

145. **Discussion** Several commenters oppose the adoption of paging spectrum disaggregation rules.⁴⁹² PageMart states that there are no public benefits to allowing the disaggregation of paging spectrum.⁴⁹³ PageMart and PCIA state that the more spectrum is divided, the less desirable it becomes, and the more difficult it is to reaggregate.⁴⁹⁴ PageNet contends that the Commission's inquiry into disaggregation of paging channels is premature because it is unaware of any technology designed for 900 MHz paging channels using less than 25 kHz.⁴⁹⁵ PCIA also contends that disaggregation is neither technically nor practically feasible given the current status of paging technology.⁴⁹⁶ PCIA states that disaggregation poses substantial and unacceptable risks of interference.⁴⁹⁷ PCIA explains that co-channel and adjacent interference will occur because paging equipment is designed to operate over 25 kHz channels, and a "spill-over" effect will occur if the equipment is used on a smaller bandwidth.⁴⁹⁸ Metrocall states that it is not convinced that disaggregating spectrum from a single paging frequency is a viable option at this time, but it does not believe that the rules should completely forbid disaggregation.⁴⁹⁹ Thus, Metrocall indicates that the Commission should retain discretion to review disaggregation proposals on a case-by-case basis, and allow disaggregation if it can be demonstrated that it is technically feasible and both parties can provide legitimate signaling services on their respective portions of spectrum.⁵⁰⁰

146. AirTouch supports disaggregation, contending that disaggregation provides licensees with flexibility, encourages efficient use of spectrum, and promotes regulatory parity.⁵⁰¹ AirTouch also argues that disaggregation is consistent with the Commission's policy of permitting flexible use of the spectrum.⁵⁰² SBT contends that disaggregation should be limited to only small businesses during the original licensee's construction period.⁵⁰³

147. Although several commenters oppose establishing disaggregation rules at this time, we will permit MEA, EA, and nationwide geographic area licensees to engage in disaggregation. We also will

⁴⁹² Arch Reply Comments at 4; PageNet Comments at 11; PageMart Comments at 4-5; PCIA Comments at 7-8.

⁴⁹³ PageMart at 4.

⁴⁹⁴ *Id.*; PCIA Comments at 8.

⁴⁹⁵ PageNet Comments at 11.

⁴⁹⁶ PCIA Comments at 7-8.

⁴⁹⁷ *Id.* at 8.

⁴⁹⁸ *Id.*

⁴⁹⁹ Metrocall Comments at 23.

⁵⁰⁰ *Id.*

⁵⁰¹ AirTouch Comments at 6-7.

⁵⁰² *Id.* at 7.

⁵⁰³ SBT Comments at 19.

not impose a minimum limit on spectrum disaggregation in the paging service.⁵⁰⁴ We conclude that the market should determine if paging spectrum is technically and economically feasible to disaggregate. In addition, allowing disaggregation will encourage the further development of paging equipment capable of operating on less than 25 kHz. Our experience in broadband PCS demonstrates that parties are capable of determining the economic and technical feasibility of disaggregation arrangements and will make sound business judgments regarding the propriety of these arrangements.⁵⁰⁵ We further conclude that allowing spectrum disaggregation at this time could potentially expedite the introduction of service to underserved areas, provide increased flexibility to licensees, and encourage participation by small businesses in the provision of services. We also find that commenters have not provided sufficient evidence that interference to adjacent or co-channel licensees is a substantial risk that should preclude the Commission from allowing disaggregation of paging spectrum. We find that our existing technical rules provide parties with sufficient protection from interference. We also believe that all qualified parties should be eligible to disaggregate any geographic area license. Open eligibility to disaggregate spectrum promotes prompt service to the public by facilitating the assignment of spectrum to the entity that values it most.

b. Build-out Requirements

148. **Background.** In the *Further Notice*, we proposed the adoption of a flexible approach to construction requirements for disaggregators and disaggregatees.⁵⁰⁶ We proposed that either the disaggregator or disaggregatee entering the geographic market should be obligated to provide coverage to one-third of the population within three years of the license grant, and to two-thirds of the population within five years of the license grant.⁵⁰⁷ In the alternative, we would permit either the disaggregator or the disaggregatee to provide substantial service to the geographic area within five years of license grant.⁵⁰⁸

149. **Discussion.** AirTouch and SBT are the only commenters that addressed this issue, and both support the imposition of build-out requirements on the disaggregator and the disaggregatee.⁵⁰⁹ AirTouch believes that the Commission's proposal to allow either party to meet the construction requirements would permit licensees who have not utilized their spectrum to engage in sham transactions

⁵⁰⁴ This is consistent with the approach we have taken in broadband PCS, 220 MHz, WCS, 800 MHz, and 900 MHz services.

⁵⁰⁵ *Partitioning and Disaggregation Report and Order and Further Notice*, 11 FCC Rcd at 21860, ¶ 49 ("[W]e will not restrict the amount of broadband PCS spectrum that can be disaggregated. ... While our broadband PCS rules do not contain specific channelization requirements, the rules do require compliance with emission limitations in the frequency bands immediately outside and adjacent to each of the broadband PCS frequency blocks. Therefore, while we will allow disaggregating parties to negotiate channelization plans among themselves as part of their disaggregation agreements, we will continue to require that such plans provide the necessary out-of-band emission protections to third party licensees as required by our rules.").

⁵⁰⁶ *Second Order and Further Notice*, 12 FCC Rcd at 2825, ¶ 216.

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.*

⁵⁰⁹ AirTouch Comments at 8; SBT Comments at 19.

to retain only the portion of the spectrum they intend to use.⁵¹⁰ SBT also argues that the original licensee should not be able to use disaggregation as a means of meeting the coverage requirements for its spectrum.⁵¹¹

150. We adopt the coverage proposal set forth in the *Further Notice* for MEA and EA licenses, and also provide disaggregating parties with an additional option. Under the first option, which is the option proposed in the *Further Notice*, the parties may agree that either the disaggregator or the disaggregatee will be responsible for meeting the coverage requirements for the geographic service area.⁵¹² Under this option, the disaggregating party certifying responsibility for the coverage requirements of an MEA or EA license will be required to provide coverage to one-third of the population of the licensed geographic area within three years of license grant, and to two-thirds of the population within five years of license grant; or, in the alternative, provide substantial service to the geographic area within five years of license grant. Under the second option, the disaggregator and disaggregatee may certify that they will share the responsibility for meeting the coverage requirements for the entire geographic area.⁵¹³ Under this option, both parties jointly will be required to provide coverage to one-third of the population of the licensed geographic area within three years of license grant, and to two-thirds of the population within five years of license grant; or, in the alternative, provide substantial service to the geographic area within five years of license grant.

151. We believe that these options are appropriate because our rules for disaggregation should allow for flexibility, and also be consistent with our rules established in other services. The goal of our coverage requirements in both the partitioning and disaggregation contexts is to ensure that the spectrum is used to the same degree that would have been required had the partitioning or disaggregation transaction not taken place.⁵¹⁴ Our rules do not dictate the amount of spectrum that licensees must use to meet coverage requirements. Thus, a licensee who disaggregates a portion of its spectrum block to another party may still meet its preexisting construction requirements for the entire geographic area by using the spectrum it has retained. Similarly, a party who receives a portion of the spectrum from the original licensee can also meet the construction requirements for the entire geographic area by using the spectrum it has acquired. In addition, parties can share responsibility for meeting construction requirements for the entire geographic area by combining areas they serve.

152. We recognize that if the parties to a disaggregation agreement select the first option, situations may arise where a party minimally builds its system but will retain its license because the other party has met the coverage requirements for the geographic area. Nonetheless, we believe that it is appropriate for one party to assume full responsibility for construction within the shared service area, because service would be offered to the required percentage of the population on a common frequency, even if not on the entire spectrum. Under the first option, if the certifying party fails to meet the

⁵¹⁰ *Id.* at 7-8.

⁵¹¹ SBT Comments at 19.

⁵¹² See 47 C.F.R. § 24.714 (Broadband PCS); *id.* § 90.911 (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).

⁵¹³ See 47 C.F.R. § 24.714 (Broadband PCS); *id.* § 90.911 (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).

⁵¹⁴ See *Partitioning and Disaggregation Report and Order and Further Notice*, 11 FCC Rcd at 21864, ¶ 61.

coverage requirements for the entire geographic area, that party's license will be subject to cancellation, but the non-certifying party's license will not be affected.⁵¹⁵ However, if the parties to a disaggregation agreement select the second option and jointly fail to satisfy the coverage requirements for the entire geographic area, both parties' licenses will be subject to cancellation.⁵¹⁶ We note that MEA or EA licensees whose licenses are cancelled will retain those sites authorized, constructed, and operating at the time the geographic area license was granted.

153. As we did with respect to the issue of coverage requirements for partitionees of nationwide geographic area licenses, we will defer any decision on such requirements for disaggregatees of nationwide geographic area licensees until we decide the question of whether to impose coverage requirements on nationwide geographic area licensees generally.⁵¹⁷ Thus, disaggregatees of nationwide licenses may be subject to coverage requirements in the future.

c. License Term

154. **Background.** The *Further Notice* proposed the adoption of a similar license term for disaggregatees as was proposed for partitionees, *i.e.*, a disaggregatee would be authorized to hold its license for the remainder of the disaggregator's original ten-year license term.⁵¹⁸ We also proposed that a disaggregatee should be afforded a renewal expectancy if it can demonstrate that it has provided substantial service during the past license term and has substantially complied with the Communications Act and applicable Commission rules and policies.⁵¹⁹

155. **Discussion.** AirTouch, the only commenter to address this issue, supports our proposal,⁵²⁰ which we adopt. Disaggregatees will therefore be authorized to hold licenses for the remainder of the disaggregator's original ten-year term. As we concluded with respect to partitioners, the disaggregator should not be entitled to confer greater rights than it was awarded under the initial license grant. We also conclude that a disaggregatee should be afforded the same renewal expectancy as the disaggregator.

⁵¹⁵ See Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, *Fifth Report and Order*, PR Docket No. 89-552, FCC 98-186, ¶ 24 (Aug. 6, 1998) (*220 MHz Fifth Report and Order*); (Phase II EA, Regional, or Nationwide 220 MHz Band); *800 MHz Second Report and Order*, 12 FCC Rcd at 19145-46, ¶¶ 197 & 199 (Upper and lower channels of 800 MHz band and MTA 900 MHz SMR); *Partitioning and Disaggregation Report and Order and Further Notice*, 11 FCC Rcd at 21865, ¶ 63 (Broadband PCS).

⁵¹⁶ See *220 MHz Fifth Report and Order*, FCC 98-186 at ¶ 24; *800 MHz Second Report and Order*, 12 FCC Rcd at 19145-46, ¶ 199 (Lower channels of 800 MHz band and MTA 900 MHz SMR); *Partitioning and Disaggregation Report and Order and Further Notice*, 11 FCC Rcd at 21865, ¶ 63 (Broadband PCS).

⁵¹⁷ See *supra* at ¶¶ 129-30.

⁵¹⁸ *Second Order and Further Notice*, 12 FCC Rcd at 2825, ¶ 217.

⁵¹⁹ *Id.*

⁵²⁰ AirTouch Comments at 7.

4. Combination of Partitioning and Disaggregation

156. **Background.** In the *Further Notice*, we tentatively concluded that if disaggregation is feasible, we should permit combinations of partitioning and disaggregation, subject to the rules we proposed for each.⁵²¹

157. **Discussion.** As the sole commenter on this issue, AirTouch supports a combination of partitioning and disaggregation for paging licenses. AirTouch contends that the Commission should adopt rules that accommodate both partitioning and disaggregation because each promotes the participation of small businesses in the paging industry and the efficient use of spectrum. We agree and adopt our proposal. We believe that allowing carriers to engage in combinations of partitioning and disaggregation will expedite the introduction of service to underserved areas, foster efficient spectrum use, provide increased flexibility to licensees, eliminate market entry barriers, and encourage market participation by small businesses. As in other wireless services, we further conclude that in the event that there is a conflict in the application of the partitioning and disaggregation rules, the partitioning rules should prevail.⁵²²

5. Unjust Enrichment Provisions Regarding Partitioning and Disaggregation

158. **Background.** In the *Further Notice*, the Commission sought comment on proposals for adjusting installment payments for licensees that partition or disaggregate spectrum. With regard to partitioning, the Commission proposed that unjust enrichment rules apply to small businesses that partition to non-small businesses or to small businesses qualifying for a lower bidding credit.⁵²³ We sought comment on how these unjust enrichment payments should be calculated. With regard to disaggregation, we sought comment on a tentative conclusion that, if we permit a qualified small business licensee to disaggregate to a non-small business entity or a small business qualifying for a lower bidding credit, the disaggregating licensee should be required to repay on a *pro rata* basis any benefits it received from the special small business provisions.⁵²⁴ This would include accelerated payment of bidding credits, unpaid principal, and accrued interest. We sought comment on how these repayments should be calculated.

159. **Discussion.** ProNet recommends that small businesses be subject to the Commission's unjust enrichment rules when such businesses partition to a non-small business.⁵²⁵ AirTouch concurs that unjust enrichment provisions should extend to partitioning, and believes that non-small business partitionees should reimburse the Commission "for the amount of benefit received from bidding credits . . . relating to the portion of the geographic area which has been partitioned."⁵²⁶ AirTouch suggests that

⁵²¹ *Second Report and Order and Further Notice*, 12 FCC Rcd at 2825, ¶ 218.

⁵²² *See Partitioning and Disaggregation Report and Order and Further Notice*, 11 FCC Rcd at 21866, ¶ 66.

⁵²³ *Second Report and Order and Further Notice*, 12 FCC Rcd at 2822, ¶ 207.

⁵²⁴ *Id.* at 2884, ¶ 214.

⁵²⁵ ProNet Comments at 9.

⁵²⁶ AirTouch Comments at 4.

the amount of repayment be calculated according to the population and amount of spectrum in the partitioned area,⁵²⁷ and suggests a similar unjust enrichment approach for disaggregation.⁵²⁸

160. In the *Memorandum Opinion and Order on Reconsideration*, we eliminated the use of installment payments for auctioned spectrum in the paging service.⁵²⁹ We need not address, therefore, how partitioning and disaggregation will affect installment payments. Further, since the release of the *Further Notice*, the Commission has adopted a general rule that determines the amount of unjust enrichment payments assessed for all current and future licensees that engage in partitioning and disaggregation.⁵³⁰ Specifically, the rules adopted in the *Part 1 Third Report and Order and Second Further Notice* indicate that if a licensee seeks to partition any portion of its geographic area, the amount of the unjust enrichment payment will be calculated based on the ratio of the population in the partitioned area to the overall population of the license area.⁵³¹ In the event of disaggregation, the amount of the unjust enrichment payment will be based upon the ratio of the amount of spectrum disaggregated to the amount of spectrum held by the disaggregating licensee.⁵³² The unjust enrichment provisions adopted in the *Part 1 Third Report and Order and Second Further Notice* will apply to any MEA or EA paging licensee that receives a bidding credit and later elects to partition or disaggregate its license. When combined partitioning and disaggregation is proposed, we will, consistent with our rules for other services, use a combination of both population of the partitioned area and amount of spectrum disaggregated to make these pro rata calculations.⁵³³

6. Application Fraud

161. **Background.** In response to the *Notice*, the Federal Trade Commission (FTC) raised the issue of paging application fraud.⁵³⁴ According to the FTC, telecommunications investment frauds are of two basic types: (1) "application mills," which use telemarketing to sell application preparation services for wireless licenses for thousands of dollars to consumers, claiming that telecommunications businesses will seek to lease or buy the licenses for many times the telemarketers' applications fees; and (2) "buildout" schemes, through which telemarketers sell, again for thousands of dollars, interests in limited liability companies or partnerships that supposedly will acquire wireless licenses, build and operate

⁵²⁷ *Id.* at 4-5.

⁵²⁸ *Id.* at 7.

⁵²⁹ *See supra* at ¶ 111.

⁵³⁰ *See Part 1 Third Report and Order and Second Further Notice*, 13 FCC Rcd at 409, ¶ 57.

⁵³¹ *Id.*

⁵³² *Id.*

⁵³³ *See, e.g., Partitioning and Disaggregation Report and Order and Further Notice*, 11 FCC Rcd at 21866, ¶ 66; 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, *Fourth Report and Order*, 13 FCC Rcd 11655, 11669, ¶ 25 (1998); *220 MHz Fifth Report and Order*, FCC 98-186, ¶ 19.

⁵³⁴ *See Comment of the Federal Trade Commission*, filed March 18, 1996 (FTC Comments on *Notice*).

telecommunications systems, and pay the consumers high dividends.⁵³⁵ Although the FTC stated that awarding licenses on a geographic area basis through competitive bidding will reduce the incidence of such fraud, the shared PCP channels, which will not be subject to geographic area licensing, remain vulnerable to abuse.⁵³⁶

162. In the *Further Notice*, we sought comment on: (1) how the Form 600, which is the long form application for an authorization in the Wireless Telecommunications Bureau (and which is being replaced by Form 601), could be revised to provide applicants with information regarding the risks of telecommunications investment and warning signs of possible investment fraud; (2) whether application preparation services should be required to sign the Form 600 and to certify that the applicant has received in writing pertinent information regarding the Commission's rules and the obligations of licensees; and (3) whether PCIA, as frequency coordinator, should be required to implement additional procedures in the coordination process to reduce fraudulent or speculative applications.⁵³⁷

163. **Discussion.** Initially, we note that we recently have established electronic filing procedures for wireless license applications.⁵³⁸ However, applicants for shared PCP channels must currently file manually because electronic filing via the universal licensing system (ULS) has not yet been instituted for the shared channels. Nonetheless, electronic filing for the shared paging channels will be mandatory six months after the date it first becomes possible to file applications electronically. The FTC suggests that we modify the long-form application to include: specific information on the Commission's rules against speculation and trafficking, applicable construction requirements and penalties for non-compliance, and general information on fraud, including the number of the FCC Call Center in case the applicant has any questions.⁵³⁹ Additionally, the FTC urges us to require that application preparers certify that they have forwarded pertinent information concerning the possibility of fraud to the applicants -- a standardized document that contains clear warnings about Commission regulations and includes a number for the FCC Call Center.⁵⁴⁰ SBT suggests that we modify Form 600 to include a warning near the signature block stating that failure to construct will result in the cancellation of licenses.⁵⁴¹ SBT also suggests that we require the applicant to include a showing of reasonable assurance of transmitter site availability upon reasonable notice by the Commission; and that we request additional information (*i.e.*, name, address, employer, telephone number, and signature) about the application preparers, if they are not

⁵³⁵ See FTC Comments on *Notice* at 1; see also *Second Report and Order and Further Notice*, 12 FCC Rcd at 2826, ¶ 219.

⁵³⁶ FTC Comments on *Notice* at 9-11. The shared PCP channels are all the non-929 MHz Part 90 shared channels and the five 929 MHz shared channels.

⁵³⁷ *Second Report and Order and Further Notice*, 12 FCC Rcd at 2826, ¶ 220.

⁵³⁸ See Wireless Telecommunications Bureau Announce New Procedures for Filing Part 22 Paging Applications in Universal Licensing System (ULS) Starting June 1, 1998, *Public Notice*, DA 98-989 (May 22, 1998).

⁵³⁹ FTC Comments at 10.

⁵⁴⁰ *Id.* at 11.

⁵⁴¹ SBT suggests the following warning: "The person signing this form acknowledges that they will construct and operate the proposed radio facilities. Failure to construct the proposed radio facilities within the required construction period shall result in cancellation of the license granted hereunder." SBT Comments at 21.

the applicant.⁵⁴² AirTouch requests that the language from paragraph 219 of the *Second Report and Order and Further Notice*, setting forth the FTC's description of the types of telecommunications investment fraud, be incorporated into publicly distributed information and into the signature block on FCC Form 600.⁵⁴³ Metrocall suggests that the Commission require information showing that the applicant has a reasonable assurance of a transmitter site and is financially qualified,⁵⁴⁴ and specific information about whether grant of the application would serve the public interest.⁵⁴⁵

164. We are currently in the process of modifying FCC Form 601 to include language near the signature block that warns applicants that the failure of the licensee to construct will result in cancellation of the license. Specifically, Form 601 will state: "Upon grant of this license application, the licensee may be subject to certain construction or coverage requirements. Failure to meet the construction or coverage requirements may result in cancellation of the license. Consult appropriate FCC regulations to determine the construction or coverage requirements that apply to the type of license requested in this application." We believe this language will be helpful to applicants in all services and may be of some use in deterring fraud. At the same time, we agree with PCIA and Metrocall that fraud victims may or may not be given a meaningful opportunity to read the application forms submitted on their behalf by application preparation services.⁵⁴⁶ Further, when electronic filing is implemented for the shared channels, applicants will not submit a handwritten signature, thus raising the possibility that the applicant may never see the electronic form.⁵⁴⁷ Therefore, we are not convinced that the inclusion of specific information on the long-form application regarding application fraud will necessarily decrease such fraud. Additionally, an application mill may obtain reasonable assurance of a transmitter site and file hundreds of applications specifying that single site. Therefore, the "reasonable assurance" requirement will not necessarily reduce fraud and we will not require applicants to supply this additional information. Nor will we require application preparers to certify as to the accuracy of the application. According to PCIA and Metrocall, this could possibly affect legitimate professional consulting and engineering services wary of attesting to the accuracy of information supplied by applicants.⁵⁴⁸

165. Consequently, we must look to additional methods of combatting fraud, including through PCIA, the frequency coordinator. PCIA acknowledges that it is willing to educate the public concerning issues that are typically the focus of misleading statements by application mills.⁵⁴⁹ Further, PCIA, as a

⁵⁴² *Id.*

⁵⁴³ AirTouch Comments at 8.

⁵⁴⁴ Metrocall Comments at 16-17. Metrocall also suggests that the Commission may only want to send a "defect letter" inquiring about site specifications to "applicants that display speculative warning signs." *Id.*

⁵⁴⁵ *Id.* at 13.

⁵⁴⁶ Metrocall Comments at 17-18; PCIA Reply Comments at 8.

⁵⁴⁷ All that is required is the applicant's taxpayer identification number (TIN).

⁵⁴⁸ Metrocall Comments at 18; PCIA Reply Comments at 10.

⁵⁴⁹ PCIA October 26, 1998 *Ex Parte* at 16.

result of discussions with the FTC, has already taken steps to reduce application fraud.⁵⁵⁰ Previously, PCIA only sent confirmation of coordination to the application preparer.⁵⁵¹ Now, PCIA's coordination confirmation form (as well as all other correspondence during the coordination process) is sent to the applicant as well as the contact representative.⁵⁵² PCIA also states that it is working with the FTC to revise the postcard it sends to applicants and their contact representatives, which indicates that the application has been received and gives a PCIA file number, to include more information about the Commission's application and construction requirements.⁵⁵³ In addition, PCIA now always provides a co-channel printout indicating co-channel licensees for new applicants whenever the channel is shared.⁵⁵⁴ We applaud these measures and encourage PCIA to do as much as possible to make applicants aware of the potential for fraud by application mills.⁵⁵⁵

166. PCIA also contends that application mills thrive because the Commission has failed to provide clear information on licensing, construction, assignment of licenses, management agreements, and frequency availability.⁵⁵⁶ Thus, PCIA suggests that the Commission issue public notices concerning those issues that are the subject of misleading statements by application mills.⁵⁵⁷ The Commission has issued such public notices in the past,⁵⁵⁸ and will continue to issue public notices in the future that are designed to inform the public and warn them of the potential for fraud arising out of the preparation and filing of FCC applications. Such public notices will also provide information regarding the application and licensing process, specifically focusing on construction requirements and frequency availability.⁵⁵⁹ Further,

⁵⁵⁰ PCIA Comments at 12-13.

⁵⁵¹ *Id.* at 13; PCIA October 26, 1998 *Ex Parte* at 16.

⁵⁵² PCIA Comments at 13; PCIA October 26, 1998 *Ex Parte* at 16.

⁵⁵³ PCIA Comments at 12-13.

⁵⁵⁴ *Id.* at 13.

⁵⁵⁵ PCIA states that in an auction environment, frequency coordination will not be required prior to the submission and grant of market area licenses. PCIA October 26, 1998 *Ex Parte* at 16. However, applicants on the shared PCP channels will still be subject to frequency coordination because these channels are not subject to competitive bidding.

⁵⁵⁶ *Id.* at 15.

⁵⁵⁷ *Id.* at 15-16.

⁵⁵⁸ *See, e.g.,* WTB's Enforcement Division Releases Consumer Brochure on Telecommunications Investment Scams, *Public Notice*, 1996 WL 627923, (Oct. 31, 1996).

⁵⁵⁹ PCIA also suggests modifying the Form 800A construction letter, which is a computer-generated letter sent to Part 90 licensees requesting confirmation that construction has been completed. Comments of PCIA at 13-15; and PCIA October 26, 1998 *ex parte* at 16. PCIA suggests that Form 800A should only be generated when newly issued licenses would give rise to a new construction obligation. PCIA Comments at 13-14; and PCIA October 26, 1998 *Ex Parte* at 16. PCIA also states that the Commission should require both the licensee and the person or entity that actually performed the construction to sign the Form 800A attesting to the completion of construction. PCIA Comments at 14-15; and PCIA October 26, 1998 *Ex Parte* at 16. We note that Form 800A will be replaced in the ULS system with a Construction/Coverage Reminder Notice that will be sent to all licensees prior to their

we will modify our website so that information regarding fraud on the shared paging channels will be accessible directly from the Commission's homepage as well as from the Wireless Telecommunications Bureau's homepage. We believe these steps will help reduce speculation and application fraud by increasing the amount of information available to the public.

167. Finally, once we have completed the modification of FCC Form 601 to include warning language as described above, the Wireless Telecommunications Bureau will release a public notice that removes our interim licensing rules for both the lower band shared PCP channels and the five shared 929 MHz PCP channels.⁵⁶⁰ Presently, our interim paging rules for the shared PCP paging channels permit only incumbents to file for new sites at any location.⁵⁶¹ We allow non-incumbents to file applications, but only for private, internal-use systems.⁵⁶² Once the interim licensing rules are removed, non-incumbents will be permitted to file applications on the shared PCP paging channels for new sites at any location. We further note that while frequency coordination is no longer required on the exclusive paging channels, all applications for new sites filed on the shared PCP paging channels will continue to require frequency coordination prior to the filing of these applications with the Commission. Accordingly, we amend section 90.175(f) to clarify that frequency coordination is only needed for shared frequencies in the 929-930 MHz band.

VI. CONCLUSION

168. In the *Order on Reconsideration*, we modify rules adopted in the *Second Report and Order and Further Notice* by replacing MTAs with MEAs for geographic area licensing of the 929 and 931 MHz bands. We affirm our decision in the *Second Report and Order and Further Notice* to award licenses for EAs for paging systems operating in the 35-36 MHz, 43-44 MHz, 152-159 MHz, and 454-460 MHz bands. In addition, we clarify and amend our rules to permit holders of system-wide licenses to include remote, stand-alone transmitters under the system-wide call sign or, alternatively, to maintain separate licenses for any remote, stand-alone transmitters. We clarify that grandfathered non-exclusive licensees on the thirty-five exclusive 929 MHz channels will continue to operate under the same arrangements established with the exclusive incumbent licensees and other non-exclusive incumbent licensees prior to the adoption of the *Second Report and Order and Further Notice*. We also amend Section 22.503(k) of our rules to provide that holders of MEA and EA paging licenses 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.

169. With regard to our competitive bidding rules for the paging service, we direct the Bureau, consistent with the Balanced Budget Act of 1997, to seek further comment on: the license groupings and

construction/coverage deadline to remind them to notify the Commission upon completion. At the time the Form 800A or the Construction/Coverage Reminder Notice is first sent, the licensee has presumably already paid its fee to the application preparer and any fraudulent activity has most likely occurred. We believe that alerting the public to the possibility of fraud will be better accomplished through Commission public notices, the Commission's website, and PCIA's distribution of information.

⁵⁶⁰ In the public notice, the Wireless Telecommunications Bureau will remove section 90.494(g) of our rules, which outlines the interim licensing procedures for the five shared 929 MHz PCP channels.

⁵⁶¹ *Second Report and Order and Further Notice*, 12 FCC Rcd at 2757-58, ¶ 43.

⁵⁶² *Id.*

sequence of the paging auctions; an appropriate stopping rule for the paging auctions; and what information, such as bidder identities, should be disclosed to bidders during the paging auctions. We decline to require that bidders specify each individual license on which they will bid and submit an upfront payment for each license; permit bid withdrawal without monetary liability; or modify our anti-collusion rule to provide safe harbors for certain business discussions during the auctions. In addition, consistent with our actions in the recent *Part 1 Third Report and Order and Second Further Notice*, we will not allow installment payments, but will allow licensees to make their final payments within ten (10) business days of the payment deadline subject to a late fee of five (5) percent of the amount due. Lastly, consistent with our proposal in the *Part 1 Third Report and Order and Second Further Notice*, we clarify our attribution rules by providing a definition of "controlling interest."

170. In the *Third Report and Order*, we defer any decision on whether we should impose coverage requirements on nationwide geographic area licensees until the Commission resolves similar issues raised in the *Narrowband PCS* proceeding. The *Third Report and Order* also adopts rules for partitioning and disaggregation of MEA, EA, and nationwide geographic area licenses. Finally, in order to deter fraud by application mills on the shared channels, we will add language to the long-form application regarding construction and coverage requirements and we will disseminate information regarding the potential for fraud and our licensing rules through public notices and our website.

VII. PROCEDURAL MATTERS AND ORDERING CLAUSES

A. Procedural Matters

171. This is a permit-but-disclose notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules.⁵⁶³

172. As required by the Regulatory Flexibility Act (RFA), the Commission has prepared a Supplemental Final Regulatory Flexibility Analysis (Supplemental FRFA) of the possible impact on small entities of the rules adopted in this *Memorandum Opinion and Order on Reconsideration*.⁵⁶⁴ The Supplemental FRFA is set forth in Appendix C. As also required by the RFA, the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) of the expected impact on small businesses of the rules adopted in this *Third Report and Order*.⁵⁶⁵ The FRFA is set forth in Appendix D. The Office of Public Affairs, Reference Operations Division, will send a copy of the *Memorandum Opinion and Order on Reconsideration*, including the Supplemental FRFA, and *Third Report and Order*, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with the RFA.

173. This *Memorandum Opinion and Order on Reconsideration and Third Report and Order* contains information collection requirements that the Commission is submitting to the Office of Management and Budget requesting clearance under the Paperwork Reduction Act.

⁵⁶³ See generally 47 C.F.R. §§ 1.1201, 1.1203, 1.1206(a).

⁵⁶⁴ 5 U.S.C. § 604.

⁵⁶⁵ *Id.* § 601 *et seq.*

B. Ordering Clauses

174. Authority for issuance of this *Memorandum Opinion and Order on Reconsideration and Third Report and Order* is contained in Sections 4(i), 303(r), 309(j), 332, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 309(j), 332, and 405.

175. Accordingly, IT IS ORDERED that the petitions for reconsideration or clarification listed in Appendix A ARE GRANTED to the extent provided herein and otherwise ARE DENIED; and that the Petition for Partial Reconsideration of PSWF Corporation filed April 11, 1997, is to the extent provided herein DISMISSED as moot. This action is taken pursuant to Sections 4(i), 303(r), 309(j), 332, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 309(j), 332, and 405, and Section 1.429(i) of the Commission's rules, 47 C.F.R. § 1.429(i).

176. IT IS FURTHER ORDERED that the petitions for reconsideration and application for review of the *CWD Order* listed in footnote 52 ARE DENIED. This action is taken pursuant to Sections 4(i), 303(r), 309(j), 332, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 309(j), 332, and 405, and Sections 1.429(i) and 1.115 of the Commission's rules, 47 C.F.R. §§ 1.429(i), 1.115.

177. IT IS FURTHER ORDERED that the Commission's rules ARE AMENDED as set forth in Appendix B. IT IS FURTHER ORDERED that the provisions of this *Memorandum Opinion and Order on Reconsideration and Third Report and Order* and the Commission's rules, as amended in Appendix B, SHALL BECOME EFFECTIVE 60 days after publication of this *Memorandum Opinion and Order on Reconsideration and Third Report and Order* in the Federal Register.

178. IT IS FURTHER ORDERED that a Public Notice will be issued by the Wireless Telecommunications Bureau following the adoption of this *Memorandum Opinion and Order on Reconsideration and Third Report and Order* that will remove the interim licensing rules on the shared PCP channels from the Commission's rules.

179. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this *Memorandum Opinion and Order on Reconsideration and Third Report and Order*, including the Supplemental Final Regulatory Flexibility Analysis and Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

APPENDIX A

PETITIONS

1. Advanced Paging, Inc. (Advanced)
2. AirStar Paging, Inc. (AirStar)
3. American Paging, Inc. (API)
4. Arch Communications Group (Arch)
5. Big Bend Telephone Company, Inc. (Big Bend)
6. Blooston, Mordkofsky, Jackson & Dickens (Blooston)
 - Arthur Dale & Angela Hickman d/b/a Omnicom
 - AzCOM Paging, Inc.
 - Cascade Utilities, Inc.
 - Cleveland Mobile Radio Sales, Inc.
 - Clifford D. Moeller & Barbara J. Moeller d/b/a Valley Answering Service
 - Com-Nav, Inc. d/b/a Radiotelephone of Maine (Com-Nav)
 - Lubbock Radio Paging Service, Inc. (Lubbock)
 - Oregon Telephone Corporation
 - Penasco Valley Telephone Cooperative, Inc.
 - Prairie Grove Telephone Company
 - Professional Answering Service, Inc.
 - Radiofone, Inc.
 - Robert F. Ryder d/b/a Radio Paging Service
 - Telephone & Two Way
 - Teletouch Licenses, Inc.
 - Ventures in Paging, L.C.
7. Century Telephone Enterprises, Inc. (Century)
8. Consolidated Communications Telecom Services, Inc. (Consolidated)
9. Lincoln County Telephone System, Inc. (Lincoln)
10. Metrocall, Inc. (Metrocall)
11. Mid-Rivers Telephone Cooperative, Inc. (Mid-Rivers)
12. Morris Communications, Inc. (Morris)
13. Mobile Telecommunications Technologies Corp. (MTel)
14. National Telephone Cooperative Association (NTCA)
15. Nationwide Paging, Inc. (Nationwide)
16. Nucla-Naturita Telephone Company (Nucla-Naturita)
17. Paging Network, Inc. (PageNet)
18. Personal Communications Industry Association (PCIA)
19. Preferred Networks, Inc. (Preferred Networks)
20. Priority Communications, Inc. (Priority)
21. ProNet, Inc. (ProNet)
22. PSWF Corporation (PSWF)⁵⁶⁶
23. Puerto Rico Telephone Company (PRTC)
24. Robert Kester, *et. al.* (Robert Kester)
25. Schuylkill Mobile Fone, Inc. (Schuylkill)
26. Teletouch Licenses, Inc. (Teletouch)
27. TSR Paging, Inc. (TSR)

⁵⁶⁶ PSWF filed separate petitions on March 26, 1997, and April 11, 1997.

28. Western Maryland Wireless Company (Western Maryland)
29. Western Paging I Corporation and Western Paging II Corporation (Western Paging)

OPPOSITIONS/COMMENTS

1. AirTouch Opposition
2. AirTouch Comments
3. API Comments
4. Arch Opposition
5. Com-Nav Comments
6. Communication Innovations Corporation (CIC) Opposition
7. Lubbock Comments
8. Metrocall Response to Petition
9. MTel Comments
10. Nationwide Opposition
11. Nucla-Naturita Comments
12. Oregon Telephone Corporation (OTC) Comments
13. PageMart II, Inc. (PageMart) Opposition
14. PageNet Comments
15. PCIA Opposition
16. Penasco Valley Telephone Cooperative (Penasco) Comments
17. Professional Answering Service (Professional) Comments
18. ProNet Comments
19. SpaceMark Communications Comments
20. Ventures in Paging, L.C. Comments

REPLIES TO OPPOSITIONS/COMMENTS

1. AirStar
2. AirTouch
3. API
4. Arch
5. Big Bend
6. Blooston
7. Century
8. Mid-Rivers
9. NTCA
10. Nucla-Naturita
11. PageNet
12. ProNet
13. PRTC

EX PARTE

1. AirTouch -- filed July 15, 1997
2. Electronic Engineering Company -- filed September 10, 1997
3. Federal Trade Commission (FTC) -- filed June 10, 1997
4. NTCA -- filed November 18, 1997
5. PageNet -- filed October 27, 1998
6. PCIA -- filed June 18, 1997
7. PCIA -- filed December 1, 1997
8. PCIA -- filed April 7, 1998
9. PCIA -- filed April 29, 1998
10. PCIA -- filed September 3, 1998
11. PCIA -- filed September 18, 1998
12. PCIA -- filed September 21, 1998
13. PCIA -- filed October 13, 1998
14. PCIA -- filed October 26, 1998

OTHER

1. Metrocall -- Motion for Stay Pending Reconsideration and Clarification -- filed April 11, 1997
2. Radiofone, Inc. -- Notice of Withdrawal as Party⁵⁶⁷ -- filed June 11, 1997
3. TSR Wireless LLC -- Notification⁵⁶⁸ -- filed April 20, 1997
4. TSR Wireless LLC -- Withdrawal of Petition for Partial Reconsideration⁵⁶⁹ -- filed October 22, 1998

⁵⁶⁷ Pursuant to this notice of withdrawal, Radiofone, Inc. withdrew as a party to the petition for reconsideration filed on April 11, 1997, by Blooston, Mordkofsky, Jackson & Dickens.

⁵⁶⁸ TSR Paging, Inc. merged with American Paging, Inc. and its subsidiaries to form a new entity, TSR Wireless LLC.

⁵⁶⁹ TSR Wireless LLC withdrew the petition for reconsideration filed on March 26, 1997, by American Paging Inc.

COMMENTS IN RESPONSE TO FURTHER NOTICE

1. AirTouch
2. Blooston
3. FTC
4. Metrocall
5. Nucla-Naturita
6. PageMart
7. PageNet
8. PCIA
9. ProNet
10. Small Business in Telecommunications (SBT)

REPLIES

1. AirTouch
2. Arch
3. Blooston
4. Century
5. Metrocall
6. PageNet
7. PCIA
8. ProNet

APPENDIX B

Part 22 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 22 continues to read as follows:

AUTHORITY: Sections 4, 303, 309 and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, 309 and 332, unless otherwise noted.

2. Section 22.213 is revised to read as follows:

§ 22.213 Long-form application (FCC Form 601).

Each successful bidder for a paging geographic area authorization must submit a "long-form" application (Form 601) within ten (10) business days after being notified by Public Notice that it is the winning bidder. Applications for paging geographic area authorizations on FCC Form 601 must be submitted in accordance with § 1.2107 and § 1.2112 of this chapter, all applicable procedures set forth in the rules in this part, and any applicable Public Notices that the FCC may issue in connection with an auction. After an auction, the FCC will not accept long-form applications for paging geographic area authorizations from anyone other than the auction winners and parties seeking partitioned authorizations pursuant to agreements with auction winners under § 22.221.

3. Section 22.215 is amended by revising paragraph (a) to read as follows:

§ 22.215 Authorization, grant, denial, default, and disqualification.

(a) Each winning bidder will be required to pay the full balance of its winning bid no later than ten (10) business days following the release date of a Public Notice establishing the payment deadline. If a winning bidder fails to pay the balance of its winning bids in a lump sum by the applicable deadline as specified by the Commission, it will be allowed to make payment no later than ten (10) business days after the payment deadline, provided that it also pays a late fee equal to five (5) percent of the amount due. When a winning bidder fails to pay the balance of its winning bid by the late payment deadline, it is considered to be in default on its authorization(s) and subject to the applicable default payments. Authorizations will be awarded upon the full and timely payment of winning bids and any applicable late fees.

* * * * *

4. Section 22.217 is amended by revising paragraph (a) and adding paragraph (b)(4) to read as follows:

§ 22.217 Bidding credits for small businesses.

(a) A winning bidder that qualifies as a small business or a consortium of small businesses as defined in § 22.223(b)(1)(i) may use a bidding credit of thirty-five (35) percent to lower the cost of its winning bid. A winning bidder that qualifies as a small business or a consortium of small businesses as defined in § 22.223(b)(1)(ii) may use a bidding credit of twenty-five (25) percent to lower the cost of its winning bid.

(b) * * *

(4) If a small business that utilizes a bidding credit under this section partitions its authorization or disaggregates its spectrum to an entity not meeting the eligibility standards for the same bidding credit, the partitioning or disaggregating licensee will be subject to the provisions concerning unjust enrichment as set forth in § 1.2111(e)(2) and (3) of this chapter.

5. Section 22.219 is removed.

6. Section 22.221 is amended by revising paragraphs (b) and (c) to read as follows:

§ 22.221 Eligibility for partitioned authorizations.

* * * * *

(b) Each party to an agreement to partition the authorization must file a long-form application (FCC Form 601) for its respective, mutually agreed-upon geographic area together with the application for the remainder of the MEA or EA filed by the auction winner.

(c) If the partitioned authorization is being applied for as a partial assignment of the MEA or EA authorization following grant of the initial authorization, request for authorization for partial assignment of an authorization shall be made pursuant to § 1.948.

7. Section 22.223 is amended by revising paragraphs (b)(1) and (b)(2) and adding paragraphs (b)(4) and (e) to read as follows:

§ 22.223 Definitions concerning competitive bidding process.

* * * * *

(b) * * *

(1) * * *

(i) Together with its affiliates and controlling interests has average gross revenues that are not more than \$3 million for the preceding three years; or

(ii) Together with its affiliates and controlling interests has average gross revenues that are not more than \$15 million for the preceding three years.

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

(3) * * * * *

(4) Applicants without identifiable controlling interests. Where an applicant (or licensee) cannot identify controlling interests under the standards set forth in this section, the gross revenues of all interest holders in the applicant, and their affiliates, will be attributable.

* * * * *

(e) Controlling interest.

(1) For purposes of this section, controlling interest includes individuals or entities with de jure and de facto control of the applicant. De jure control is greater than 50 percent of the voting stock of a corporation, or in the case of a partnership, the general partner. De facto control is determined on a case-by-case basis. An entity must disclose its equity interest and demonstrate at least the following indicia of control to establish that it retains de facto control of the applicant:

(i) The entity constitutes or appoints more than 50 percent of the board of directors or management committee;

(ii) The entity has authority to appoint, promote, demote, and fire senior executives that control the day-to-day activities of the licensee; and

(iii) The entity plays an integral role in management decisions.

(2) Calculation of certain interests.

(i) Ownership interests shall be calculated on a fully diluted basis; all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised.

(ii) Partnership and other ownership interests and any stock interest equity, or outstanding stock, or outstanding voting stock shall be attributed as specified below.

(iii) Stock interests held in trust shall be attributed to any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and, to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal, or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust.

(iv) Non-voting stock shall be attributed as an interest in the issuing entity.

(v) Limited partnership interests shall be attributed to limited partners and shall be calculated according to both the percentage of equity paid in and the percentage of distribution of profits and losses.

(vi) Officers and directors of an entity shall be considered to have an attributable interest in the entity. The officers and directors of an entity that controls a licensee or applicant shall be considered to have an attributable interest in the licensee or applicant.

(vii) Ownership interests that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest.

(viii) Any person who manages the operations of an applicant or licensee pursuant to a management agreement shall be considered to have an attributable interest in such applicant or licensee if such person or its affiliate pursuant to paragraph (d) has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence

(A) The nature or types of services offered by such an applicant or licensee;

(B) The terms upon which such services are offered; or

(C) The prices charged for such services.

(ix) Any licensee or its affiliate who enters into a joint marketing arrangement with an applicant or licensee, or its affiliate, shall be considered to have an attributable interest, if such applicant or licensee, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence,

(A) The nature or types of services offered by such an applicant or licensee;

(B) The terms upon which such services are offered; or

(C) The prices charged for such services.

8. Section 22.225 is amended by revising paragraphs (a)(1), (b)(1) and (e) to read as follows:

§ 22.225 Certifications, disclosures, records maintenance and audits.

(a) * * *

(1) The identity of the applicant's controlling interests and affiliates, and, if a consortium of small businesses, the members of the joint venture; and

* * * * *

(b) * * *

(1) Disclose separately and in the aggregate the gross revenues, computed in accordance with § 22.223, for each of the following: the applicant, the applicant's affiliates, the applicant's controlling interests, and, if a consortium of small businesses, the members of the joint venture;

* * * * *

(e) Definitions. The terms affiliate, small business, consortium of small businesses, gross revenues, and controlling interest used in this section are defined in § 22.223.

9. Section 22.503 is amended by revising paragraphs (b)(2), (b)(3), (h), (i), and (k) to read as follows:

§ 22.503 Paging geographic area authorizations.

* * * * *

(b) * * *

(2) Major Economic Areas (MEAs) and Economic Areas (EAs) are defined below. EAs are defined by the Department of Commerce, Bureau of Economic Analysis. See Final Redefinition of the MEA Economic Areas, 60 FR 13114 (March 10, 1995). MEAs are based on EAs. In addition to the Department of Commerce's 172 EAs, the FCC shall separately license Guam and the Northern Mariana Islands, Puerto Rico and the United States Virgin Islands, and American Samoa, which have been assigned FCC-created EA numbers 173-175, respectively, and MEA numbers 49-51, respectively.

(3) The 51 MEAs are composed of one or more EAs as defined in the table below:

MEAs	EAs
1 (Boston)	1-3
2 (New York City)	4-7, 10
3 (Buffalo)	8
4 (Philadelphia)	11-12
5 (Washington)	13-14
6 (Richmond)	15-17, 20
7 (Charlotte-Greensboro-Greenville-Raleigh)	18-19, 21-26, 41-42, 46
8 (Atlanta)	27-28, 37-40, 43
9 (Jacksonville)	29, 35
10 (Tampa-St. Petersburg- Orlando)	30, 33-34

11 (Miami)	31-32
12 (Pittsburgh)	9, 52-53
13 (Cincinnati-Dayton)	48-50
14 (Columbus)	51
15 (Cleveland)	54-55
16 (Detroit)	56-58, 61-62
17 (Milwaukee)	59-60, 63, 104-105, 108
18 (Chicago)	64-66, 68, 97, 101
19 (Indianapolis)	67
20 (Minneapolis-St. Paul)	106-107, 109-114, 116
21 (Des Moines-Quad Cities)	100, 102-103, 117
22 (Knoxville)	44-45
23 (Louisville-Lexington-Evansville)	47, 69-70, 72
24 (Birmingham)	36, 74, 78-79
25 (Nashville)	71
26 (Memphis-Jackson)	73, 75-77
27 (New Orleans-Baton Rouge)	80-85
28 (Little Rock)	90-92, 95
29 (Kansas City)	93, 99, 123
30 (St. Louis)	94, 96, 98
31 (Houston)	86-87, 131
32 (Dallas-Fort Worth)	88-89, 127-130, 135, 137-138
33 (Denver)	115, 140-143
34 (Omaha)	118-121
35 (Wichita)	122
36 (Tulsa)	124
37 (Oklahoma City)	125-126
38 (San Antonio)	132-134
39 (El Paso-Albuquerque)	136, 139, 155-157

40 (Phoenix)	154, 158-159
41 (Spokane-Billings)	144-147, 168
42 (Salt Lake City)	148-150, 152
43 (San Francisco-Oakland-San Jose)	151, 162-165
44 (Los Angeles-San Diego)	153, 160-161
45 (Portland)	166-167
46 (Seattle)	169-170
47 (Alaska)	171
48 (Hawaii)	172
49 (Guam and the Northern Mariana Islands)	173
50 (Puerto Rico and U.S. Virgin Islands)	174
51 (American Samoa)	175

* * * * *

(h) *Adjacent geographic area coordination required.* Before constructing a facility for which the interfering contour (as defined in § 22.537 or § 22.567, as appropriate for the channel involved) would extend into another paging geographic area, a paging geographic area licensee must obtain the consent of the relevant co-channel paging geographic area licensee, if any, into whose area the interfering contour would extend. Licensees are expected to cooperate fully and in good faith attempt to resolve potential interference problems before bringing matters to the FCC. In the event that there is no co-channel paging geographic area licensee from whom to obtain consent in the area into which the interfering contour would extend, the facility may be constructed and operated subject to the condition that, at such time as the FCC issues a paging geographic area authorization for that adjacent geographic area, either consent must be obtained or the facility modified or eliminated such that the interfering contour no longer extends into the adjacent geographic area.

(i) *Protection of existing service.* All facilities constructed and operated pursuant to a paging geographic area authorization must provide co-channel interference protection in accordance with § 22.537 or § 22.567, as appropriate for the channel involved, to all authorized co-channel facilities of *exclusive* licensees within the paging geographic area. Non-exclusive licensees on the thirty-five exclusive 929 MHz channels are not entitled to exclusive status, and will continue to operate under the sharing arrangements established with the exclusive licensees and other non-exclusive licensees that were in effect prior to February 19, 1997. MEA, EA, and nationwide geographic area licensees have the right to share with non-exclusive licensees on the thirty-five exclusive 929 MHz channels on a non-interfering basis.

* * * * *

(k) *Coverage Requirements.* Failure by an MEA or EA licensee to meet either the coverage requirements in paragraphs (k)(1) and (k)(2), or alternatively, the substantial service requirement in paragraph (k)(3), will result in automatic termination of authorizations for those facilities that were not

authorized, constructed, and operating at the time the geographic area authorization was granted. MEA and EA licensees have the burden of showing when their facilities were authorized, constructed, and operating, and should retain necessary records of these sites until coverage requirements are fulfilled. For the purpose of this paragraph, to "cover" area means to include geographic area within the composite of the service contour(s) determined by the methods of §§ 22.537 or 22.567, as appropriate for the particular channel involved. Licensees may determine the population of geographic areas included within their service contours using either the 1990 census or the 2000 census, but not both.

(1) No later than three years after the initial grant of an MEA or EA geographic area authorization, the licensee must construct or otherwise acquire and operate sufficient facilities to cover one third of the population in the paging geographic area. The licensee must notify the FCC at the end of the three-year period pursuant to § 1.946, either that it has satisfied this requirement or that it plans to satisfy the alternative requirement to provide substantial service in accordance with paragraph (k)(3).

(2) No later than five years after the initial grant of an MEA or EA geographic area authorization, the licensee must construct or otherwise acquire and operate sufficient facilities to cover two thirds of the population in the paging geographic area. The licensee must notify the FCC at the end of the five year period pursuant to § 1.946, either that it has satisfied this requirement or that it has satisfied the alternative requirement to provide substantial service in accordance with paragraph (k)(3).

* * * * *

10. Section 22.507 is amended by revising paragraph (c) to read as follows:

§ 22.507 Number of transmitters per station.

* * * * *

(c) *Consolidation of separate stations.* The FCC may consolidate site-specific contiguous authorizations upon request (FCC Form 601) of the licensee, if appropriate under paragraph (a). Paging licensees may include remote, stand-alone transmitters under the single system-wide authorization, if the remote, stand-alone transmitter is linked to the system via a control/repeater facility or by satellite. Including a remote, stand-alone transmitter in a system-wide authorization does not alter the limitations provided under § 22.503(f) on entities other than the paging geographic area licensee. In the alternative, paging licensees may maintain separate site-specific authorizations for stand-alone or remote transmitters. The earliest expiration date of the authorizations that make up the single system-wide authorization will determine the expiration date for the system-wide authorization. Licensees must file timely renewal applications for site-specific authorizations included in a single system-wide authorization request until the request is approved. Renewal of the system-wide authorization will be subject to § 1.949.

11. Paragraph (c) of Section 22.509 is removed.

12. New Section 22.513 is added to read as follows:

§ 22.513 Partitioning and disaggregation. MEA and EA licensees may apply to partition their authorized geographic service area or disaggregate their authorized spectrum at any time following grant of their geographic area authorizations. Nationwide geographic area licensees may apply to partition their authorized geographic service area or disaggregate their authorized spectrum at any time as of [insert effective date of the *Third Report and Order*].

(a) *Application required.* Parties seeking approval for partitioning and/or disaggregation shall apply for partial assignment of a license pursuant to § 1.948.

(b) *Partitioning.* In the case of partitioning, requests for authorization for partial assignment of a license must include, as attachments, a description of the partitioned service area and a calculation of the population of the partitioned service area and the authorized geographic service area. The partitioned service area shall be defined by 120 sets of geographic coordinates at points at every 3 degrees azimuth from a point within the partitioned service area along the partitioned service area boundary unless either an FCC-recognized service area is used (e.g., MEA or EA) or county lines are followed. The geographical coordinates must be specified in degrees, minutes, and seconds to the nearest second latitude and longitude, and must be based upon the 1983 North American Datum (NAD83). In the case where FCC-recognized service areas or county lines are used, applicants need only list the specific area(s) through use of FCC designations or county names that constitute the partitioned area.

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

(d) *Combined partitioning and disaggregation.* Licensees may apply for partial assignment of authorizations that propose combinations of partitioning and disaggregation.

(e) *License term.* The license term for a partitioned license area and for disaggregated spectrum shall be the remainder of the original licensee's license term as provided for in § 1.955.

(f) *Coverage Requirements for partitioning.*

(1) Parties to a partitioning agreement must satisfy at least one of the following requirements:

(i) The partitionee must satisfy the applicable coverage requirements set forth in § 22.503 (k)(1), (2) and (3) for the partitioned license area; or

(ii) The original licensee must meet the coverage requirements set forth in § 22.503 (k)(1), (2) and (3) for the entire geographic area. In this case, the partitionee must meet only the requirements for renewal of its authorization for the partitioned license area.

(2) Parties seeking authority to partition must submit with their partial assignment application a certification signed by both parties stating which of the above options they select.

(3) Partitionees must submit supporting documents showing compliance with their coverage requirements as set forth in § 22.503 (k)(1), (2) and (3).

(4) Failure by any partitionee to meet its coverage requirements will result in automatic cancellation of the partitioned authorization without further Commission action.

(2) *Coverage Requirements for disaggregation.*

(1) Parties to a disaggregation agreement must satisfy at least one of the following requirements:

(i) Either the disaggregator or disaggregatee must satisfy the coverage requirements set forth in § 22.503 (k)(1), (2) and (3) for the entire license area; or

(ii) Parties must agree to share responsibility for meeting the coverage requirements set forth in § 22.503 (k)(1), (2) and (3) for the entire license area.

(2) Parties seeking authority to disaggregate must submit with their partial assignment application a certification signed by both parties stating which of the above requirements they meet.

(3) Disaggregates must submit supporting documents showing compliance with their coverage requirements as set forth in § 22.503 (k)(1), (2) & (3).

(4) Parties that accept responsibility for meeting the coverage requirements and later fail to do so will be subject to automatic license cancellation without further Commission action.

13. Section 22.531 is amended by revising paragraph (f) to read as follows:

§ 22.531 Channels for paging operation.

* * * * *

(f) For the purpose of issuing paging geographic authorizations, the paging geographic areas used for UHF channels are the MEAs, and the paging geographic areas used for the low and high VHF channels are the EAs (see § 22.503(b)).

14. Section 90.175 is amended by revising paragraph (f) to read as follows:

§ 90.175 Frequency coordination requirements.

* * * * *

(f) For frequencies in the 929-930 MHz band listed in paragraph (b) of § 90.494. A statement from the coordinator recommending the most appropriate frequency.

APPENDIX C

Supplemental Final Regulatory Flexibility Analysis
Memorandum Opinion and Order on Reconsideration

As required by the Regulatory Flexibility Act (RFA),⁵⁷⁰ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in Appendix A of the *Notice* in this proceeding, and a Final Regulatory Flexibility Analysis (FRFA) was incorporated in Appendix C of the subsequent *Second Report and Order*.⁵⁷¹ As described below, two petitions for reconsideration of the *Second Report and Order* raise an issue concerning the previous FRFA. The *Memorandum Opinion and Order on Reconsideration* addresses those reconsideration petitions, among others. This associated Supplemental Final Regulatory Flexibility Analysis (Supplemental FRFA) also addresses those petitions and conforms to the RFA.

I. Need for and Purpose of this Action

In the *Second Report and Order*, the Commission adopted rules for geographic area licensing of Common Carrier Paging and exclusive 929 MHz Private Carrier Paging and procedures for auctioning mutually exclusive applications for these licenses. The actions taken in this *Memorandum Opinion and Order on Reconsideration* are in response to petitions for reconsideration or clarification of the *Second Report and Order*. Throughout this proceeding, we have sought to promote Congress's goal of regulatory parity for all Commercial Mobile Radio Services (CMRS), and to encourage the participation of a wide variety of applicants, including small businesses, in the paging industry. In addition, we have sought to establish rules for the paging services that will streamline the licensing process and provide a flexible operating environment for licensees, foster competition, and promote the delivery of service to all areas of the country, including rural areas.

II. Summary of Significant Issues Raised in Response to the Final Regulatory Flexibility Analysis

Priority Communications, Inc.'s (Priority) petition for reconsideration raises various issues, one of which is in direct response to the FRFA contained in the *Second Report and Order*. Priority states that the FRFA did not address alternatives to competitive bidding, e.g., granting geographic area licenses, without competitive bidding, to incumbents of highly encumbered areas.⁵⁷² We disagree with the contention that the Commission failed to consider alternatives to competitive bidding. In the *Second Report and Order*, the Commission considered and rejected proposals to retain site-by-site licensing for the paging industry. In rejecting the proposals, the Commission found that geographic area licensing provides flexibility for licensees and ease of administration for the Commission, facilitates further build-out of wide-area systems, and enables paging operators to meet the needs of their customers more easily. Moreover, the Commission concluded that geographic area licensing will further the goal of providing

⁵⁷⁰ 5 U.S.C. §§ 603 & 604. Congress amended the RFA, *id.* § 601 *et seq.*, by the Contract With America Advancement Act of 1996, Pub. L. No. 1045-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996.

⁵⁷¹ *Notice of Propose Rulemaking*, 11 FCC Rcd 3108 (1996); *Second Report and Order and Further Notice*, 12 FCC Rcd 2732 (1997).

⁵⁷² Priority Communications, Inc. Petition for Reconsideration at 11-13.

carriers that offer substantially similar services more flexibility to compete, and will enhance regulatory symmetry between paging and other service in the CMRS marketplace.⁵⁷³

The Commission further concluded that it would grant mutually exclusive applications for geographic area licenses through competitive bidding even in areas extensively built out by an incumbent licensee. The Commission specifically considered and rejected proposals to award geographic area licenses, without competitive bidding, to any incumbent providing coverage to 70 percent or more of the population or to two-thirds of the population in the license area. Similarly, the Commission rejected a proposal not to hold auctions where an incumbent licensee is serving at least 50 percent of the geographic area or 50 percent of the population in that market. The Commission also considered and rejected proposals to award a dispositive preference in the auction to a licensee that provides service to one-third or greater of the population, or one-half or greater of the geographic area, or to restrict competitive bidding to incumbent licensees.⁵⁷⁴ In rejecting these proposals, the Commission concluded that market forces, not regulation, should determine participation in competitive bidding for geographic area licenses.

In its petition for reconsideration, the National Telephone Cooperative Association (NTCA) contends that the FRFA failed to address alternatives that parties suggested in response to the *Notice* to minimize the impact of the rule changes adopted in the *Second Report and Order* on small BETRS operators. NTCA specifically contends that the Commission did not address the investment BETRS operators would be unable to recover once they were required to terminate operations upon notification by a geographic area licensee of interference. NTCA further contends that the Commission did not address the adverse impact on small BETRS operators resulting from auctions that "pit them against paging operations that have no interest in the site licenses needed for BETRS operations."⁵⁷⁵ Initially, we note that NTCA did not raise these issues in response to the *Notice*. NTCA has raised these issues only in response to the *Second Report and Order*. We also disagree with the contention that the Commission failed to consider alternatives that would minimize the impact on small BETRS operators. The Commission specifically found it unnecessary to adopt the plan that Puerto Rico Telephone proposed, under which (1) BETRS operators would be given preferential treatment over paging operators for mutually exclusive applications (on a site-by-site basis), and (2) the Commission would designate a frequency block for reallocated frequencies solely for BETRS use.⁵⁷⁶ Based on the potentially competitive environment in local exchange services, the Commission saw no basis for distinguishing BETRS from other commercial radio services that are auctionable under Section 309(j) of the Communications Act.⁵⁷⁷ Rather, the Commission determined that BETRS licensees should be required to participate in competitive bidding for paging licenses. In considering proposals to continue licensing BETRS facilities on a site-specific basis, the Commission decided that BETRS licensees could obtain site licenses on a secondary basis and enter into partitioning agreements with paging geographic area licensees. With respect to the issue of stranded costs, the *Second Report and Order* does not limit BETRS operators' options to that of obtaining licenses on a secondary basis. As already explained, they may also obtain co-primary licenses through partitioning. Moreover, the Commission has adopted specific procedures in the *Memorandum*

⁵⁷³ *Second Report and Order and Further Notice*, 12 FCC Rcd at 2744, ¶ 15 & 2748, ¶ 23.

⁵⁷⁴ *Id.* at 2758-59, ¶ 45.

⁵⁷⁵ NTCA Petition for Reconsideration at 7-8.

⁵⁷⁶ *Second Report and Order and Further Notice*, 12 FCC Rcd at 2751, ¶ 29.

⁵⁷⁷ *Id.* at 2752-54, ¶¶ 32-35.

Opinion and Order on Reconsideration to limit the extent to which BETRS providers will be required to discontinue operations at secondary sites.

III. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

The rules adopted in the *Memorandum Opinion and Order on Reconsideration* will affect all small businesses that hold or seek to acquire commercial paging licenses. As noted, a FRFA was incorporated into the *Second Report and Order*.⁵⁷⁸ In that analysis, we described the small businesses that might be significantly affected at that time by the rules adopted in the *Second Report and Order*. Those entities include existing commercial paging operators and new entrants into the paging market. To ensure the more meaningful participation of small business entities in the auctions, the Commission adopted a two-tiered definition of small businesses in the *Second Report and Order*: (1) an entity that, together with its affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$3 million; or (2) an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$15 million.⁵⁷⁹ Because the Small Business Administration (SBA) had not yet approved this definition, the Commission relied in the FRFA on the SBA's definition applicable at that time to radiotelephone companies, *i.e.*, an entity employing less than 1,500 persons.⁵⁸⁰ Given the fact that nearly all radiotelephone companies had fewer than 1,000 employees, and that no reasonable estimate of the number of prospective paging licensees could be made, the Commission assumed, for purposes of the evaluations and conclusions in the FRFA, that all the auctioned 16,630 geographic area licenses would be awarded to small entities. In December 1998, the SBA approved the two-tiered size standards for paging services set forth in the *Second Report and Order*.⁵⁸¹

In the FRFA, the Commission anticipated that approximately 16,630 non-nationwide geographic area licenses will be auctioned. No party submitting or commenting on the petitions for reconsideration giving rise to this *Memorandum Opinion and Order on Reconsideration* commented on the potential number of small businesses that might participate in the commercial paging auction and no reasonable estimate can be made. While we are unable to predict accurately how many paging licensees meeting one of the above definitions will choose to participate in or be successful at auction, our *Third CMRS Competition Report* estimated that, as of January 1998, there were more than 600 paging companies in the United States.⁵⁸² The *Third CMRS Competition Report* also indicates that at least ten of the top twelve publicly held paging companies had average gross revenues in excess of \$15 million for the three years preceding 1998.⁵⁸³ Data obtained from publicly available company documents and SEC filings indicate

⁵⁷⁸ *Id.* at 2861-69.

⁵⁷⁹ *Id.* at 2811, ¶ 179.

⁵⁸⁰ *Id.* at 2863 (citing 13 C.F.R. § 121.201, Standard Industrial Classification Code 4812).

⁵⁸¹ 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.

⁵⁸² Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, *Third Report*, FCC 98-9, at 40 (June 11, 1998) (*Third CMRS Competition Report*).

⁵⁸³ See *Third CMRS Competition Report*, App. C at 5.

that this is also true for the three years preceding 1999. While the Commission expects these ten companies to participate in the paging auction, the Commission also expects, for the purposes of the evaluations and conclusions in this Supplemental FRFA, that a number of geographic area paging licenses will be awarded to small businesses.

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

With one exception, this *Memorandum Opinion and Order on Reconsideration* does not impose additional recordkeeping or other compliance requirements beyond the requirements contained in the *Second Report and Order*. If an MEA or EA licensee fails to meet its coverage requirements, that licensee will have the burden of showing which of its facilities were authorized, constructed, and operating at the time the geographic area license was granted. MEA and EA licensees will need to retain necessary records of any such facilities until they meet the geographic area license coverage requirements.

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

The previous FRFA stated that the rules adopted for geographic area licensing will affect the Common Carrier Paging and exclusive 929 MHz Private Carrier Paging services. This Supplemental FRFA concludes that a number of geographic area commercial paging licenses may be awarded to small businesses. As described below, our actions taken to implement the transition to geographic area licensing and competitive bidding represent a balancing of various factors.

Certain petitioners suggested replacing Rand McNally MTAs with Major Economic Areas (MEAs) for the 929 MHz and 931 MHz bands. Considering these requests, we have decided to adopt MEAs instead of MTAs.⁵⁸⁴ Because MEAs are composed of EAs, licensees with paging systems on both the lower channels and the 929 and 931 MHz bands, including small businesses, will be able to operate their systems more efficiently. The MEA designation will also enhance competition because paging systems on the lower channels, including small business paging systems, will be able to combine their EAs to form MEAs. In addition, we considered and rejected a recommendation to use Basic Trading Areas (BTAs) for geographic area licensing on the lower paging bands. In rejecting the BTA designation, we concluded that EAs, which the majority of commenters supported, best reflect the geographic area that the paging licensees on the lower channels seek to serve. We also found that the use of EAs will not prevent paging operators of small systems from participating in the auction. We noted that bidding credits will allow small businesses to compete against larger bidders. In addition, our partitioning rules will allow entities, including small businesses, to acquire licenses for areas smaller than EAs.

A number of petitioners have requested that we reconsider our decision to grant mutually exclusive applications for geographic area licenses through competitive bidding even in areas extensively built out by an incumbent licensee. Again balancing various interests, we have affirmed the use of competitive bidding to grant mutually exclusive paging applications. We have rejected the petitioners' request because open eligibility promotes prompt service to the public by allocating spectrum to the entity that values it most.⁵⁸⁵ We believe that the market should decide whether an economically viable paging system can be established in the unserved area of a geographic market. Our decision on this issue will provide adjacent

⁵⁸⁴ *Memorandum Opinion and Order on Reconsideration* at Section IV.B.1.

⁵⁸⁵ *Id.* at Section IV.B.3.

geographic area licensees and new entrants, including small businesses, with the opportunity to establish a viable system that serves the public as well as an incumbent. Moreover, we see no reason to give licensees that serve a substantial portion of a geographic area an advantage over other entities, including small businesses, that may also value the spectrum in that particular market.

Several petitioners request that we clarify section 22.723 of our rules, which requires Rural Radiotelephone Service (RRS) licensees, including BETRS operators, to discontinue operations once the paging geographic area licensee notifies the RRS licensee that its co-channel secondary facilities may cause interference to the geographic area licensee's existing or planned facilities. The petitioners argue that our rules will allow geographic area licensees to terminate BETRS upon any allegation of harmful interference. In response to this concern, we are adopting new procedures in the *Memorandum Opinion and Order* that geographic area licensees must follow in notifying a BETRS operator that its facility causes or will cause interference with the geographic area licensee's service contour in violation of our interference rules.⁵⁸⁶ The new procedures limit the termination of operating BETRS co-channel secondary facilities until harmful interference would occur.

In the *Second Report and Order*, we defined a system-wide license by the aggregate of the interference contours around each of the incumbent's contiguous sites operating on the same channel. We also concluded that incumbent licensees may add or modify sites within their existing interference contours without filing site-specific applications, but may not expand their existing interference contours without the consent of the geographic area licensee.⁵⁸⁷ Several petitioners expressed confusion over our definition of "contiguous sites" for the purpose of determining an incumbent's "aggregate interference contour." In addition, one petitioner asked that we define "composite interference contours" to include all authorized transmitters, including valid construction permits, regardless of the grant date. Another petitioner requested that we include remote transmitters within system-wide licenses, or in the alternative maintain separate licenses for any stand-alone or remote transmitter. Recognizing these concerns and balancing various interests as explained more fully in the *Memorandum Opinion and Order*,⁵⁸⁸ we have maximized the definition of composite interference contour to reduce unnecessary regulatory burdens on licensees, reduce administrative costs on the industry, and thereby benefit consumers. In this regard, we have clarified that contiguous sites, for the purpose of defining an incumbent's composite interference contour, are defined by overlapping interference contours, not service contours. We further state that all authorized site-specific paging licenses and construction permits are included in a composite interference contour. Finally, we have amended section 22.507 to allow system-wide licensees to maintain separate licenses for any stand-alone or remote transmitters, or to include remote and stand-alone sites within the system-wide license.

On a related matter, petitioners asked the Commission to allow reversion to the geographic area licensee of spectrum recovered from an incumbent in all instances except where an incumbent licensee discontinues operations in a location wholly encompassed by the incumbent's composite interference contour. In balancing the various relevant considerations, we concluded that no demonstration had been made showing that the geographic area licensee would be unable to serve areas wholly surrounded by an

⁵⁸⁶ *Id.* at ¶ 31.

⁵⁸⁷ *Second Report and Order and Further Notice*, 12 FCC Rcd at 2764, ¶ 58.

⁵⁸⁸ *Memorandum Opinion and Order on Reconsideration* at Section IV.B.6.

incumbent.⁵⁸⁹ Moreover, we do not believe the public interest would be served by withholding such areas from the geographic area licensee in hope that the incumbent will one day resume service to those areas. We further noted that if incumbents, including small businesses, wish to serve reverted areas, they may seek to enter into partitioning agreements with the geographic area licensees. Similarly, a number of petitioners contended that system-wide licenses should include areas where an incumbent licensee's interference contours do not overlap, but where no other licensee could place a transmitter because of interference rules. We considered and rejected this proposal, finding that inclusion of areas outside of an incumbent's interference contours would be contrary to our objective of prohibiting encroachment on the geographic area licensee's operations.⁵⁹⁰ Incumbents seeking to expand their contours, including small businesses, may participate in the auction or seek partitioning agreements with geographic area licensees.

In the *Second Report and Order*, the Commission elected not to impose a limit or "cap" on the number of licensees that may operate on shared paging channels.⁵⁹¹ Two petitioners asked us to reconsider that determination. Again, balancing the options, we reaffirmed our prior decision.⁵⁹² A "cap" would not promote efficient use of spectrum because the capacity limits on paging channels are based primarily on use and not the number of licensees. Our goal is to increase the use of these shared channels, not to unduly restrict access to them. This decision will provide new entrants, including small businesses, with another opportunity to acquire paging spectrum.

In the *Second Report and Order*, the Commission also eliminated the Part 90 height and power limitations on 929 MHz stations and increased the maximum permitted effective radiated power (ERP) to 3,500 watts.⁵⁹³ Some petitioners have asked for 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. In response to this request, we have clarified that incumbent 929 MHz licensees need not 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 existing composite interference contour.⁵⁹⁴ This clarification conforms our technical requirements for height and power with the general rule that incumbents need not file applications for internal system changes. Adopting this rule will minimize burdens on all entities, including small businesses, that increase the ERP of their base stations.

One petitioner advocated that we make our coverage requirements more stringent by requiring geographic area licensees to provide coverage to one-third of the market area within one year, and two-thirds within three years. We considered and rejected this proposal because we believe that our coverage requirements adequately promote prompt service to the public without being unduly burdensome on licensees, including small businesses, that need a reasonable amount of time to complete construction. Moreover, we believe that overly stringent coverage requirements unfairly favor incumbents by erecting formidable barriers to new entrants, including small businesses. Several petitioners also requested that

⁵⁸⁹ *Id.* at Section IV.B.5.

⁵⁹⁰ *Id.* at Section IV.B.6.

⁵⁹¹ *Second Report and Order and Further Notice* at 2757, ¶ 42.

⁵⁹² *Memorandum Opinion and Order on Reconsideration*, at Section IV.D.

⁵⁹³ *Second Report and Order and Further Notice*, 12 FCC Rcd at 2773-74, ¶ 78.

⁵⁹⁴ *Memorandum Opinion and Order on Reconsideration* at Section IV.F.

we eliminate the "substantial service" option for meeting MEA or EA coverage requirements. We have rejected this request because we believe that the "substantial service" option will facilitate build-out in rural areas, encourage licensees to provide new services, and enable new entrants to satisfy our coverage requirements in geographic areas where incumbents are already substantially built out.⁵⁹⁵ We believe that rural service providers as well as new entrants are likely to include small businesses, and thus retaining the "substantial service" option should benefit small businesses. While we will presume that the "substantial service" option is satisfied if an MEA or EA licensee provides coverage to two-thirds of the population in unserved areas within five years of license grant, we decline to adopt specific coverage requirements as the sole means of defining "substantial service." Giving licensees flexibility to satisfy the "substantial service" option in different ways should benefit small businesses.

In the *Part 1 Third Report and Order and Further Notice*, the Commission suspended the availability of installment payment financing for small businesses participating in future auctions.⁵⁹⁶ Consistent with this decision, the *Memorandum Opinion and Order on Reconsideration* rescinds installment payment financing for the paging auctions. To balance the impact of this decision on small businesses, however, we are increasing the bidding credits available to qualifying entities. The revised rule conforms to a schedule of bidding credits adopted in the *Part 1 Third Report and Order and Second Further Notice*.⁵⁹⁷ Under this rule, an applicant will qualify for a twenty-five percent (25%) bidding credit if the average gross revenues for the preceding three years of the applicant, its affiliates and controlling interests do not exceed \$15 million. Similarly, an applicant will qualify for a thirty-five percent (35%) bidding credit if the average gross revenues for the preceding three years of the applicant, its affiliates and controlling interests do not exceed \$3 million. As we stated in the *Part 1 Third Report and Order and Second Further Notice*, we believe that these increased bidding credits will provide small businesses with adequate opportunities to participate in the paging auctions.⁵⁹⁸ Moreover, we are further conforming the paging competitive bidding rules to the Part 1 rules by allowing winning bidders to make their final payments within ten (10) business days after the payment deadline, provided that they also pay a late fee of five (5) percent of the amount due.⁵⁹⁹ As we stated in the *Part 1 Third Report and Order and Second Further Notice*, we believe that this additional ten-day period provides winning bidders with adequate time to adjust for any last-minute problems in arranging financing and making final payment.⁶⁰⁰

⁵⁹⁵ *Memorandum Opinion and Order on Reconsideration* at Section IV.G.

⁵⁹⁶ *See Part 1 Third Report and Order*, 13 FCC Rcd at 397-98, ¶ 38.

⁵⁹⁷ *See id.* at 403-04, ¶ 47.

⁵⁹⁸ *Id.*

⁵⁹⁹ *See Part 1 Third Report and Order*, 13 FCC Rcd at 428-30, ¶¶ 93-96 (amending 47 C.F.R. § 1.2104(g)(2)).

⁶⁰⁰ *Id.* at 429-30, ¶ 93.

VI. Report to Congress

The Commission will send a copy of the *Memorandum Opinion and Order on Reconsideration*, including this Supplemental FRFA, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.⁶⁰¹ In addition, the Commission will send a copy of the *Memorandum Opinion and Order on Reconsideration*, including this Supplemental FRFA, to the Chief Counsel for Advocacy of the Small Business Association. A copy of the *Memorandum Opinion and Order on Reconsideration* and Supplemental FRFA (or summaries thereof) will also be published in the Federal Register.⁶⁰²

⁶⁰¹ See 5 U.S.C. § 801(a)(1)(A).

⁶⁰² See *id.* § 604(b).

APPENDIX D

Final Regulatory Flexibility Analysis
Third Report and Order

As required by the Regulatory Flexibility Act (RFA),⁶⁰³ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in Appendix D of the *Second Report and Order and Further Notice of Proposed Rulemaking* in this proceeding.⁶⁰⁴ The Commission sought written public comment on the proposals in that *Further Notice of Proposed Rulemaking*, including comment on the IRFA. As described below, no commenter raised an issue concerning the IRFA. The Commission's Final Regulatory Flexibility Analysis in this *Third Report and Order* conforms to the RFA.⁶⁰⁵

I. Need for and Purpose of this Action

In the *Second Report and Order*, the Commission adopted coverage requirements for and decided to allow partitioning by non-nationwide geographic area licensees, including small businesses. In the *Further Notice of Proposed Rulemaking*, the Commission sought comment on whether to adopt coverage requirements for nationwide geographic area licenses, whether to allow partitioning by nationwide geographic area licensees, whether to permit disaggregation of paging licenses, and whether to revise the application procedures for shared channels. In the *Third Report and Order*, the Commission concludes that it is best to defer any decision on coverage requirements for nationwide geographic area licenses until similar issues raised in the *Narrowband PCS Further Notice of Proposed Rulemaking* are resolved.⁶⁰⁶ The Commission further modifies the paging rules to permit partitioning by all nationwide geographic area licensees and to allow disaggregation by all MEA, EA, and nationwide geographic area licensees. The *Third Report and Order* also adopts rules governing the coverage requirements for parties to partitioning or disaggregation agreements involving MEA or EA licenses, and the license term of partitioned or disaggregated MEA, EA, and nationwide geographic area licenses. Further, the *Third Report and Order* permits MEA, EA, and nationwide geographic area licensees to combine partitioning and disaggregation. These partitioning and disaggregation rules will allow entities in addition to the initial geographic area licensees, including small businesses, to participate in providing paging services. Indeed, partitioning and disaggregation should be well suited to small businesses that do not wish to acquire an entire geographic area license. Finally, the *Third Report and Order* establishes additional mechanisms to inform consumers of the rules governing paging licenses and the danger of fraudulent schemes perpetrated by application mills. These mechanisms should help to reduce application fraud and protect consumers.

⁶⁰³ 5 U.S.C. § 603. Congress amended the RFA, *id.* § 601 *et seq.*, by the Contract With America Advancement Act of 1996, Pub L. No. 1045-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996.

⁶⁰⁴ *Second Report and Order and Further Notice*, 12 FCC Rcd 2732 (1997).

⁶⁰⁵ *See* 5 U.S.C. § 604.

⁶⁰⁶ *Third Report and Order* at Section V.B.1. (citing *Narrowband PCS Further Notice*, 12 FCC Rcd 12972 (1997)).

II. Summary of Issues Raised in Response to the Initial Regulatory Flexibility Analysis

None of the commenters submitted comments specifically in response to the IRFA. We have, however, taken small business concerns into account in the *Third Report and Order*, as discussed in Sections V and VI of the FRFA.

III. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

The rules adopted in the *Third Report and Order* will affect small businesses that hold or seek to acquire commercial paging licenses. These entities include small business nationwide geographic area licensees that decide to partition or disaggregate, small businesses that obtain MEA or EA licenses through auction and subsequently decide to partition or disaggregate, and small businesses that may acquire partitioned and/or disaggregated MEA, EA, or nationwide geographic area licenses. To ensure the more meaningful participation of small business entities in the auctions, the Commission adopted a two-tiered definition of small businesses in the *Second Report and Order*: (1) an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$3 million; or (2) an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$15 million.⁶⁰⁷ In December 1998, the Small Business Association approved the two-tiered size standards for paging services set forth in the *Second Report and Order*.⁶⁰⁸

MEA and EA Licenses

In the Final Regulatory Flexibility Analysis incorporated in Appendix C of the *Second Report and Order*, the Commission anticipated that approximately 16,630 non-nationwide geographic area licenses will be auctioned. No parties, however, commented in response to the *Further Notice of Proposed Rulemaking* on the number of small businesses that might elect to use the proposed partitioning and disaggregation rules and no reasonable estimate can be made. While we are unable to predict accurately how many paging licensees meeting one of the above definitions will participate in or be successful at auction, our *Third CMRS Competition Report* estimated that, as of January 1998, there were more than 600 paging companies in the United States.⁶⁰⁹ The *Third CMRS Competition Report* also indicates that at least ten of the top twelve publicly held paging companies had average gross revenues in excess of \$15 million for the three years preceding 1998.⁶¹⁰ The Commission expects that these ten companies will participate in the paging auction and may employ the partitioning or disaggregation rules. The Commission also expects, for purposes of the evaluations and conclusions in this Final Regulatory Flexibility Analysis, that a number of paging licenses will be awarded to small businesses, and at least

⁶⁰⁷ *Second Report and Order and Further Notice*, 12 FCC Rcd at 2811, ¶ 179.

⁶⁰⁸ 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.

⁶⁰⁹ Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, *Third Report*, FCC 98-9, at 40 (June 11, 1998) (*Third CMRS Competition Report*).

⁶¹⁰ See *Third CMRS Competition Report*, App. C at 5.

some of those small business licensees will likely also take advantage of the partitioning and disaggregation rules. We are unable to predict accurately the number of small businesses that may choose to acquire partitioned or disaggregated MEA or EA licenses. The Commission expects, however, for purposes of the evaluations and conclusions in this Final Regulatory Flexibility Analysis, that entities meeting one of the above definitions will use partitioning and disaggregation as a means to obtain a paging license from an MEA or EA licensee at a cost lower than the cost of the license for the entire MEA or EA.

Nationwide Geographic Area Licenses

The partitioning and disaggregation rules pertaining to nationwide geographic area licenses adopted in the *Third Report and Order* will affect the 26 licensees holding nationwide geographic area licenses to the extent they choose to partition or disaggregate, as well as any entity that enters into a partitioning or disaggregation agreement with a nationwide geographic area licensee. No parties, however, commented on the number of small business nationwide geographic area licensees that might elect to partition or disaggregate their licenses and no reasonable estimate can be made. While we are unable to state accurately how many nationwide geographic area licensees meet one of the above small business definitions, our *Third CMRS Competition Report* indicates that at least eight of the top twelve publicly held paging companies hold nationwide geographic area licenses and had average gross revenues in excess of \$15 million for the three years preceding 1998.⁶¹¹ The Commission expects at least some of these eight companies to employ the partitioning or disaggregation rules, and also expects, for the purposes of evaluations and conclusions in this Final Regulatory Flexibility Analysis, that nationwide geographic area licensees meeting one of the above definitions may use the partitioning or disaggregation rules. No parties commented on the number of small businesses that may choose to acquire partitioned or disaggregated licenses from nationwide geographic area licensees and, again, no reasonable estimate can be made. While we are unable to predict accurately the number of small businesses that may choose to acquire partitioned or disaggregated licenses from nationwide geographic area licensees, the Commission expects, for purposes of the evaluations and conclusions in the Final Regulatory Flexibility Analysis, that entities meeting one of the above small business definitions will use partitioning and disaggregation as a means to obtain a paging license from a nationwide geographic area licensee.

Fraud on Shared Paging Channels

The additional mechanisms established to inform consumers of the paging rules and the potential for paging application fraud on the shared channels will not affect small businesses seeking to acquire a license on a shared paging channel, except that small businesses interested in investing in shared channel licenses will be more informed of the potential for fraud.

IV. Summary of Projected Reporting, Recordkeeping, and Other Compliance Requirements

The rules adopted in the *Third Report and Order* impose reporting and recordkeeping requirements on small businesses, as well as others, seeking to obtain or transfer licenses through partitioning and disaggregation. The information requirements would be used to determine whether the proposed partitionee or disaggregatee is an entity qualified to obtain a partitioned license or disaggregated spectrum. This information will be a one-time filing by any applicant requesting such a license. The information can be submitted on FCC Form 490 or Form 603 for Part 22 paging services until July 1, 1999. Part 22

⁶¹¹ *Third CMRS Competition Report*, App. C at 5.

applicants must file electronically in the Universal Licensing System (ULS) on Form 603 on or after July 1, 1999. The Commission estimates that the average burden on the applicant is three hours for the information necessary to complete these forms. The Commission estimates that seventy-five percent of the respondents, which may include small businesses, will contract out the burden of responding. The Commission estimates that it will take approximately 30 minutes to coordinate information with those contractors. The remaining twenty-five percent of respondents, which may include small businesses, are estimated to employ in-house staff to provide the information. Applicants filing electronically, including small businesses, will not incur any per minute on-line charge. The Commission estimates that applicants contracting out the information would use an attorney or engineer (average of \$200 per hour) to prepare the information.

V. Steps Taken to Minimize Burdens on Small Entities

The rules adopted in the *Third Report and Order* are designed to implement Congress' goal of giving small businesses, as well as other entities, the opportunity to participate in the provision of spectrum-based services. The rules are also consistent with the Communications Act's mandate to identify and eliminate market entry barriers for entrepreneurs and small businesses in the provision and ownership of telecommunications services.

Partitioning and Disaggregation

Partitioning of nationwide geographic area licenses and disaggregation of MEA, EA, and nationwide geographic area licenses will facilitate market entry by parties that may lack the financial resources to participate in auctions, including small businesses. Partitioning and disaggregation are expected to enable small businesses to obtain licenses for areas smaller than MEA, EA, and nationwide areas, or smaller amounts of spectrum, at costs they will be able to afford. Allowing for the partitioning and disaggregation of MEA and EA licenses prior to fulfillment of construction requirements by the initial licensees will facilitate the immediate entry of new competitors, including small businesses, into the paging market. Finally, the Commission's decision to allow parties to partitioning or disaggregation agreements of MEA and EA licenses to choose between two options to meet the coverage requirements will provide small businesses with more flexibility in managing their resources.

Fraud on Shared Paging Channels

As stated above, the additional mechanisms established to deter paging application fraud on the shared channels are not expected to have an impact on any small business or other entity applying for a paging license on a shared channel. The changes are intended to protect consumers from application fraud. Small businesses interested in investing in shared channel licenses, however, will be more informed of the potential for fraud.

VI. Significant Alternatives Considered

The Commission considered and rejected the following alternative proposals concerning partitioning, disaggregation, coverage requirements for parties to partitioning and disaggregation agreements, and license terms.

Partitioning

The Commission declined to adopt Paging Network, Inc.'s (PageNet) proposal that partitioning should be allowed only after the initial geographic area licensee has met the build-out requirements for

the entire geographic area, and that partitioning before a geographic area licensee meets its construction requirements should be allowed only on a waiver basis where good cause is shown. PageNet's concern was that the ability to partition may encourage bidders in the auction to engage in 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.⁶¹² The Commission found, however, that there was no 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. The Commission also determined that any unlawful activity between bidders concerning partitioning falls within our anti-collusion rules. Finally, allowing parties to partition spectrum immediately after license grant will facilitate the entry of new competitors to the paging market, many of whom will be small businesses seeking to acquire a smaller service area or smaller amount of paging spectrum at a reduced cost.

Disaggregation

A number of petitioners opposed our proposal to allow MEA, EA, and nationwide geographic area licensees to disaggregate, contending that disaggregation of paging spectrum is neither technically nor practically feasible. Small Business in Telecommunications (SBT) proposes that disaggregation should be limited only to small businesses during the original licensee's construction period. In considering and rejecting the petitioners' arguments, we concluded that the market should determine whether it is technically or economically feasible to disaggregate spectrum.⁶¹³ We further concluded that all qualified parties should be eligible to disaggregate any geographic area license because open eligibility to disaggregate spectrum promotes prompt service to the public by facilitating the assignment of spectrum to the entity that values it most. We found that allowing spectrum disaggregation at this time could potentially expedite the introduction of service to underserved areas, provide increased flexibility to licensees, and encourage participation by small businesses in the provision of services.

Coverage Requirements

The Commission declined to adopt Metrocall, Inc.'s proposal that geographic area licensees' coverage benchmarks should be based on the entire geographic area, including the partitioned area, to prevent the geographic area licensee from using partitioning to circumvent coverage requirements. As stated previously, we found that there was no 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. The Commission also declined to adopt PCIA's proposal that the partitioner should be responsible for build-out in the partitioned area if the partitionee fails to build out, and that the entire license should be cancelled if build-out in the partitioned area is not completed by either the partitionee or the partitioner.⁶¹⁴ The decision not to place the ultimate responsibility for the partitionee's coverage requirements on the partitioner, as well as the decision to provide parties to partitioning agreements with two options for meeting the coverage requirements, is expected to encourage more partitioning agreements, including agreements involving small businesses. The resulting benefits will be the same for disaggregation arrangements.

⁶¹² *Third Report and Order* at Section V.B.2.b.

⁶¹³ *Id.* at Section V.B.3.a.

⁶¹⁴ *Id.* at Section V.B.2.b.

Finally, the Commission declined to adopt commenters' proposal to eliminate the "substantial service" option as it applies to coverage requirements in the partitioning and disaggregation context. We found that maintaining the "substantial service" 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, we found that the substantial service alternative will promote service growth while helping licensees to remain financially viable and retain their licenses.⁶¹⁵ Retaining the "substantial service" option will also allow small businesses flexibility in meeting their coverage requirements.

License Term

We decline to adopt SBT's proposal that when an area is partitioned within one year of the renewal date of the original ten-year license term, the partitionee should receive the license for a one-year term. We found that adopting this proposal would result in the partitioner conferring greater rights than it was awarded under the original terms of its license grant.

VII. Report to Congress

The Commission shall send a copy of the *Third Report and Order*, including this Final Regulatory Flexibility Analysis, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.⁶¹⁶ In addition, the Commission will send a copy of the *Third Report and Order*, including this Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Association. A copy of the *Third Report and Order* and Final Regulatory Flexibility Analysis (or summaries thereof) will also be published in the Federal Register.⁶¹⁷

⁶¹⁵ *Id.*

⁶¹⁶ *See* 5 U.S.C. § 801(a)(1)(A).

⁶¹⁷ *See id.* § 604(b).