subject to the default payment specified in section 1.2104(g)(2) of the Commission's rules.³⁹⁹

116. We emphasize that our decision to permit late payments is limited to payments owed by winning bidders that have submitted timely initial down payments. We continue to believe that the strict enforcement of payment deadlines enhances the integrity of the auction and licensing process by ensuring that applicants have the necessary financial qualifications. In this connection, we believe that the *bona fide* ability to pay demonstrated by a timely initial down payment is essential to a fair and efficient auction

³⁹³ *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 462, ¶ 111.

³⁹⁴ *Id.*

³⁹⁵ See 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, and Suite 12 Group Petition for Pioneer Preference, *Third Notice of Proposed Rulemaking and Supplemental Tentative Decision*, 11 FCC Rcd 53, 124, ¶ 194 (1995).

³⁹⁶ See 47 C.F.R. § 22.215.

³⁹⁷ See *Part 1 Third Report and Order and Second Further Notice*, 13 FCC Rcd at 428-30, ¶¶ 93-96 (amending 47 C.F.R. § 1.2109(a)).

³⁹⁸ *Id.* at 429-30, ¶ 95.

³⁹⁹ See 47 C.F.R. § 1.2104(g)(2).

process. Thus, we have not proposed to modify our approach of requiring timely submission of initial down payments that immediately follow the close of an auction. We believe that it is reasonable to expect that winning bidders timely remit their down payments given that it is their first opportunity to demonstrate to the Commission their ability to make payments toward their licenses. Similarly, we do not allow for any late submission of upfront payments, as to do so would slow down the licensing process by delaying the start of an auction.

117. Finally, we reiterate that the procedures set forth in Part 1, Subpart Q of our rules apply to the paging service unless otherwise indicated in Part 22 of our rules.⁴⁰⁰ We therefore clarify that applicants at the short- and long-form application stages are subject to the reporting requirements contained in the Part 1 ownership disclosure rule.⁴⁰¹

V. THIRD REPORT AND ORDER

A. Introduction and Background

118. In the *Second Report and Order*, the Commission adopted rules governing geographic area licensing of paging systems for exclusive channels in the 35-36 MHz, 43-44 MHz, 152-159 MHz, 454-460 MHz, 929-930 MHz, and 931-932 MHz bands allocated for paging. We adopted competitive bidding rules for granting mutually exclusive applications, adopted partitioning for non-nationwide geographic area licenses, imposed coverage requirements on non-nationwide geographic area licenses, and awarded nationwide geographic area licenses on the 929 MHz and 931 MHz bands. We concurrently adopted a *Further Notice* seeking comment on whether we should adopt coverage requirements for nationwide geographic area licenses,⁴⁰² various rules related to partitioning and disaggregation by paging licensees,⁴⁰³ and whether we should revise the application procedures for shared channels.⁴⁰⁴

119. In this *Third Report and Order*, we adopt rules that address issues raised in the *Further Notice*. The rules we adopt today are designed to expedite the introduction of paging and messaging services to unserved and underserved areas and to increase the flexibility of entities, including small businesses, to tailor licenses to meet market demands.

B. Discussion

1. Coverage Requirements for Nationwide Geographic Area Licensees

120. **Background.** As we discussed in the *Memorandum Opinion and Order On Reconsideration* adopted today, the Commission designated three channels in the 931 MHz band for

⁴⁰⁰ See *id.* § 22.201.

⁴⁰¹ See *id.* § 1.2112.

⁴⁰² *Second Report and Order and Further Notice*, 12 FCC Rcd at 2820, ¶ 202.

⁴⁰³ *Id.* at 2821-25, ¶¶ 203-18.

⁴⁰⁴ *Id.* at 2826, ¶¶ 219-20.

exclusive nationwide use.⁴⁰⁵ Licensees on the nationwide 931 MHz frequencies were required initially to construct stations in at least 15 Standard Metropolitan Statistical Areas, and to offer service on a nationwide basis within two years of the start of service.⁴⁰⁶ In 1993, to encourage the development of wide-area paging systems, the Commission also implemented exclusive licensing of qualified local, regional, and nationwide paging systems on thirty-five of the forty 929 MHz channels licensed, at that time, under Part 90 of our rules.⁴⁰⁷ To earn nationwide exclusivity on 929 MHz channels, licensees were required to construct 300 transmitters or more in the continental United States, Alaska, Hawaii, and Puerto Rico.⁴⁰⁸ Licensees were also required to provide service to at least 50 urban markets, including 25 of the top 50 markets, and to two markets in each of the seven regions modeled on Regional Bell Operating Company regions.⁴⁰⁹

121. As we have already explained, the *Second Report and Order and Further Notice* awarded nationwide geographic area licenses on the three nationwide 931 MHz channels and to the eighteen licensees who had constructed sufficient stations to obtain nationwide exclusivity on 929 MHz channels under our rules as of February 8, 1996.⁴¹⁰ In addition, we granted nationwide geographic area licenses to four licensees on the 929 MHz band that had sufficient authorizations, as of February 8, 1996, to qualify for nationwide exclusivity on a conditional basis. We also granted nationwide exclusivity to Nationwide on 929.8875 MHz based on showings that it had met the criteria for nationwide exclusivity as of February 8, 1996. In the *Second Report and Order*, we noted that our existing Part 22 and Part 90 requirements for construction of nationwide systems were not consistent, and both sets of requirements differ from the construction and coverage requirements applicable to nationwide narrowband PCS licenses.⁴¹¹ As a result, we sought comment in the *Further Notice* on whether to impose minimum coverage requirements for nationwide paging licenses, and on what the appropriate coverage area should be. We asked, for example, whether coverage should be required on a per MTA basis or a nationwide basis. We also sought comment on whether we should auction the entire nationwide license, or just a portion of the license, if the licensee fails to meet the coverage requirements.⁴¹²

122. **Discussion.** We consider first the constitutional and statutory arguments commenters make in opposition to coverage requirements. PageNet and PageMart argue that additional coverage requirements would be a taking without just compensation in violation of the Fifth Amendment of the

⁴⁰⁵ See *supra* at ¶ 74.

⁴⁰⁶ Amendments of Parts 2 and 22 of the Commission's Rules to Allocate Spectrum in the 928-941 MHz Band and to Establish Other Rules, Policies, and Procedures for One-Way Paging Stations in the Domestic Public Land Mobile Radio Service, *Memorandum Opinion and Order on Reconsideration (Part 2)*, 93 F.C.C.2d 908, 917 (1983); see 47 C.F.R. § 22.527(b)(5)(1994).

⁴⁰⁷ *PCP Exclusivity Order*, 8 FCC Rcd at 8319-20, ¶ 6.

⁴⁰⁸ See 47 C.F.R. § 90.495(c)(3).

⁴⁰⁹ *Id.*

⁴¹⁰ See *supra* at ¶ 74 (citing *Second Report and Order and Further Notice*, 12 FCC Rcd at 2761, ¶¶ 50-52).

⁴¹¹ *Second Report and Order and Further Notice*, 12 FCC Rcd at 2762, ¶¶ 54.

⁴¹² *Id.* at 2820; ¶ 202.

United States Constitution.⁴¹³ PageMart contends that if the Commission does not allow some kind of grace period for nationwide licensees to conform to any new standard, the action "would be a *de facto* modification of a licensee's authorization, a taking, which raises serious legal considerations."⁴¹⁴ PageNet argues that additional coverage requirements would interfere with its investment-backed expectation that it would operate facilities on nationwide channels without additional licensing by third parties; auctioning unserved areas resulting from the loss of a nationwide license would secure a public financial benefit at the expense of the nationwide licensee; and additional coverage requirements would circumscribe PageNet's nationwide service area.⁴¹⁵ The first step in a takings analysis, however, is to determine whether there is a protected property right at issue,⁴¹⁶ and courts have held that licensees have no property right in their licenses.⁴¹⁷ Moreover, where, as here, the government retains the power to alter rights it has created,⁴¹⁸ the right is not considered "private property," and exercise of the retained power is not

⁴¹³ PageMart II, Inc. Comments (PageMart Comments) at 4; Comments of Paging Network, Inc. (PageNet Comments) at 5-9; Reply Comments of Paging Network, Inc. (PageNet Reply Comments) at 2-3 & 6.

⁴¹⁴ PageMart Comments at 4.

⁴¹⁵ PageNet Comments at 5-9 (relying on *Connolly v. Pension Benefit Guaranty Corp.*, 106 S. Ct. 1018, 1026 (1986) (setting out three factors for determining whether a federal agency action qualifies as a taking in violation of the Fifth Amendment: "(1) the extent to which regulation has interfered with distinct investment-backed expectations; (2) the character of the government action; and (3) the economic impact of the regulation on the claimant").

⁴¹⁶ *Peterson v. United States DOI*, 899 F.2d 799, 807 (9th Cir. 1990), *cert. denied*, 498 U.S. 1003 (1990) (citing *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 54-55 (1986); and *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958)).

⁴¹⁷ See *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 331 (1945) ("No licensee obtains any vested interest in any frequency."); *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1940) (stating that "[t]he policy of the [Communications] Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license"); *National Association of Broadcasters v. FCC*, 740 F.2d 1190, 1211 (D.C. Cir. 1984) (citing *Sanders Brothers*); see also *In re Application of Bill Welch*, 3 FCC Rcd 6502, 6503, ¶ 11 (1998) (stating that the plain language of Sections 301 and 304 of the Act addresses "congressional concerns that the Federal Government retain ultimate control over radio frequencies, as against any rights, especially property rights, that might be asserted by licensees who are permitted to use the frequencies").

⁴¹⁸ In granting exclusivity, we neither intended to create a property right in favor of nationwide licensees, nor would creating a property right be a proper exercise of our authority under the Act. Section 301 explicitly states that "the purpose of this Act, among other things, [is] to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license." 47 U.S.C. § 301. Section 304 of the Act prohibits grant of a license "until the applicant thereof shall have waived any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise." *Id.* at § 304. *Cf. Peterson*, 899 F.2d at 807 (explaining that, for purposes of determining whether there is a constitutionally protected property interest in federal government contractual agreements, the "sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms (citations omitted)).

considered a "taking" for Fifth Amendment purposes.⁴¹⁹ Accordingly, the Commission's grant of exclusivity to nationwide licensees does not enjoy constitutional protection.

123. Metrocall and ProNet argue that imposing additional coverage requirements on nationwide carriers would modify nationwide licenses in violation of Section 316 of the Communications Act.⁴²⁰ We disagree. Section 316 provides for a hearing process before Commission modification of a particular license. The provision does not deprive the Commission of its authority to establish rules of general applicability to an industry through its rulemaking authority.⁴²¹ It is well established that licenses may be modified in a rulemaking proceeding as long as a reasoned explanation is provided for doing so.⁴²²

124. Several commenters also argue that nationwide licensees' compliance with existing rules created a reasonable expectation that they would enjoy exclusivity on a nationwide basis, and imposing additional coverage requirements would improperly subject those licensees to retroactive rulemaking.⁴²³ We disagree. We acknowledge that to the extent we decide to impose coverage requirements, it would be unfair to commence the construction period with the grant of the nationwide geographic area licenses, because these licenses would have been granted well before the adoption of any coverage requirements. However, if we adopt coverage requirements whose effect would be prospective only, giving nationwide licensees sufficient opportunity to know what the requirements are and to conform their conduct

⁴¹⁹ *Democratic Central Comm. v. Washington Metro. Area Transit Comm'n*, 38 F.3d 603, 606-07 (D.C. Cir. 1994).

⁴²⁰ Comments of Metrocall, Inc. (Metrocall Comments) at 5-7; Reply Comments of Metrocall, Inc. (Metrocall Reply Comments) at 8; ProNet Inc. Comments on Further Notice of Proposed Rulemaking, (ProNet Comments) at 6-7; ProNet Reply Comments at 3.

⁴²¹ See *Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309 (D.C. Cir. 1995); *Upjohn Co. v. FDA*, 811 F.2d 1583 (D.C. Cir. 1987); *WBEN, Inc. v. FCC*, 396 F.2d 601, 618 (2d Cir.), *cert. denied*, 393 U.S. 914 (1968) (stating that "[a]djudicatory hearings serve an important function when the agency bases its decision on the peculiar situation of individual parties who know more than anyone else. But when, as here, a new policy is based upon the general characteristics of an industry, rational decision is not furthered by requiring the agency to lose itself in an excursion into detail that too often obscures fundamental issues rather than clarifies them."); *California Citizens Band v. United States*, 375 F.2d 43, 52 (9th Cir. 1967) (stating that the primary function of Section 316 "is to protect the individual licensee from a modification order of the Commission and is concerned with the conduct and facts peculiar to an individual licensee"); Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, *Further Memorandum and Opinion on Reconsideration*, 12 FCC Rcd 2109, 2127-28, ¶ 37 (1997); and Revision of Rules and Policies for the Direct Broadcast Satellite Service, *Report and Order*, 11 FCC Rcd 9712, 9766, ¶ 139 (1995) (stating that "the Commission may modify any station license or construction permit if in its judgment such action will promote the public interest, convenience, and necessity, and, ... such modification may appropriately be accomplished through notice and comment rulemaking").

⁴²² See *CECR v. FCC*, 53 F.3d at 1317 (citing *Florida Cellular Mobile Communications Corp. v. FCC*, 28 F.3d 191 (D.C. Cir. 1994)); *Rainbow Broadcasting Co. v. FCC*, 949 F.2d 405 (D.C. Cir. 1991)).

⁴²³ AirTouch Comments on Further Notice of Proposed Rulemaking (AirTouch Comments) at 2; Metrocall Comments at 8; Metrocall Reply Comments at 7; PageNet Reply Comments at 4-5; PageMart Comments at 2-3; ProNet Comments at 3-4.

accordingly, we will not be engaging in retroactive rulemaking.⁴²⁴ Moreover, as the Court of Appeals for the District of Columbia has stated, "[i]t is often the case that a business will undertake a certain course of conduct based on the current law, and will then find its expectations frustrated when the law changes. This has never been thought to constitute retroactive rulemaking, and indeed most economic regulation would be unworkable if all laws disrupting prior expectations were deemed suspect."⁴²⁵ While additional coverage requirements might disrupt nationwide licensees' expectations, they would not make past behavior unlawful or otherwise impose a penalty for past actions and, thus, would not have an impermissible retroactive effect.

125. Certain commenters also argue against nationwide coverage requirements on the basis that nationwide licensees are not similarly situated with either MEA/EA paging licensees or narrowband PCS licensees. PageNet and ProNet argue that nationwide and non-nationwide geographic area licensees should not be subject to identical regulatory treatment because nationwide carriers have already complied with coverage requirements similar to the coverage requirements of other geographic area licensees.⁴²⁶ Similarly, PCIA argues that nationwide and non-nationwide geographic area licensees are not similarly situated because nationwide licensees have already committed the resources necessary to construct nationwide networks consistent with pre-existing Commission build-out rules, and licenses were granted subject to these explicit requirements.⁴²⁷ Blooston, however, argues that a failure to impose coverage requirements would result in similarly situated applicants being treated in a disparate manner in violation of the requirements of regulatory parity set forth in the Omnibus Budget Reconciliation Act of 1993.⁴²⁸ ProNet and Metrocall argue that, whereas nascent paging services, including narrowband PCS, need regulatory incentives to promote competition, efficient spectrum use, and universal service, paging is a mature, highly competitive service, in which market forces compel licensees to use their allocations efficiently.⁴²⁹ ProNet further notes that the Commission's pending *Narrowband PCS Further Notice* sought comment on relaxing or eliminating coverage requirements altogether for narrowband PCS.⁴³⁰

126. Commenters also present several other arguments against additional coverage requirements for nationwide geographic area licensees, contending that additional requirements are unjustified and

⁴²⁴ See *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) (stating that in examining allegations of retroactive legislation, "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted").

⁴²⁵ *Chemical Waste Management, Inc. v. EPA*, 869 F.2d 1526, 1536 (D.C. Cir. 1989)); see also *Landgraf*, 511 U.S. at 269 (stating that "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment ... or upsets expectations based on prior law" (citations omitted)).

⁴²⁶ PageNet Comments at 4-5; PageNet Reply Comments at 5-6; ProNet Comments at 3-7.

⁴²⁷ PCIA Reply Comments at 5.

⁴²⁸ Comments of Blooston, Mordkofsky, Jackson & Dickens (Blooston Comments) at 2.

⁴²⁹ Metrocall Comments at 9; ProNet Comments at 5-6; ProNet Reply Comments at 5.

⁴³⁰ ProNet Reply Comments at 5 (emphasis in original) (referencing Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS, *Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 12972 (1997) (*Narrowband PCS Further Notice*)).

would not serve the public interest.⁴³¹ Specifically, several commenters argue that nationwide licensees have already met the goal of providing nationwide service by meeting their original coverage requirements.⁴³² They also contend that competition in markets where customers demand wide-area service, in addition to the significant investment already made in developing nationwide systems, impels nationwide licensees to continue to expand nationwide systems and alleviates any concern about spectrum warehousing.⁴³³ A number of commenters also contend that adding coverage requirements would create unnecessary economic burdens, disrupting business activities and service offerings created in reliance on previous rules.⁴³⁴ AirTouch argues that nationwide licensees, like other CMRS providers, must already demonstrate that they provide "substantial service" to earn a license renewal expectancy.⁴³⁵

127. SBT, however, supports additional coverage requirements to prevent spectrum warehousing and ensure build-out.⁴³⁶ SBT suggests that nationwide licensees should be required to construct, within one year of the effective date of this Order, enough base stations within each of the top 30 MTAs to cover at least 75 percent of the nation's population.⁴³⁷ SBT further urges the Commission to publicly notice the filing of nationwide carriers' construction reports, so the public can review the reports for accuracy.⁴³⁸

⁴³¹ AirTouch Comments at 2-3; Reply Comments of Arch Communications Group, Inc. (Arch Reply Comments) at 2-4; Metrocall Comments at 3-9; Metrocall Reply Comments at 4-8; PageMart Comments at 2-4; PageNet Comments at 2-10; PageNet Reply Comments at 2-7; Comments of the Personal Communications Industry Association (PCIA Comments) at 4-6; PCIA Reply Comments at 3-5; and ProNet Comments at 2-7; ProNet Reply Comments at 2-6.

⁴³² Airtouch Comments at 3; Arch Reply Comments at 3; Metrocall Comments at 3-5; PageNet Comments at 2-3; PageNet Reply Comments at 3-4; and ProNet Comments at 3. Metrocall states that it has "constructed and is operating over 1,100 transmitters throughout the United States on two exclusive, nationwide 929 MHz frequencies, and continues to expand its nationwide systems." Metrocall Comments at 4. PageNet notes that it already serves "over 600,000 nationwide customers on its nationwide systems and has spent over 100 million dollars on the build-out of facilities." PageNet Comments at 3.

⁴³³ AirTouch Comments at 3; Arch Reply Comments at 3; Metrocall Comments at 4, 8; Metrocall Reply Comments at 7-8; PageNet Reply Comments at 2, 3-4, & 6; PCIA Comments at 5; PCIA Reply Comments at 3, 5; ProNet Comments at 3-5, 6; ProNet Reply Comments at 3, 6.

⁴³⁴ AirTouch Comments at 3-4; Arch Reply Comments at 3-4; Metrocall Comments at 5; PageMart Comments at 2; PCIA Comments at 5; PCIA Reply Comments at 3; ProNet Reply Comments at 3. Metrocall argues that having expended considerable money and resources to build out nationwide networks, nationwide licensees would be forced to incur further expenses in meeting new requirements, not because of subscriber demand or sound network management, "but because of regulatory fiat." Metrocall Comments at 8. ProNet also states that additional coverage requirements would "disproportionately burden nationwide licensees by necessitating construction of multiple transmitters throughout sparsely populated portions of the country, requiring a substantial (but, probably, an inefficient) capital expenditure." ProNet Reply Comments at 4.

⁴³⁵ AirTouch Comments at 3.

⁴³⁶ Comments to Further Notice of Proposed Rulemaking by Small Business in Telecommunications (SBT Comments) at 2-6.

⁴³⁷ *Id.* at 3.

⁴³⁸ *Id.* at 5-6.

Blooston argues that nationwide carriers should be required to serve one-third of the U.S. population within three years, and two-thirds within five years, but opposes allowing nationwide carriers to meet the requirement by showing substantial service.⁴³⁹ Blooston argues that the coverage requirements are necessary to reduce the "distinct competitive advantage" nationwide licensees have because of their exemption from the paging auctions.⁴⁴⁰ Blooston further contends that coverage requirements would prevent nationwide licensees from "skimming the cream" by serving only areas of high population density, which would result in lack of service to rural areas.⁴⁴¹ While acknowledging that nationwide licensees arguably have a competitive advantage because of their exemption from auctions, ProNet responds that the advantage was earned, at considerable expense, through compliance with construction requirements "that far exceed what will ultimately be required of geographic licensees."⁴⁴² PageNet responds that "cream skimming" is contrary to the interests of nationwide licensees because of the market realities they face.⁴⁴³

128. Commenters that oppose coverage requirements also oppose any cancellation of nationwide licenses based on a failure to meet those requirements. PageNet specifically argues that the loss of nationwide licenses based on new coverage requirements would be seriously damaging to nationwide carriers, would restrict the ability of nationwide licensees to expand their systems, and would ultimately lead to the public's being unable to receive nationwide service.⁴⁴⁴ SBT opposes the cancellation of a nationwide geographic area license, in its entirety, for failure to meet coverage requirements.⁴⁴⁵ SBT suggests that a failure to meet coverage requirements should result in a forfeiture of the licensee's nationwide authority and an auction of unserved areas; such an auction would be reserved for small business entities, which often provide service to underserved areas.⁴⁴⁶ SBT further urges the Commission to impose a forfeiture on nationwide licensees that fail to meet coverage requirements and preclude them from further expanding their systems.⁴⁴⁷ Blooston states that regulatory parity and the rural service mandate dictate that nationwide licenses be cancelled and auctioned upon a carrier's failure to meet coverage requirements.⁴⁴⁸

129. While petitioners have not persuaded us that there are any legal impediments to the adoption of coverage requirements for nationwide geographic area paging licensees, we conclude that it

⁴³⁹ Blooston Comments at 2-3.

⁴⁴⁰ *Id.* at 2.

⁴⁴¹ *Id.*

⁴⁴² ProNet Reply Comments at 4; *see* Metrocall Reply Comments at 4-6.

⁴⁴³ PageNet Reply Comments at 4.

⁴⁴⁴ PageNet Comments at 3-4.

⁴⁴⁵ SBT Comments at 6-9.

⁴⁴⁶ *Id.* at 7-8.

⁴⁴⁷ *Id.* at 7.

⁴⁴⁸ Blooston Comments at 3.

is best to defer any decision on this issue until we resolve similar issues raised in the *Narrowband PCS Further Notice*. Doing so will allow us to more fully consider the question of whether regulatory parity with respect to coverage requirements is appropriate not only for nationwide and MEA/EA paging licensees, but also for nationwide paging and narrowband PCS carriers. In the *Narrowband PCS Further Notice*, we sought comment on whether to conform narrowband PCS rules to our paging rules by allowing narrowband PCS licensees to meet their performance requirements through a demonstration of substantial service as an alternative to meeting the coverage requirements provided under the existing rules.⁴⁴⁹ We further sought comment on whether to conform MTA-based narrowband PCS coverage requirements to the same requirements adopted for MTA and EA paging licenses in this proceeding.⁴⁵⁰ As a result, commenters in the *Narrowband PCS* proceeding have raised the issue of whether narrowband PCS, nationwide paging, and MTA/EA licensees provide substantially similar services. We believe that we need to consider this issue more carefully and to make a decision on nationwide paging coverage requirements in conjunction with a decision on narrowband PCS.

130. This will enable us to better look into the question of whether nationwide paging carriers provide nationwide coverage that extends to rural areas. While a number of petitioners claim that they are providing service on a nationwide basis, they have not offered any information on the extent to which nationwide paging geographic area licensees have built out their markets. We have previously indicated that nationwide licensees have exceeded the construction thresholds required to earn nationwide exclusivity;⁴⁵¹ however, we find that we have little data on actual build-out, and we are concerned about whether rural areas have sufficient access to paging services.⁴⁵² When we sought comment in the *Narrowband PCS Further Notice* on whether to eliminate all coverage requirements for narrowband PCS, we asked about the potential impact of doing so on service to rural areas.⁴⁵³ Accordingly, we defer resolution of whether to impose coverage requirements on nationwide paging geographic area licensees to the *Narrowband PCS* proceeding. If we ultimately determine that coverage requirements are appropriate for either nationwide narrowband PCS or nationwide paging geographic area licensees, we will decide, at that time, what the consequence of failing to meet those requirements should be.

⁴⁴⁹ *Narrowband PCS Further Notice*, 12 FCC Rcd at 12996, ¶ 44.

⁴⁵⁰ *Id.* at 12997, ¶ 45.

⁴⁵¹ *Second Report and Order and Further Notice*, 12 FCC Rcd at 2761, ¶ 50.

⁴⁵² We do not accept site-specific applications for facilities located within the geographic area, except where an environmental assessment, international coordination, or consent for transfer of control is required. See 47 C.F.R. § 22.503(g). In addition, incumbent licensees may add or modify sites without filing site-specific applications related to facilities located within their existing interference contour. See *id.* § 90.693; and *Second Report and Order and Further Notice*, 12 FCC Rcd at 2764, ¶ 58.

⁴⁵³ *Narrowband PCS Further Notice*, 12 FCC Rcd at 12997-98, ¶¶ 45-46.

2. Partitioning

a. Nationwide Geographic Area Licenses

131. **Background.** In the *Second Report and Order*, we adopted geographic partitioning provisions for MTA and EA paging licensees.⁴⁵⁴ In the *Further Notice*, we sought comment on whether nationwide geographic area licensees should also be permitted to partition their license areas.⁴⁵⁵

132. **Discussion.** Metrocall states that nationwide geographic area licensees should be permitted to partition their licenses in the same manner as MTA and EA licensees.⁴⁵⁶ ProNet supports partitioning for nationwide geographic area licensees because partitioning provides increased flexibility to tailor service offerings and will also allow local and rural telephone companies to operate in areas where a nationwide network is unlikely to expand.⁴⁵⁷ PCIA and PageMart also support partitioning for nationwide licensees, contending that there is no reason to treat nationwide geographic area licensees differently than MTA and EA licensees.⁴⁵⁸ Metrocall and ProNet further contend that the fact that nationwide geographic area licenses were not acquired through competitive bidding should not prevent nationwide licensees from having the right to partition their licenses.⁴⁵⁹ We agree with these commenters. Geographic partitioning would be an effective means of providing nationwide geographic area licensees with the flexibility to tailor their service offerings to meet market demands and facilitating greater participation in the paging industry by small businesses and rural telephone companies. Although we recognize the value that other licensees place on their competitively won licenses, we believe that the overall goal of partitioning -- operational flexibility -- outweighs any possible disadvantage of allowing nationwide licensees to receive a financial windfall through partitioning. We therefore will permit partitioning of nationwide geographic area licenses to any eligible party.

133. Consistent with our partitioning rules established for broadband PCS licensees, we permitted MTA and EA licensees to partition service areas along any boundaries defined by the parties.⁴⁶⁰ We adopt the same rule for partitioning of nationwide geographic area licenses. Thus, we will permit partitioning of nationwide geographic area paging licenses based on any boundaries defined by the parties.⁴⁶¹

⁴⁵⁴ Partitioning is the assignment of geographic portions of the geographic area paging license along geopolitical or other boundaries. *Second Report and Order and Further Notice*, 12 FCC Rcd at 2817, ¶ 192.

⁴⁵⁵ *Id.* at 2821, ¶ 203.

⁴⁵⁶ Metrocall Comments at 20.

⁴⁵⁷ ProNet Comments at 8.

⁴⁵⁸ PageMart Comments at 4; PCIA Comments at 6.

⁴⁵⁹ Metrocall Comments at 20; ProNet Comments at 8.

⁴⁶⁰ *Second Report and Order and Further Notice*, 12 FCC Rcd 2817, ¶ 192 (referencing *Partitioning and Disaggregation Report and Order and Further Notice*).

⁴⁶¹ *Second Report and Order and Further Notice*, 12 FCC Rcd at 2817, ¶ 192.

b. Build-out Requirements

134. **Background.** In the *Further Notice*, we tentatively concluded that both the partitioner and partitionee of a geographic area should be subject to coverage requirements that ensure that both portions of the license area will be served.⁴⁶² We proposed to require that a partitionee meet the same build-out requirements as the original licensee within its partitioned area, regardless of when the license was acquired. Under this proposal, a partitionee of a geographic area would be required to provide coverage to one-third of the population in its partitioned area within three years of the license grant, and to two-thirds of the population within its partitioned area within five years of the license grant. In the alternative, partitionees would have the option of providing "substantial service" within five years of license grant.⁴⁶³ We also sought comment on build-out requirements for partitioned nationwide geographic area licenses, and what build-out requirements should apply where a licensee partitions a portion of its license area after the initial ten-year license term has expired.⁴⁶⁴

135. **Discussion.** AirTouch agrees with the Commission that both the partitioner and partitionee should be subject to the same build-out requirements within their respective licensed areas.⁴⁶⁵ AirTouch and ProNet, however, support the elimination of the "substantial service" option.⁴⁶⁶ PageNet believes that partitioning should be allowed only after the initial geographic area licensee has met the build-out requirements for the entire geographic area, and proposes that partitioning before a geographic area licensee meets its construction requirements should be allowed only on a waiver basis where good cause is shown.⁴⁶⁷ PageNet believes that the ability to partition may encourage bidders in the auction to have unlawful contact with other bidders, particularly if the market is highly contested, and that geographic area licensees may seek to avoid the cancellation of their licenses by partitioning to a "straw man" when they fail to meet our coverage requirements.⁴⁶⁸ Metrocall opposes PageNet's proposal, contending that permitting partitioning only on a waiver basis would unduly restrict a licensee's flexibility in the mature paging industry.⁴⁶⁹

136. PCIA and Metrocall are also concerned that the partitioning rules may be used to circumvent the Commission's construction requirements.⁴⁷⁰ Metrocall suggests that geographic area licensees' coverage benchmarks should be based on the entire geographic area, which includes the partitioned area, to prevent the geographic area licensee from using partitioning to circumvent the coverage

⁴⁶² *Id.* at 2822, ¶ 209.

⁴⁶³ *Id.*

⁴⁶⁴ *Id.*

⁴⁶⁵ AirTouch Comments at 5.

⁴⁶⁶ *Id.* at 5-6; ProNet Comments at 8-9.

⁴⁶⁷ PageNet Comments at 12; PageNet Reply Comments at 8.

⁴⁶⁸ *Id.*

⁴⁶⁹ Metrocall Reply Comments at 11; *see also* ProNet Comments on Petitions for Reconsideration at 13.

⁴⁷⁰ Metrocall Comments at 22; PCIA Comments at 6-7.

requirements.⁴⁷¹ PCIA states that certain unscrupulous licensees might construct only part of their systems, and then, shortly before the construction deadline, partition the unconstructed area to another party in a pre-arranged, sham transaction.⁴⁷² PCIA explains that such a transaction would allow the geographic area licensee to maintain its license even though the partitionee would forfeit its license.⁴⁷³ To avoid this result, PCIA suggests that the partitioner should be responsible for build-out in the partitioned area if the partitionee fails to build out.⁴⁷⁴ Thus, PCIA supports cancellation of the entire license if build-out in the partitioned area is not completed by either the partitionee or the partitioner.⁴⁷⁵ SBT responds that the partitioner should not be responsible for the partitionee's failure to construct.⁴⁷⁶

137. We find that commenters have not provided evidence that "sham" arrangements between geographic area licensees and other parties to avoid construction requirements are likely to occur in the paging service or have already taken place in other services. We also disagree with PageNet's concern that allowing the geographic area licensee to partition prior to completing its coverage requirements will result in unlawful activity between bidders concerning partitioning because, as Metrocall notes, this type of activity falls within our anti-collusion rules.⁴⁷⁷ Therefore, we will allow all MEA and EA licensees to partition at any time after the grant of their geographic area licenses, and all nationwide geographic area licensees to partition upon the effective date of this Order.⁴⁷⁸

138. We adopt the proposal set forth in the *Further Notice*, and provide an additional option for meeting our coverage requirements, as we have for several other services.⁴⁷⁹ Under the first option, partitionees of MEA or EA licenses must provide coverage to one-third of the population in their partitioned area within three years of the initial grant of the license, and to two-thirds of the population in their partitioned area within five years of the initial grant of the license; or, licensees may provide, in the alternative, substantial service within five years of the grant of the MEA or EA license. Under the second option, the original licensee may certify at the time of the partitioning transaction that it has already met, or will meet, the coverage requirements for the entire geographic area.

⁴⁷¹ Metrocall Comments at 22.

⁴⁷² PCIA Comments at 7.

⁴⁷³ *Id.*

⁴⁷⁴ *Id.*

⁴⁷⁵ *Id.*

⁴⁷⁶ SBT Comments at 11.

⁴⁷⁷ 47 C.F.R. § 1.2105(c); *see* Metrocall Reply Comments at 11.

⁴⁷⁸ We note that with the adoption of the ULS rules, FCC Form 603 will be used for requesting approval of assignment of licenses, including partitioning and disaggregation requests. We also note that no parties commented on the question of what build-out requirements should apply where a licensee partitions its license area after the initial ten-year license term has expired, and we will not address this issue at this time.

⁴⁷⁹ *See* 47 C.F.R. § 24.714(f) (Broadband PCS); *id.* § 90.911 (Upper and lower channels of 800 MHz band); *id.* § 90.813 (MTA 900 MHz SMR); *id.* § 90.1019 (Phase II EA, Regional, or Nationwide 220 MHz bands).

139. Under the first option, both the partitioner and partitionee are individually responsible for meeting the coverage requirements for their respective areas. Failure by either party to meet its coverage requirements will result in the automatic cancellation of its license without further Commission action.⁴⁸⁰ Under the second option, only the partitioner's license will be cancelled if it fails to meet the coverage requirements for the entire geographic area. The partitionee will not be subject to coverage requirements except for those necessary to obtain renewal.⁴⁸¹ Partitioners whose licenses are cancelled will retain those sites authorized, constructed, and operating at the time the geographic area license was granted. We reject commenters' proposal to eliminate the "substantial service" option because we believe that this option will encourage licensees to build out their systems while safeguarding the financial investments made by those licensees who are financially unable to meet specific population coverage requirements. Thus, the substantial service alternative will promote service growth while helping licensees to remain financially viable and retain their licenses.

140. We have explained above that we will defer any decision regarding whether to impose coverage requirements on nationwide geographic area licensees to our *Narrowband PCS* proceeding. Accordingly, we will not impose coverage requirements at this time on partitionees of a nationwide geographic area license, and will defer reaching a decision on this issue until we resolve the question of coverage requirements for nationwide licensees generally. We believe that it would be inappropriate to subject entities that obtain partitioned licenses from nationwide geographic area licensees to coverage requirements when no such requirements have been established for partitioners.⁴⁸² However, partitionees of nationwide licenses may be subject to coverage requirements in the future.

c. License Term

141. **Background.** In the *Further Notice*, we proposed that a partitionee (including a nationwide license partitionee) be authorized to hold its license for the remainder of the partitioner's original ten-year term and be afforded the same renewal expectancy as a geographic area licensee. We further proposed to grant a partitionee a preference in a renewal proceeding if it can demonstrate that it has provided substantial service during its past license term and has substantially complied with the Communications Act and applicable Commission rules and policies.⁴⁸³

142. **Discussion.** AirTouch, Metrocall, and SBT support our proposal to authorize a partitionee (including a nationwide geographic area license partitionee) to hold its license for the remainder of the partitioner's original ten-year term.⁴⁸⁴ No commenters opposed this proposal. However, SBT proposes that when an area is partitioned within one year of the renewal date of the original license, the partitionee

⁴⁸⁰ See 47 C.F.R. § 24.714(f) (Broadband PCS); *id.* § 90.911 (Upper and lower channels of 800 MHz band); *id.* § 90.813 (MTA 900 MHz SMR); *id.* § 90.1019 (Phase II EA, Regional, or Nationwide 220 MHz bands).

⁴⁸¹ See 47 C.F.R. § 90.813 (MTA 900 MHz SMR); *see also* 800 MHz *Second Report and Order*, 12 FCC Rcd at 19144-45, ¶¶ 195 & 196 (Upper and Lower 800 MHz Band).

⁴⁸² See 800 MHz *Second Report and Order*, 12 FCC Rcd at 19144, ¶ 194 ("[I]t would be inappropriate to subject entities that obtain partitioned licenses or disaggregated spectrum from incumbent SMR licensees to additional performance requirements when no such requirements currently exist for these licenses.").

⁴⁸³ *Second Report and Order and Further Notice*, 12 FCC Rcd at 2823, ¶ 211.

⁴⁸⁴ AirTouch Comments at 6; Metrocall Comments at 23; SBT Comments at 18.

should receive the license for a one-year term.⁴⁸⁵ Thus, the partitionee's license term would extend beyond the partitioner's license term. The majority of commenters also support our proposal to grant a partitionee the same renewal expectancy as the original licensee.⁴⁸⁶ We also note that no commenters opposed this proposal.

143. We conclude that partitionees should be authorized to hold their licenses for the remainder of the partitioner's original ten-year term. As we stated in the *Further Notice*, we find this approach to be reasonable in that a partitioner should not be able to confer greater rights than it was awarded under the terms of its license grant. We also believe that authorizing partitionees to hold licenses for the partitioner's original term will promote our goal of providing service to all areas. We decline to adopt SBT's proposal that a partitionee receive a one-year term when any partitioning transaction occurs within one year of the renewal date of the original license because, in this instance, the partitioner would be conferring greater rights than it was awarded under the terms of its license grant. We also find that a partitionee should be granted the same renewal expectancy as the partitioner. In the *CMRS Third Report and Order*, we adopted a renewal expectancy standard for all CMRS providers, including paging licensees.⁴⁸⁷ Under this standard, a CMRS licensee will be entitled to a renewal expectancy if it demonstrates that it has provided substantial service during the license term and has complied with the Commission's rules and policies and the Communications Act.⁴⁸⁸ This renewal expectancy standard provides additional incentive for licensees to provide service, thereby promoting investment in and rapid deployment of new technologies and services.

3. Disaggregation

a. In General

144. **Background.** In the *Notice*, we sought comment on whether we should allow spectrum disaggregation.⁴⁸⁹ We did not receive sufficient comment on this issue, and therefore we sought further comment. In the *Further Notice*, we specifically asked commenters to address the feasibility of spectrum disaggregation for paging.⁴⁹⁰ Commenters were also asked to address whether minimum disaggregation standards are necessary for paging services, and whether nationwide geographic area licensees should be permitted to disaggregate spectrum.⁴⁹¹

⁴⁸⁵ SBT Comments at 23.

⁴⁸⁶ *Id.*

⁴⁸⁷ See *CMRS Third Report and Order*, 9 FCC Rcd at 8157, ¶ 386.

⁴⁸⁸ *Id.*

⁴⁸⁹ Disaggregation is the assignment of discrete portions or "blocks" of spectrum licensed to a geographic area licensee.

⁴⁹⁰ *Second Report and Order and Further Notice*, 12 FCC Rcd at 2824, ¶ 212.

⁴⁹¹ *Id.*