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

In the Matter of	)	
	)	
Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band	)	PR Docket No. 93-144 RM-8117, RM-8030 RM-8029
	)	
Implementation of Sections 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services	)	GN Docket No. 93-252
	)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding	)	PP Docket No. 93-253

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: September 30, 1999 **Released:** October 8, 1999

By the Commission:

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I. INTRODUCTION

1. In this *Memorandum Opinion and Order on Reconsideration*, we complete the implementation of a new licensing framework for the 800 MHz Specialized Mobile Radio (SMR) service. Specifically, we revise or clarify our rules concerning: (a) the channel plan for General Category channels, (b) the modification of incumbent licensee systems, and (c) the mandatory relocation of incumbent licensee systems from the upper 200 channels to the lower 230 channels. Additionally, we retain our current construction and coverage requirements and clarify our rules concerning co-channel interference protection, the definition of incumbent and the applicability of our partitioning and disaggregation rules to Private Mobile Radio Service (PMRS)[1] licensees in the 800 MHz and 900 MHz SMR services. We also reaffirm our conclusion that competitive bidding is an appropriate tool to resolve mutually exclusive license applications for the General Category and lower 80 channels of the 800 MHz SMR service. These modifications and clarifications strike an equitable balance between the competing interests of 800 MHz SMR licensees seeking to provide local service and those desiring to provide geographic area service. Further, our licensing framework will enhance the competitive potential of SMR services in the Commercial Mobile Radio Service (CMRS)[2] marketplace.

II. EXECUTIVE SUMMARY

2. The following is a synopsis of the major actions we adopt. In this *Memorandum Opinion and Order on Reconsideration*, we:

A. Service Rules for the Lower 230 Channels

- Determine to license the 150 General Category channels in six contiguous 25-channel blocks, thereby amending our previous decision to license these channels in three contiguous 50-channel blocks;

- Retain the "substantial service" standard as an alternative to meeting the applicable construction requirements for EA licensees in the lower 230 channels;

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

- Clarify that the grandfathering provisions in Section 90.693 of the Commission's rules, setting forth the parameters within which incumbent licensees can modify their systems, apply to both SMR and non-SMR licensees that obtained their licenses or filed applications on or before December 15, 1995;

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[1] PMRS is any mobile service that is not a commercial mobile service or the functional equivalent of a commercial mobile service. *See* the Communications Act, 47 U.S.C. § 332 (d) (3).

[2] CMRS is any mobile service that is provided for profit and makes interconnected service available to the public or to classes of eligible users such that it is effectively available to a substantial portion of the public. *See* the Communications Act, 47 U.S.C. § 332(d)(1).

- Clarify that an incumbent licensee on the lower 230 channels seeking to modify its system using its 18 dBμ interference contour may, in the absence of consent from affected incumbents, provide a statement from a certified frequency advisory committee that a modification will not cause interference to adjacent licensees;

- Specify the operating parameters that incumbent licensees will use to calculate their service area contours and interference contours;

- Conclude that incumbents may not expand their geographic licenses beyond the contours of their individual site licenses to include areas where the EA licensee is not able to operate;

- Clarify that an incumbent's geographic license area includes, in addition to external base stations that are in operation, any interior sites that are constructed within the applicable construction period;

- Clarify that even when an incumbent licensee has expanded its operation throughout its 18 dBμ contour, its interference protection continues to extend only to its 36 dBμV/m signal strength contour;

- Affirm that the lower 80 SMR channels will not be redesignated for non-SMR use;

- Clarify that the construction requirements in Section 90.685(b) of the Commission's rules are applicable to all EA licensees on the lower 230 channels without distinction between CMRS and PMRS licensees;

- Clarify that EA licensees on the lower 80 SMR channels and General Category channels may switch between CMRS and PMRS services, provided that channels designated exclusively for SMR use continue to be used only for SMR service;

C. Relocation of Incumbents from the Upper 200 Channels

- Clarify that, for the purpose of determining what facility an EA licensee is responsible for relocating, an incumbent licensee's "system" includes mobile units and a redundant system when necessary to effect a transparent relocation;

- Affirm that our definition of "system" does not include managed systems that are comprised of individual licenses;

- Determine that an EA licensee that relocates an incumbent to a system with a comparable channel capacity, but a different channel configuration, is required to reimburse the incumbent for the increased cost inherent in operating such a system;

- Retain the five-year cost recovery period for increased operating costs caused by incumbent licensee relocation;

- Affirm that reimbursement of relocation costs will not be due until the incumbent has been fully relocated and the frequencies are free and clear;

- Decline to revise the time period for relocation negotiations between EA licensees and incumbent licensees;

- Determine that EA licensees are not required to compensate end users for service interruptions caused by realignment and retuning to new frequencies;

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

- Clarify that our geographic partitioning and spectrum disaggregation rules apply to PMRS licensees in the 800 MHz and 900 MHz SMR services;

E. Competitive Bidding Issues

- Affirm our previous determination that the General Category channels and lower 80 SMR channels of the 800 MHz SMR band are auctionable under Section 309(j) of the Communications Act;

- Clarify that the auction exemption for public safety radio services in Section 309(j)(2) of the Communications Act does not apply to spectrum that has been allocated for SMR use and which the Commission has already determined to be auctionable;

- Affirm that licensing in the lower 230 channels will be open to all parties.

- Amend the method by which licenses in the lower 230 channels will be grouped for auction, and direct the Wireless Telecommunications Bureau, pursuant to delegated authority, to determine what licensing groups, if any, should be established for auctioning the lower 230 channels;

- Affirm that a bidder's upfront payment will be based on the number of licenses on which a bidder anticipates bidding in any round;

- Affirm that the Commission will not offer installment payment financing for licenses in the lower 230 channels;

- Affirm that the Commission will not adopt gender- or minority-based provisions for auctioning licenses for the lower 230 channels at this time.

III. BACKGROUND

3. The Commission initially established the 800 MHz SMR service to license dispatch radio systems on a site-by-site basis in local markets. In recent years, however, a number of SMR licensees have expanded the geographic scope of their services, aggregated channels, and developed digital networks to enable them to provide a type of service comparable to that provided by cellular and Personal Communications Service (PCS) operators. In response to these developments, the Commission has re-evaluated its site-by-site licensing procedures, which were cumbersome for systems comprised of several hundred sites, because licensees were required to obtain Commission approval for each site. This re-examination has stemmed from a concern that site-by-site licensing procedures impair an SMR licensee's ability to respond to changing market conditions and consumer demand.

4. In the *800 MHz First Report and Order*, the Commission restructured the licensing framework that governs the 800 MHz SMR service.[3] For the upper 200 channels, we replaced site- and frequency-specific licensing with a geography-based system similar to those used in other Commercial Mobile Radio Services ("CMRS").[4] We designated the upper 200 channels of 800 MHz SMR spectrum for geographic licensing, and created 120-, 60- and 20-channel blocks within the U.S. Department of Commerce Bureau of Economic Analysis Economic Areas ("EAs").[5] We concluded that mutually exclusive applications for these licenses would be awarded through competitive bidding. Additionally, we granted EA licensees the right to relocate incumbent licensees out of the upper 200 channels to comparable facilities.[6] Finally, we reallocated the 150 contiguous 800 MHz General Category channels for exclusive SMR use.[7]

5. In the *800 MHz Second Report and Order*, the Commission established EAs as the licensing area for the lower 230 800 MHz channels, which include the lower 80 SMR channels and the 150 General Category channels.[8] The Commission established competitive bidding rules for resolving mutually exclusive applications for EA licenses in the lower 230 channels, determined that incumbents on the lower 230 channels would not be subject to mandatory relocation, and defined the rights of incumbent licensees on those channels. The Commission also provided further details

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

[4] *Id.* at 1476-1480, ¶¶ 9-14.

[5] *Id.* at 1476-1497, ¶¶ 9-37.

[6] *Id.* at 1503-1510, ¶¶ 65-79.

[7] *Id.* at 1534-1535, ¶¶ 133-137.

[8] Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *Second Report and Order*, 12 FCC Rcd 19079, 19088-89, ¶15 (1997) ("*800 MHz Second Report and Order*").

concerning the mandatory relocation rules for the upper 200 channel block and established partitioning and disaggregation rules for 800 MHz and 900 MHz SMR licensees.

6. In response to the *800 MHz Second Report and Order*, the Commission received a number of pleadings requesting reconsideration, modification or clarification of its rules relating to mandatory relocation, co-channel interference, spectrum block size, geographic area licensing, and partitioning and disaggregation.[9] We address these concerns below.

IV. DISCUSSION

A. Service Rules for the Lower 230 Channels

1. Channel Blocks

7. Background. In the *800 MHz Second Report and Order*, we adopted channel blocks for licensing the lower 80 SMR channels and the 150 General Category channels.[10] Specifically, we determined to license the lower 80 SMR channels in sixteen non-contiguous 5-channel blocks.[11] We reasoned that the non-contiguous nature of these channels made it impractical to impose any other channel plan.[12] We further concluded that this approach would provide opportunities for incumbents and applicants that base their systems on trunking of non-contiguous channels to acquire spectrum and was, therefore, consistent with the mandate of Section 309(j)(4)(C) of the Communications Act of 1934[13] to promote an equitable distribution of licenses and provide economic opportunities for a wide variety of entities.[14] Finally, we determined that this channel plan was the least disruptive geographic licensing method for smaller incumbent licensees that had acquired their channels in 5-channel increments.[15]

8. We decided to license the 150 General Category channels in three contiguous 50-channel blocks.[16] Initially, in the *Second Further Notice*, we proposed three alternative block sizes for

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[9] *See* Appendix A for a list of the parties that filed pleadings in response to the *800 MHz Second Report and Order*.

[10] *800 MHz Second Report and Order*, 12 FCC Rcd at 19089-19091, ¶¶ 16-22.

[11] *Id.* at 19089, ¶ 18. *See* 47 C.F.R. § 90.617(d) (listing the specific channel numbers in each of the sixteen channel blocks).

[12] *800 MHz Second Report and Order*, 12 FCC Rcd at 19089, ¶ 18.

[13] 47 U.S.C. § 309(j)(4)(C).

[14] *800 MHz Second Report and Order*, 12 FCC Rcd at 19089, ¶ 18.

[15] *Id.*

[16] *Id.* at 19090, ¶ 22.

licensing these channels: (1) a 120-channel block, a 20-channel block, and a 10-channel block; (2) six 25-channel blocks; or (3) fifteen 10-channel blocks.[17] In response, commenters suggested various other options for channel allotment such as 5-channel blocks or licensing all 150 channels individually.[18] While we considered all of the proposed plans, we ultimately adopted, in part, the Industry Proposal[19] plan for licensing channels in three contiguous 50-channel blocks.[20] We rejected that portion of the Industry Proposal channel plan that would have permitted incumbent licensees to enter into settlement agreements for the distribution of unlicensed spectrum on a channel-by-channel basis prior to auction.[21] We believed that licensing the General Category channels in three contiguous 50-channel blocks, without permitting pre-auction settlements, struck the appropriate balance between the needs of some licensees for large contiguous blocks of spectrum and those of other licensees for smaller spectrum blocks.[22]

9. Discussion. On reconsideration, we conclude that auctioning the 150 General Category channels in six contiguous 25-channel blocks, rather than three contiguous 50-channel blocks, will best serve the interests of licensees with different spectrum allocation needs. Currently, the General Category frequencies are occupied by a wide variety of entities, including public safety, SMR, business, and industrial/land transportation users. Each of these entities has different spectrum allocation needs based on the services they provide and their technological capabilities. While some licensees use contiguous spectrum technologies and therefore need large blocks of spectrum, other licensees (*i.e.* small businesses) trunk small numbers of contiguous channels and thus seek smaller amounts of spectrum. We believe that licensing General Category channels in blocks of 25 will achieve our goal of providing a wide variety of entities a meaningful opportunity to pursue spectrum in this band.

10. AMTA agrees that the Commission should reduce the size of channel blocks from 50 channels to, at most, 25 channels.[23] Petitioners that supported the Industry Proposal plan of 50-channel blocks, such as AMTA and PCIA, argue on reconsideration for smaller channel block sizes.

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[17] *800 MHz First Report and Order*, 11 FCC Rcd at 1592, ¶ 301.

[18] *800 MHz Second Report and Order*, 12 FCC Rcd at 19089-19090, ¶ 20.

[19] The Industry Proposal (or Industry Coalition Proposal) refers to the Joint Reply Comments filed on March 1, 1996 by AMTA, SMR Won and Nextel in response to the *First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making*, 11 FCC Rcd 1463. *See also* AMTA, SMR Won, PCIA, Nextel ex parte Comments filed on September 6, 1996.

[20] *800 MHz Second Report and Order*, 12 FCC Rcd at 19090, ¶ 22.

[21] *Id.* at 19103-19104, ¶¶ 60-63.

[22] *Id.* at 19090-19091, ¶ 22.

[23] AMTA Petition at 8.

SBT and ACSC also support a smaller block size.[24] In their petitions for reconsideration, both AMTA and PCIA explain that their support of the 50-channel block plan was predicated on the Commission's acceptance of a related proposal.[25] That proposal would have permitted incumbent licensees to engage in pre-auction settlements for the distribution of unlicensed spectrum which, in turn, would have substantially reduced the number of frequencies actually auctioned in the channel blocks.[26] AMTA states that in light of the Commission's rejection of the Industry Proposal settlement procedure, it now endorses the earlier-proposed plans of either fifteen 10-channel blocks or, at most, six 25-channel blocks.[27] On reconsideration, PCIA contends that the General Category channels should be auctioned on a single channel basis.[28]

11. A significant portion of incumbent licensees on the General Category frequencies are small businesses and are licensed for only a few channels in the band. Auctioning licenses for General Category channels in smaller channels blocks will provide these small business incumbents with greater opportunities to take advantage of geographic area licensing. In addition, it will encourage new entrant participation in the provision of 800 MHz services. As we explained in the *800 MHz Second Report and Order*, and as AMTA and PCIA argue on reconsideration, auctioning the General Category channels in large channel blocks could preclude small businesses and new entrants with limited financial resources from acquiring licenses because, generally, bigger blocks of spectrum require larger bids.[29] Smaller channel blocks, on the other hand, are less likely to be cost prohibitive. In addition, because many incumbent licensees on the General Category frequencies trunk small numbers of channels, small channel blocks would best suit their current technology. Changing the block size from 50 channels to 25 channels will provide small entities with the opportunity to acquire smaller amounts of spectrum consistent with their financial means and technological needs. By further facilitating small business and new entrant participation in the provision of 800 MHz services, this channel plan fulfills our statutory mandate of promoting economic opportunity for a wide variety of applicants and avoiding an excessive concentration of licenses.[30] At the same time, allotting 25-channel blocks will permit entities desiring large blocks of spectrum to pursue such spectrum in the General Category.

12. In concluding that licensing the General Category channels in blocks of 25 strikes a better balance between the competing needs of different licensees, we also reject PCIA's proposal to

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[24] SBT Petition at 6-7; ACSC Petition at 9.

[25] AMTA Petition at 8; PCIA Petition at 10.

[26] *See* AMTA Petition at 8.

[27] *Id.* at 8.

[28] PCIA Petition at 10; *see also* ACSC Petition at 9.

[29] *See 800 MHz Second Report and Order*, 12 FCC Rcd at 19090, ¶ 21; AMTA Petition at 8-9; PCIA Petition at 12.

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

license channels on an individual basis.[31] First, conducting an auction of the General Category channels on a channel-by-channel basis would be administratively burdensome given the large number of channels involved. Second, this method of licensing is inconsistent with the needs of applicants that require blocks of contiguous spectrum. Further, blocks of contiguous spectrum allow for more flexibility in terms of technological applications and innovation.[32] Single channel licensing would not foster the kind of technological advancements that would allow SMR licensees, which typically operate multichannel systems, to compete with other CMRS licensees. Finally, our partitioning and disaggregation rules provide licensees with the flexibility to further divide their spectrum or their license area after auction.[33] Thus, to the extent that some entities may not need 25 channels, they will have the ability to further reduce their spectrum allotment under our rules.[34] We disagree with SBT's contention that the only way in which small businesses can acquire spectrum to partition and disaggregate is, in effect, to relinquish their small business status.[35] The Commission's rules permitting small businesses to join consortia are intended to assist such entities in capital formation for the purposes of acquiring or utilizing spectrum, which subsequently can be partitioned or disaggregated.[36] A consortium of small businesses consists of mutually-independent business firms, each of which individually satisfies the definition of small business.[37] Thus, contrary to SBT's arguments, small businesses that join consortia do not become larger entities but, rather, retain their status as independent small businesses with enhanced opportunities for capital formation.

2. Construction and Coverage Requirements

13. Background. In the *800 MHz First Report and Order*, we required EA licensees on the upper 200 channels to construct their systems within five years of licensing.[38] We imposed interim

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[31] *See* PCIA Petition at 10-12.

[32] *See* SBT Reply at 4-5 (opposing the licensing of contiguous spectrum) and Nextel Opposition at 4-6 (supporting the licensing of contiguous spectrum). *See 800 MHz Second Report and Order*, 12 FCC Rcd at 19090, ¶ 22 ("retaining the contiguity of these [General Category] channels will permit alternative offerings that may require multiple, contiguous channels"); *cf.* Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, *Third Report and Order*, 9 FCC Rcd 7988, 8046, ¶ 103 ("assigning contiguous spectrum, where feasible, is likely to enhance the competitive potential of wide-area SMR providers").

[33] *See* 47 C.F.R. § 90.911.

[34] *Id.* We disagree with SBT's arguments that small businesses do not benefit from our partitioning and disaggregation rules simply because these rules permit all licensees to partition or disaggregate. *See* SBT Petition at 7.

[35] *See* SBT Petition at 7, n.5.

[36] *See* 47 C.F.R. §§ 90.912, 90.913.

[37] *See* 47 C.F.R. § 90.912.

[38] *800 MHz First Report and Order*, 11 FCC Rcd at 1521, ¶ 104.

coverage requirements, requiring EA licensees to provide coverage to one-third of the population within the EA within three years of initial license grant and to two-thirds of the population by the end of the five-year construction period.[39] In addition, we required EA licensees to use at least 50 percent of the channels in their spectrum blocks in at least one location within the EA within three years of initial license grant.[40]

14. In the *800 MHz Second Report and Order*, we adopted construction requirements for the lower 230 channels.[41] Specifically, we required that EA licensees in these channel blocks provide coverage to one-third of the population within three years of initial license grant and to two-thirds of the population within five years of license grant.[42] Unlike their counterparts in the upper 200 channels, however, we stated that EA licensees in the lower 230 channels could, in the alternative, provide "substantial service" to their geographic license area within five years of license grant.[43] We defined "substantial service" as "service that is sound, favorable, and substantially above a level of mediocre service, which would barely warrant renewal." We stated that a licensee could satisfy the substantial service requirement by demonstrating that it is providing a technologically innovative service or that it is providing service to unserved or underserved areas.[44] We did not adopt a channel usage requirement for licensees in the lower 230 channel block.[45] We made clear that failure to meet these construction requirements would result in automatic termination of the geographic area license.[46]

15. Discussion. PCIA argues that the Commission should eliminate the substantial service test and require that construction standards be met on a "per-channel" basis.[47] PCIA's proposal, in effect, would require licensees to build out 100 percent of their channels in their spectrum blocks. SBT argues that the Commission should require geographic area licensees to construct sufficient facilities to operate on at least 50 percent of their channels or spectrum.[48] In the *800 MHz Second Report and Order*, we stated our belief that the adoption of flexible construction requirements would enhance the rapid deployment of new technologies and services and expedite service to rural areas by

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[39] *Id.* at 1529, ¶ 120.

[40] *Id.* at 1529, ¶ 121.

[41] *800 MHz Second Report and Order* at 19094-19095, ¶¶ 34-35.

[42] *Id.* at 19094, ¶ 34.

[43] *Id.*

[44] *800 MHz Second Report and Order* at 19095, ¶ 34.

[45] *Id.* at 19095, ¶ 34.

[46] *Id.* at 19095, ¶ 35.

[47] PCIA Petition at 15.

[48] SBT Petition at 10.

providing EA licensees with the flexibility to respond to market demands for service.[49] We specifically rejected PCIA's proposal for a "per-channel" construction requirement, asserting that it would interfere with a licensee's ability to respond to such demands.[50] In its petition for reconsideration, PCIA contends that our failure to adopt a "per channel," or 100 percent channel build-out, requirement will result in inefficient spectrum use and warehousing as well as the filing of speculative or fraudulently induced license applications.[51] PCIA provides no evidence to support its claims, and we have no reason to believe that the substantial service requirement will encourage the warehousing of spectrum. To the contrary, we believe that the competitive bidding process effectively allocates spectrum to the entity that values it most and results in service being provided to the public expeditiously. An EA licensee would incur an opportunity cost if spectrum is not used as efficiently as possible and thus would have incentives to promote spectrum efficiency.

16. On reconsideration, we will maintain the "substantial service" test as an alternative to meeting applicable construction requirements for EA licensees in the lower 230 channel block. We believe that this approach is the most effective means to foster diversity in services and technology and encourage the provision of services to unserved or underserved areas. We disagree with PCIA and SBT concerning the need for channel usage requirements and believe that market forces, not government regulation, will ensure the provision of services to the public.[52] We note, too, that we have adopted a substantial service option in the past with respect to other services.[53] Permitting

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[49] *800 MHz Second Report and Order* at 19094-19095, ¶ 34.

[50] *Id.* at 19095, ¶ 34.

[51] PCIA Petition at 12-15.

[52] *See* PCIA Petition at 12-15; SBT Petition at 10

[53] *800 MHz Second Report and Order* at 19095, ¶ 35. *See also* Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, WT Docket No. 98-169, *Report and Order and Memorandum Opinion and Order*, FCC 99-239, at ¶¶ 69-75 (rel. September 10, 1999); Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, CC Docket No. 92-297, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 12545, 12660-61, ¶¶ 269-271; Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS"), GN Docket No. 96-228, *Report and Order*, 12 FCC Rcd 10785, 10843-44, ¶¶ 112-114 (1997); Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket 96-18, *Memorandum Opinion and Order on Reconsideration and Third Report and Order*, FCC 99-98 (rel. May 24, 1999); Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET Docket No. 95-183, *Report and Order and Second Notice of Proposed Rulemaking*, 12 FCC Rcd 18600, 18623-18625, ¶¶ 43-46 (1997); 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, PR Docket No. 89-552, *Third Report and Order and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 10943, 11017-18, ¶ 158, 11020-21, ¶ 163-164 (1997); Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool and Implementation of Sections 3(n) and 322 of the Communications Act, PR

licensees to satisfy our construction requirement by providing "substantial service" affords licensees the flexibility to develop and provide new services, rather than focusing their resources on meeting population coverage criteria and channel usage requirements. The substantial service alternative will thus encourage innovative use of the spectrum as well as a more robust response to market demands. Unhampered by stringent population coverage and channel usage requirements, licensees will have the flexibility to provide "niche" services. In contrast, a stricter construction requirement might impair innovation and unnecessarily limit the types of service offerings that licensees in the lower 230 channels could provide. For instance, adopting a channel usage requirement as suggested by PCIA and SBT could encourage licensees to develop and provide only those kinds of services that utilize large channel blocks.

17. PCIA contends that our substantial service requirement is unclear and may lead to litigation.[54] We disagree. We have provided sufficient guidance on how to meet the requirement. Adopting additional guidelines would undermine our goal of encouraging maximum flexibility in spectrum use. Further, as a practical matter, it would be impossible to cite all contingencies under which the substantial service requirement can be met. Because the requirement can be met in a variety of ways, the Wireless Telecommunications Bureau will review licensees' showings on a case-by-case basis at renewal. To the extent that licensees seek a "safe harbor" for compliance with our construction requirements, they have the alternative of relying on the specific population coverage criteria.

18. Adoption of the substantial service option is necessary to provide opportunities for new entrants to compete with incumbents in the lower 230 channel block. In some EAs, an incumbent licensee may already serve a large portion of the population. A new entrant, therefore, may not be able to satisfy the population coverage requirement because its service area cannot overlap with that of the incumbent's. The option of providing a showing of substantial service allows potential EA licensees that cannot meet the three-year and five-year coverage requirements because of the existence of incumbent co-channel licensees to satisfy a construction requirement.[55] Without a substantial service alternative, potential co-channel licensees other than the incumbent would be prevented from bidding and, therefore, competing in these markets because the five-year coverage requirement could only be satisfied by the incumbent. Allowing licensees to make substantial service showings also encourages build-out in rural areas since one of the ways in which a licensee may satisfy the substantial service requirement is to demonstrate that it is providing service to unserved or underserved areas, which are often rural areas.

Docket No. 89-553, *Third Order on Reconsideration*, 11 FCC Rcd 1170, 1170 ¶ 2 (1995).

[54] *See* PCIA Petition at 15.

[55] Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket 96-18, *Memorandum Opinion and Order on Reconsideration and Third Report and Order*, FCC 99-98, ¶ 66 (rel. May 24, 1999).

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

1. Treatment of Incumbents

a. Definition of Incumbent

19. Background. In our *800 MHz SMR Second Report and Order* we declined to adopt a mandatory relocation plan for incumbents on the lower 230 channels.[56] We concluded that incumbent licensees on these frequencies should be allowed to continue to operate under their existing authorizations, and that geographic area licensees would be required to provide protection to all co-channel systems within their licensing areas.[57] We also adopted operating parameters for incumbents that would give them a reasonable opportunity to expand their systems.[58]

20. Discussion. The City Of Los Angeles Police Department (LAPD) requests that we clarify Section 90.693(a) of our rules.[59] Section 90.693 sets forth specific conditions under which "grandfathered" licensees can modify their systems.[60] Subsection 90.693(a) specifies those licensees to which the grandfathering provisions apply. LAPD contends that Section 90.693(a) does not make clear that the grandfathering provisions apply to both SMR and non-SMR licensees that obtained licenses or filed applications on or before December 15, 1995.[61] We note that incumbent licensees in the lower 230 channels include both SMR and non-SMR licensees,[62] and thus, the term "incumbent licensees," in Section 90.693(a) of our rules, refers to both SMR and non-SMR licensees that obtained licenses or filed applications on or before December 15, 1995.

b. Expansion and Flexibility Rights of Lower Channel Incumbents

21. Background. *In the 800 MHz Second Report and Order*, we concluded that while geographic licensing is appropriate for the lower 230 channels, some additional flexibility is appropriate for incumbents on these channels to facilitate modifications and limited expansion of their systems.[63] We stated that we would allow incumbents on the lower 230 channels to make system

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[56] *800 MHz Second Report and Order*, 12 FCC Rcd at 19100, ¶ 52.

[57] *Id.* at 19107-08, ¶¶ 75-76.

[58] *Id.* at 19104-05, ¶¶ 65-67.

[59] LAPD Petition at 1.

[60] 47 C.F.R. § 90.693.

[61] LAPD Petition at 2.

[62] *See* 47 C.F.R. §§ 90.617, 90.619.

[63] *800 MHz Second Report and Order*, 12 FCC Rcd at 19104-05, ¶¶ 65-67.

modifications within their interference contours without prior Commission approval.[64] Thus, an incumbent licensee that desires to make modifications to its existing system, such as adding new transmitters and altering its coverage area, will be able to do so with the concurrence of all affected incumbents, so long as such an incumbent does not expand the 18 dBμ interference contour of its system. Moreover, licensees who do not receive the consent of all incumbent affected licensees, will be able to make similar modifications within their 22 dBμ signal strength interference contour and licensees who do not desire to make modifications may continue to operate within their existing systems.[65] We emphasized that the revised interference standard protects incumbents only against EA licensees, not against other incumbents. As such, the protection that one incumbent must provide to another incumbent continues to be governed by section 90.621(b) of our rules.[66] In the absence of consent of all affected incumbent licensees, incumbent licensees must locate their stations at least seventy miles from the facilities of any other incumbent or comply with the co-channel separation standards established in our short-spacing rules.[67]

22. Discussion. ITA seeks clarification that an incumbent licensee on the lower 230 channels seeking to modify its system may provide, in lieu of consent, a statement from a certified frequency advisory committee that a modification will not cause interference to adjacent licensees.[68] Mobex and Duke Energy agree with ITA's suggestion that a frequency coordinator should be allowed to authorize an incumbent licensee's permissive modification when the consent of a co-channel licensee is unreasonably withheld.[69] Mobex further contends, however, that an incumbent licensee should first attempt to obtain the consent of all co-channel licensees.[70] Mobex argues that a co-channel licensee should be permitted to assert its rights against an incumbent licensee by submitting to the Commission and the frequency coordinator contrary information concerning the likelihood of harmful interference.[71] Nextel opposes ITA's proposal to allow frequency coordinators to authorize incumbent system modifications.[72]

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[64] *Id.*

[65] *Id.*

[66] *Id.* at 19108, ¶ 76. *See* 47 C.F.R. § 90.621(b).

[67] *See* 47 C.F.R. §§ 90.621(b)(4) and (b)(6). *See also* Amendment of Part 90 of the Commission's Rules to Permit the Short-Spacing of Specialized Mobile Radio Systems Upon Concurrence from Co-Channel Licensees, *Report and Order*, 6 FCC Rcd 4929 (1991).

[68] ITA Petition for Clarification and Reconsideration at 3-4.

[69] Mobex Reply to Opposition at 2; Duke Energy Reply to Opposition at 5.

[70] Mobex Reply to Opposition at 2.

[71] *Id.*

[72] Nextel Opposition at 4.

23. We agree with those commenters that suggest that an alternative should exist to obtaining the consent of co-channel licensees. Accordingly, we conclude that incumbent licensees seeking to utilize an 18 dBμ signal strength interference contour shall first seek to obtain the consent of affected co-channel incumbents. When the consent of a co-channel licensee is withheld, an incumbent licensee may submit to any certified frequency coordinator an engineering study showing that interference will not occur, together with proof that the incumbent licensee has sought consent. We believe that this alternative will allow for faster implementation of our modification plan and provide a balance between incumbent licensee flexibility and incumbent licensee protection.

24. PCIA requests clarification of the 40/22 dBμV/m and 36/18 dBμV/m standards by which incumbent licensees on the lower 230 channels may modify their systems. PCIA contends that Section 90.693 of our rules permits different interpretations regarding the way in which an incumbent licensee calculates its "originally-licensed" signal strength contours.[73] PCIA states that one interpretation of the section could be that the licensee should utilize maximum effective radiated power ("ERP") and maximum height above average terrain ("HAAT"),[74] while another interpretation could be that the licensee utilize the licensed power and the licensed composite HAAT. PCIA, however, supports a third interpretation: licensees should use the maximum permissible ERP for the composite HAAT and the actual HAAT along each radial.[75] PCIA contends that this interpretation is supported by our short-spacing criteria in Sections 90.621(b)(4) and (b)(6) of our rules,[76] which are cited in Section 90.693.[77] AMTA proposes that the lower 230 channel incumbents be entitled to protection based on the station's maximum ERP and licensed HAAT.[78] Nextel opposes the proposals of PCIA and AMTA. Nextel considers both suggestions to be unjustified departures from long-standing Commission policy that would improperly deny EA licensees access to spectrum.[79]

25. We agree with PCIA that the "originally-licensed" contour should be calculated using the maximum ERP and the actual HAAT along each radial. This interpretation is consistent with our short-spacing separation table in Section 90.621(b)(4) and with Section 90.621(b)(6) of our rules. The short-spacing table protects existing licensees at maximum power, and actual HAAT in the direction of

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[73] PCIA Petition at 19-22. Section 90.693(b) of the Commission's rules reads in part: "An incumbent licensee's service area shall be defined by its *originally-licensed* 40 dBμ field strength contour and its interference contour shall be defined as its *originally-licensed* 22 dBμ field strength contour." 47 C.F.R. § 90.693(b) (emphasis added).

[74] PCIA Petition at 19-22.

[75] *Id.* at 20.

[76] *Id.* Subsections 90.621 (b)(4) and (b)(6) establish ERP and antenna criteria for co-channel stations that are spaced less than 70 miles apart. *See* 47 C.F.R. §§ 90.621(b)(4) and (b)(6).

[77] *See* 47 C.F.R. § 90.693.

[78] AMTA Petition for Reconsideration at 6.

[79] Nextel Opposition at 5.

the co-channel station.[80] We believe that these protection criteria will provide more flexibility to incumbent licensees and are consistent with Section 90.693 of our rules.[81]

c. Converting Site-Specific Licenses to Geographic Licenses

26. Background. In the *800 MHz Second Report and Order*, we allowed incumbents on the lower 230 channels to combine their site-specific licenses into single geographic licenses to provide them with the same flexibility and reduced administrative burden that geographic licensing affords to EA licensees.[82] Because we adopted the 18 dBμ contour rather than the 22 dBμ contour, where the incumbent licensee has obtained the consent of all affected parties, as the benchmark for defining an incumbent licensee's protected service area, we used the contiguous and overlapping 18 dBμ contours of the incumbent's previously authorized sites to define the scope of the incumbent's geographic license.[83] We stated that once the geographic license has been issued, incumbents will not be required to obtain prior Commission approval or provide subsequent notification to add or modify facilities that do not extend the licensee's 18 dBμ interference contour.[84] Additionally, licensees that do not receive the consent of all affected parties may follow the same process utilizing their 22 dBμ signal strength contour, rather than the 18 dBμ contour.[85]

27. Discussion. Entergy Services, Inc. and Delmarva Power (Entergy and Delmarva) contend that incumbents' geographic licenses should include areas where an incumbent's interference contours do not overlap, but where no other licensee could place a transmitter because of our interference protection rules.[86] We decline to expand an incumbent's geographic license beyond the contours of its individual site licenses. We find that inclusion of areas that are outside of an incumbent's interference contours within the incumbent's geographic license would be contrary to our objective of prohibiting encroachment by incumbents on the geographic area licensee's operations. In our *800 MHz Second Report and Order*, we explained that incumbents on the lower 230 channels should have flexibility to modify and expand their systems.[87] However, our objective was to provide

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[80] *See* 47 C.F.R. § 90.621(b)(4).

[81] *See* 47 C.F.R. § 90.693.

[82] *800 MHz Second Report and Order*, 12 FCC Rcd at 19106, ¶ 72.

[83] We required that external base stations used to define the incumbent licensee's protected service area be constructed and placed in operation. *Id.* at 19106, ¶ 72.

[84] *Id.*

[85] *Id.*

[86] Entergy and Delmarva Petition at 5; Entergy and Delmarva Reply to Opposition at 4-5.

[87] *800 MHz Second Report and Order*, 12 FCC Rcd at 19104-05, ¶¶ 65-68.

incumbents with such flexibility without allowing them to encroach on upon EA licensees' operations.[88] This approach is consistent with the approach we adopted recently in our paging proceeding.[89] Incumbent licensees seeking to expand their contours may participate in the auction of geographic area licenses, or may seek partitioning agreements with the geographic area licensee.

28. Entergy and Delmarva also seek clarification that an incumbent licensee's geographic license includes authorized but not yet constructed facilities within that geographic licensee's external contour, provided that the specific station's construction deadline has not passed.[90] In the *800 MHz Second Report and Order*, we required incumbents seeking to convert site-specific licenses to geographic licenses to provide evidence that their external base stations are constructed and placed in operation.[91] We also stated that SMR licensees with site-specific authorizations continue to have 12 months from the grant date to complete construction and commence service, unless the authorization is part of a system that has received an extended implementation grant.[92] We agree with Entergy and Delmarva, and clarify that in defining the scope of an incumbent's geographic license area by the contiguous and overlapping 18 dBμ contours of its previously authorized sites, we include external base stations that are already constructed and operational[93] and interior sites that are constructed within the particular construction period applicable to the incumbent.[94] We note additionally, that once the

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[88] *See 800 MHz Second Further Notice*, 11 FCC Rcd at 1598, ¶ 316.

[89] *See* Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, *Memorandum Opinion and Order on Reconsideration and Third Report and Order*, FCC 99-98, ¶ 39 (rel. May 24, 1999).

[90] Entergy and Delmarva Petition at 5-6; Entergy and Delmarva Reply to Opposition at 2-3.

[91] *800 MHz Second Report and Order*, 12 FCC Rcd at 19106, ¶ 72.

[92] *Id.* at 19096, ¶ 38.

[93] *Id.* at 19106, ¶ 72.

[94] Non-SMR licensees with site specific authorizations are subject to a twelve-month construction requirement. *See* 47 C.F.R. § 90.631(e). *See also* Amendment of Part 90 of the Commission's Rules Concerning Private Land Mobile Radio Services, WT Docket No. 97-153, *Report and Order*, FCC 99-9, ¶ 20 (rel. February 19, 1999). Although SMR licensees with site-specific authorizations are subject to a 12-month construction requirement, *see* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, *Third Report and Order*, 9 FCC Rcd 7988, 8074, ¶ 177 ("*CMRS Third Report and Order*"), the Commission modified its rules to allow SMR licensees to request extended implementation authority under Section 90.629. The Commission subsequently eliminated SMR licensees' eligibility for extended implementation authority, and concluded that the termination date for all extended implementation authorizations previously granted to 800 MHz SMR incumbents should be accelerated. The Commission concluded that incumbents should be required to rejustify the need for extended time to construct their facilities, and that incumbents that rejustified their extended implementation authority would be afforded a construction period of the shorter of two years or the remainder of their current extended implementation period, unless the incumbent demonstrated that it needed more than two years. *800 MHz Report and Order*, 11 FCC Rcd at 1524-26. *See* 47 C.F.R. § 90.629(e). The Commission's construction requirements for incumbent wide-area 800 MHz licensees was the subject of a recent remand by the U.S. Court of Appeals. *See Fresno Mobile*

geographic license has been issued, facilities that are added within an incumbent's existing footprint and that are not subject to prior approval by the Commission will not be subject to construction requirements.[95]

2. Co-channel Interference Protection

29. Background. In our *800 MHz SMR Second Report and Order,* we concluded that additional flexibility was needed for lower 230 channel incumbent licensees to facilitate modifications and limited expansion of their systems.[96] We determined that additional flexibility for the lower 230 channel incumbent licensee was appropriate because these channels were subject to an application freeze and geographic licensing of these channels would not occur until after the upper 200 channel auction was completed and upper 200 channel incumbent licensees were relocated to the lower channels.[97]

30. Because we adopted an 18 dBμV/m standard which gives incumbent licensees greater flexibility to expand, we adopted stricter interference protection criteria to ensure that EA licensees do not interfere with incumbents' operations. Specifically, we further determined that incumbent licensees who currently utilize the 40 dBμ signal strength contour for their service area contour and 22 dBμ signal strength contour for their interference contour will be permitted to use their 18 dBμ signal strength contour for their interference contour as long as they obtain the consent of all affected parties.[98] In particular, EA licensees are required to either: locate their stations at least 173 km (107 miles) from the licensed coordinates of any incumbent licensee, or comply with co-channel separation standards based on a 36/18 dBμV/m standard, rather than the previously applicable 40/22 dBμV/m standard.[99] EA licensees must ensure that the 18 dBμV/m signal strength contour of a proposed station does not encroach upon the 36 dBμV/m signal strength contour of an incumbent licensee's existing stations.[100]

31. Discussion. AMTA requests that we clarify the interference protection criteria for lower 230 channel incumbents by stating that incumbent licensees on the lower 230 channels will be protected by EA licensees only on the basis of the 36/18 dBμV/m contour analysis of the incumbent's

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Radio, Inc. v. FCC, 165 F.3d 965 (D.C. Cir., Feb. 5, 1999). Accordingly, the Bureau has temporarily suspended application of the construction timetable for wide-area licensees until the Commission conducts a further analysis and establishes new timetables for the buildout of their systems.

[95] *800 MHz Second Report and Order*, 12 FCC Rcd at 19096, ¶ 38.

[96] *Id.* at 19104, ¶ 65.

[97] *Id.* at 19105, ¶ 67.

[98] *800 MHz Second Report and Order*, 12 FCC Rcd at 19107-19108, ¶ 75.

[99] *Id.*

[100] *Id.*

existing station, even if an incumbent licensee has expanded its operation throughout its 18 dBμV/m contour.[101] AMTA contends that an EA licensee is required only to ensure that its own 18 dBμV/m interference contour does not overlap the incumbent licensee's 36 dBμV/m service area contour and that interference problems will occur unless incumbent licensees realize that the EA-protected service area will be limited to a 36 dBμV/m contour.[102] We agree with AMTA and clarify that an incumbent licensee's protection extends only to its 36 dBμV/m signal strength contour. As we stated in our *800 MHz Second Report and Order,* an EA licensee must ensure that the 18 dBμV/m signal strength contour of its proposed station does not encroach upon the 36 dBμV/m signal strength contour of an incumbent licensee's existing station.[103] In turn, an EA licensee will have its 36 dBμV/m desired signal strength contour protected with an 18 dBμ ratio, because the undesired signal strength contour limit is 18 dBμV/m for incumbent licensees that have obtained the consent of all other affected parties.[104]

32. Finally, AMTA requests clarification that our new rules do not diminish the protection afforded licensees operating on sites or in geographic areas for which the Commission has determined that greater geographic separation between co-channel facilities is required.[105] We will grant AMTA's request and clarify that where the co-channel separation requirements in Section 90.621(b) of our rules have afforded certain licensees greater interference protection, those standards will continue to apply.

3. Regulatory Classification of EA Licensees on the Lower 230 Channels

33. Background. In the *800 MHz Second Report and Order*, we concluded that we would presumptively classify SMR winners of EA licenses on the lower 230 channels as CMRS providers, because we anticipate that most applicants for these licenses will be SMR applicants who seek to provide interconnected service and thus meet the definition of CMRS.[106] However, we stated that we would allow SMR applicants and licensees to overcome this presumption by demonstrating that their service does not meet the CMRS definition. In the *800 MHz Memorandum Opinion and Order*, we determined that both SMRs and non-SMRs would be eligible to obtain licenses for the 150 General Category channels.[107] Thus, where an EA license is obtained by a non-SMR operator, the CMRS

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[101] AMTA Petition at 5-6.

[102] *Id.*

[103] *800 MHz Second Report and Order*, 12 FCC Rcd at 19107-19108, ¶ 75.

[104] *Id.* Thus, we decline to accept ITA's contention that once an incumbent has made modifications within its 18 dBμ contour, EA licensees will be barred from challenging the modification. *See* ITA Reply at 4.

[105] AMTA Petition at 7. *See* 47 C.F.R. §§ 90.621(b)(1), (2), and (3). *See also 800 MHz Memorandum Opinion and Order*, 12 FCC Rcd at 9993, ¶ 67.

[106] *800 MHz Second Report and Order*, 12 FCC Rcd at 19109-10 ¶83.

[107] *800 MHz Memorandum Opinion and Order*, 12 FCC Rcd at 10003-04 ¶¶ 100-102.

presumption is inapplicable.[108] In the event that EA licenses are awarded to Public Safety, Industrial/Land Transportation or Business licensees, for example, such licensees will be classified as PMRS providers.[109]

34. Discussion. Entergy and Delmarva request that we redesignate the lower 80 channels for non-SMR use, as well as for SMR use.[110] We decline to do so. When the Commission initially allocated channels in the 800 MHz band, it designated the lower 80 SMR channels for use in SMR systems based on a significant increase in the number of applicants for 800 MHz trunked systems and private users seeking service from SMR operators.[111] Subsequently, in the *800 MHz First Report and Order*, the Commission again concluded that SMR providers' demand for additional spectrum significantly exceeded the demand of non-SMR services.[112] Moreover, although the Commission found that the primary demand for General Category channels came from SMR operators and initially redesignated those channels exclusively for SMR use, on reconsideration, it concluded that non-SMRs would continue to be eligible for licensing on those channels.[113] We also anticipate that SMR providers' demand for the lower 80 channels will be increased by geographic area licensing of the upper 200 channels and our mandatory relocation policy. Accordingly, we will not redesignate the lower 80 channels for non-SMR use. We note additionally, that because reallocation of the lower 80 channels for non-SMR use was not an issue initially raised in the *800 MHz Second Report and Order*, it is more properly the subject of a separate reallocation proceeding that provides affected parties an opportunity for notice and comment. As such, we find that Entergy and Delmarva's proposal is beyond the scope of this proceeding.

35. Entergy and Delmarva also request that we specify that EA licensees in the lower 230 channels classified as PMRS providers are subject to the same construction requirements that are imposed on EA licensees providing CMRS services.[114] The construction requirements in Section 90.685(b) are applicable to all EA licensees in the lower 230 channels without distinction between licensees classified as CMRS and those classified as PMRS.[115] Therefore, SMR licensees and non-SMR licensees in the lower 230 channels that are classified as PMRS providers are required to comply

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[108] *800 MHz Second Report and Order*, 12 FCC Rcd at 19110 ¶ 84.

[109] *Id.*

[110] Entergy and Delmarva Petition at 6-7.

[111] Amendment of Part 90 of the Commission's Rules to Release Spectrum in the 806-821/851-866 MHz Bands and to Adopt Rules and Regulations Which Govern Their Use, PR Docket No. 79-191, *Second Report and Order*, 90 FCC 2d 1281, 1299 ¶ 51 (1982).

[112] *800 MHz First Report and Order*, 11 FCC Rcd at 1535 ¶ 137.

[113] *800 MHz Memorandum Opinion and Order*, 12 FCC Rcd at 10003-04 ¶ 101.

[114] Entergy and Delmarva Petition at 7.

[115] *See* 47 C.F.R. § 90.685(b).

with the coverage requirements or, alternatively, the substantial service standard set forth in Section 90.685(b). We take this opportunity to clarify that to the extent that a non-SMR PMRS licensee uses its channels in a manner that is inconsistent with the population coverage criteria of the rule, it may demonstrate compliance with the alternative substantial service standard.

36. Entergy and Delmarva further request that we clarify that EA licensees are permitted to switch between providing PMRS service and CMRS service in response to evolving communications needs.[116] Our rules permit SMR channels to be used to provide either CMRS or PMRS service.[117] We see no reason why an SMR licensee that obtains an EA license for channels designated for SMR use should be prohibited from switching between CMRS and PMRS service, provided that channels designated exclusively for SMR use continue to be used only for SMR service. Additionally, with respect to the General Category channels, which are designated for both SMR and non-SMR use by both CMRS and PMRS licensees, there is no reason to prohibit an EA licensee from using the channels for either CMRS service or PMRS service.[118]

C. Relocation of Incumbents from the Upper 200 Channels

1. Relocation Negotiations

37. Background. In the *800 MHz First Report and Order*, the Commission established procedures for the mandatory relocation of incumbent licensees from the upper 200 to the lower 230 channels on the 800 MHz SMR band.[119] The Commission established a three-phase process for the relocation of incumbents.[120] Phase I comprises a one-year voluntary negotiation period that commenced on December 4, 1998. In the initial one-year voluntary period, the EA licensee and incumbents may negotiate any mutually agreeable relocation agreement.[121] If no agreement is reached in the voluntary negotiation period, the EA licensee may initiate Phase II, which is a one-year

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[116] Entergy and Delmarva Petition at 8.

[117] *See* 47 C.F.R. § 90.617.

[118] The issue of whether the Commission should permit non-SMR channels in the 800 MHz band licensed for PMRS operation to be used for CMRS operation in SMR systems is currently under examination in a proceeding seeking comment on the impact of the Balanced Budget Act of 1997. *See* Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, WT Docket No. 99-87, *Notice of Proposed Rule Making*, FCC 99-52 (rel. March 25, 1999); Wireless Telecommunications Bureau Incorporates Nextel Communications, Inc. Waiver Record into Docket No. 99-87, *Public Notice*, DA 99-1431 (rel. July 21, 1999).

[119] *800 MHz First Report and Order*, 12 FCC Rcd at 1510, ¶¶ 73-79.

[120] *Id.* at 1509-10, ¶¶ 77-79. *See also* "Wireless Telecommunications Bureau Announces the Commencement of the Voluntary Negotiation Period for the Relocation of Incumbent Licensees in the 800 MHz Band," *Public Notice*, DA 99-283 (rel. December 4, 1998) ("*Negotiation Period Public Notice*").

[121] See *Negotiation Period Public Notice* at 1.

mandatory negotiation period during which the parties are required to negotiate in "good faith." The Phase II negotiation period commences on December 4, 1999.[122] If the parties still fail to reach an agreement, the EA licensee may then initiate Phase III, which is an involuntary relocation of the incumbent's system. Phase III will commence on December 4, 2000.[123] The Commission determined that incumbents on the upper 200 channels would not be subject to mandatory relocation unless the EA licensee provided the incumbent with "comparable facilities" without any significant disruption in the incumbent's operations.[124]

38. Before an EA licensee may request involuntary relocation of an incumbent licensee's system, the EA licensee must: (a) guarantee payment of all costs of relocating the incumbent licensee to a comparable facility; (b) complete all activities necessary for placing the new facilities into operation, including engineering and frequency coordination, if necessary; and (c) build and test the new system.[125] The Commission further determined that the relocation of an incumbent licensee must be conducted in such a fashion that there is a "seamless" transition from the incumbent licensee's upper 200 channel to its lower 230 channel (i.e., no significant disruption in the incumbent licensee's operations).[126]

39. In the *800 MHz Second Report and Order*, the Commission defined comparable facilities as facilities that will provide the same level of service as the incumbent licensee's existing facilities.[127] Because we concluded that the determination of whether facilities are comparable should be made from the perspective of the end user, we identified four factors relevant to this determination: system, capacity, quality of service and operating costs.[128]

40. Discussion. Nextel and SBT suggest that the two-year negotiation period is too long and, therefore, seeks a shorter period.[129] Mobex and Duke Energy oppose a shorter negotiation period. Mobex and Duke Energy maintain that the two-year time period is necessary to enable parties to reach a reasonable transaction, but that a shorter time frame may not permit both incumbents and EA

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[122] See *Negotiation Period Public Notice* at 1-2. *See also 800 MHz Memorandum Opinion and Order on Reconsideration*, 12 FCC Rcd at 9972, ¶ 52.

[123] See *Negotiation Period Public Notice* at 2.

[124] *800 MHz First Report and Order*, 12 FCC Rcd at 1508, ¶ 74; *800 MHz Second Report and Order*, 12 FCC Rcd at 19122, ¶ 119.

[125] *800 MHz First Report and Order*, 12 FCC Rcd at 1510, ¶ 79. *See* 47 C.F.R. § 90.699(c).

[126] *800 MHz First Report and Order*, 12 FCC Rcd at 1510, ¶ 79.

[127] *800 MHz Second Report and Order*, 12 FCC Rcd at 19112, ¶ 89.

[128] *Id.* at ¶ 90. *See* 47 C.F.R. § 90.699(d).

[129] Nextel Opposition at 9; SBT Petition at 19.

licensees enough time to engage in meaningful negotiations prior to involuntary relocation.[130] We agree with Mobex and Duke Energy. In the *800 MHz Memorandum Opinion and Order on Reconsideration*, the Commission reduced the two-year mandatory negotiation period to one year, concluding that a one-year voluntary negotiation period and a one-year mandatory negotiation period would provide parties with the flexibility to negotiate voluntarily while ensuring that relocation occurs expeditiously.[131] This approach is consistent with the Commission's decision in broadband PCS to adopt a one-year voluntary negotiation period and a one-year mandatory negotiation period for the C, D, E, and F blocks. Accordingly, we decline to further reduce the negotiation period for incumbents and EA licensees in the upper 200 channels. Moreover, on December 4, 1998, the Bureau announced the commencement of the voluntary negotiation period.[132] Further revision of the time period for negotiation would cause an undue administrative burden on licensees and the Commission.

41. SBT requests that the Commission establish a time period after which an incumbent may terminate relocation negotiations if it does not reach agreement with the EA licensee.[133] SBT's proposal would thus allow an incumbent that is subject to mandatory relocation to avoid being relocated if it could not agree with the EA licensee within a specified time. We decline to adopt SBT's proposal. We believe that our phased negotiation plan provides adequate protection of incumbent licensees' interests. In the *800 MHz Memorandum Opinion and Order*, we reduced the mandatory negotiation period to one year for the purpose of minimizing the period of uncertainty concerning relocation. Allowing incumbents to circumvent the involuntary relocation phase by terminating the relocation process would be fundamentally inconsistent with our decision to clear incumbents from the upper 200 channel blocks so that EA licensees can implement their wide area systems. By providing incumbents with the ability to terminate the relocation process after a certain period of time, we would encourage some incumbents to refrain from negotiating in good faith. We see no need to upset the balance we previously established between the interests of EA licensees and relocated incumbents.

2. Comparable Facilities

a. System

42. In the *800 MHz Second Report and Order*, the Commission defined "system" functionally from the end user's point of view. A system is comprised of base station facilities that operate on an integrated basis to provide service to a common end user, and all mobile units

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[130] Mobex Reply to Opposition at 3; Duke Energy Reply to Opposition at 7-8.

[131] *800 MHz Memorandum Opinion and Order on Reconsideration*, 12 FCC Rcd at 9972, ¶ 52.

[132] *See* "Wireless Telecommunications Bureau Announces the Commencement of the Voluntary Negotiation Period for the Relocation of Incumbent Licensees in the 800 MHz Band," *Public Notice*, DA 99-283 (rel. December 4, 1998).

[133] SBT Petition at 19.

associated with those base stations.[134] A system can include multiple-licensed facilities that share a common switch or are otherwise operated as a unitary system, provided that an end user has the ability to access all such facilities.[135] Although we defined "system" broadly to provide incumbent licensees flexibility to continue meeting their customers' needs, we specifically excluded from our definition facilities that are operationally separate and managed systems that are comprised of individual licenses.[136]

43. Discussion. AMTA and PCIA seek clarification of our definition of "system."[137] PCIA notes that the SMR relocation process will involve the reprogramming of mobile units, which will cause service interruption to customers.[138] PCIA believes the harm due to such disruption can be minimized through the use of a redundant mobile system, in addition to a redundant backbone (i.e., repeater equipment and antennas).[139] PCIA thus requests confirmation that the costs of a redundant mobile system and redundant backbone are recoverable relocation costs. In addition, SBT contends that our definition of "system" should extend to control and roamer units.[140]

44. We agree with PCIA that our definition of "system" should include redundant mobile units and a redundant backbone when necessary to effect a relocation that is transparent to the end user. In the *800 MHz Second Report and Order*, we stated that it may be necessary for the incumbent licensee to operate the old system and the new system simultaneously to ensure a seamless transition.[141] We also recognized, however, that EA licensees and incumbents may agree upon alternative means to avoid a substantial disruption in service.[142] Therefore, we believe that the costs of redundant mobile units and redundant systems are reimbursable costs, but only to the extent that they are necessary to avoid a substantial disruption in service.

45. With respect to SBT's request that we include control stations and roamer units in our definition of "system," we decline to engage in a specific detailed analysis of the various individual components that potentially could be included in a system. Because our definition of system is defined functionally from the end user's point of view, EA licensees are required to look to the

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[134] *800 MHz Second Report and Order*, 12 FCC Rcd at 19112, ¶ 91.

[135] *Id.*

[136] *Id.* at 19112, n.189.

[137] AMTA Petition at 4-5; PCIA Petition at 6-8.

[138] PCIA Petition at 6-8.

[139] *Id.* at 8.

[140] SBT Petition at 13-14.

[141] *800 MHz Second Report and Order*, 12 FCC Rcd at 19122, ¶ 119.

[142] *Id.* at 19122, ¶ 119.

function of a specific component and consider whether the equipment in question is part of a unitary system providing service to the end user. Individual components, such as control stations and roamer units, must meet these requirements to appropriately fall within our definition.

46. In the *800 MHz Second Report and Order*, our definition of system did not include managed systems that are comprised of individual licenses.[143] AMTA requests that we reconsider this decision and define an integrated system to include separately licensed but commonly managed systems in which users are able to manually access multiple base stations.[144] We decline to expand our definition of "system" to include commonly managed systems that are comprised of individual licenses. To the extent that a manager operates separately licensed facilities as a unitary system that could meet our definition of "system," such operation would be likely to conflict with the licensees' obligation under Section 310(d) of the Communications Act to retain exclusive responsibility for the operation and control of authorized facilities.[145] And, as noted above, to the extent that such facilities are kept operationally separate, they are excluded from our definition of "system."

b. Capacity

47. Background. To comply with our capacity requirements, an EA licensee must provide an incumbent licensee with equivalent channel capacity. We defined channel capacity as the same number of channels with the same bandwidth that is currently available to the end user.[146] If a different channel configuration is used, it must have the same overall capacity as the original configuration.[147] Accordingly, comparable channel capacity requires equivalent signaling capability, baud rate and access time.[148]

48. Discussion. Genesee argues that a definition of comparable facilities must take into account that the incumbent licensees of the upper 200 channels were originally granted 450 kHz spacing between channels such that a five-channel SMR system could be operated with an RF transmitter/receiver on one antenna.[149] Genesee contends that it is possible for EA licensees to offer to

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[143] *800 MHz Second Report and Order*, 12 FCC Rcd at 19112, n.189.

[144] AMTA Petition at 4-5.

[145] 47 U.S.C. § 310(d). *See also* 47 C.F.R. § 90.403 (requiring licensees to exercise sufficient direction and control of authorized facilities to assure compliance with applicable statutory and regulatory provisions); *Intermountain Microwave*, 12 FCC 2d 559, 560, 24 Rad. Reg. (P&F) 983 (1963) (establishing six factors to determine whether an unauthorized transfer of control has taken place in violation of Section 310(d) of the Communications Act).

[146] *800 MHz Second Report and Order*, 12 FCC Rcd at 19112, ¶ 92.

[147] *Id.*

[148] *Id.* at 19113, ¶ 92.

[149] Genesee Petition at 2.

retune an incumbent licensee's channels by placing the channels together at one end of the upper 200 channel block, with much closer spacing between channels.[150] Genesee argues that it will be difficult to operate a new radio system with very close frequencies, and as an example, states that a ten channel system in which channels are spaced closer together could require a more powerful transmitter and five antennas rather than one or two.[151]

49. We do not believe that retuning requires the exact channel spacing that the incumbent licensee had on the upper 200 channels. Because of the large number of incumbent licensees presently licensed on the lower 230 channels, we believe that some relocated licensees will not receive the exact channel spacing that the relocated licensees had on the upper 200 channels. We emphasize, however, that in these situations, the EA licensee must configure the system in a way that does not compromise channel capacity and must reimburse the incumbent for the increased cost of operating the reconfigured system.[152]

c. Operating Costs

i. Increased Operating Costs

50. Background. In the *800 MHz Second Report and Order*, we defined operating costs as costs that affect the delivery of services to the end user.[153] We stated that if the EA licensee provides facilities that entail higher operating costs than the operating cost of the incumbent's previous system, and the cost increase is a direct result of the relocation of the system, the EA licensee must compensate the incumbent licensee for the difference.[154]

51. Discussion. Genesee asserts that relocating an incumbent licensee to channels with spacing of less than 250 kHz separation may require a higher power transmitter and larger antennas, thereby resulting in increased operating costs.[155] Genesee contends that we failed to provide for these increased costs.[156] We disagree. As noted above, EA licensees are required to reimburse incumbents for increases in operating costs that are directly related to the relocation. In the *800 MHz Second Report and Order*, we also explained that operating costs associated with the relocation might consist of either increased recurring costs associated with the replacement facilities or increased maintenance

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150 *Id.*

151 *Id.* at 2-3.

152 *See* paragraphs 50-51, *infra.*

153 *800 MHz Second Report and Order*, 12 FCC Rcd at 19113, ¶ 94.

154 *Id.*

155 Genesee Petition at 4.

156 *Id.*

costs.[157] Accordingly, if a higher power transmitter or larger antennas are necessitated by relocation, the incumbent should be compensated for any additional rental payments, increased utility fees, or increased maintenance costs associated with the new transmitter or antennas.

ii. Cost Recovery Period

52. Background. While we concluded in the *800 MHz Second Report and Order* that EA licensees should be responsible for increased operating costs caused by relocation, we noted that identifying whether increased costs are attributable to relocation becomes more difficult over time.[158] We therefore determined not to impose this obligation indefinitely, but stated that the EA licensee's obligation to pay increased costs will end five years after relocation has occurred.[159] We further concluded that a five year payment period appropriately balances the interest of EA licensees and relocated incumbents.[160]

53. Discussion. Chadmoore and Genesee argue that EA licensees should be required to reimburse relocated incumbent licensees for at least a ten-year period.[161] They maintain that because communication systems are put into service by operators, licensees expect a ten-year life cycle for most communication systems, and it is only equitable that an EA licensee should assume new recurring expenses in excess of existing recurring expenses for a ten-year period.[162] Nextel disagrees and supports a three-year limitation on repayment of recurring expenses.[163] Nextel argues that any payments beyond a three-year period would be purely speculative and beyond the realm of our cost reimbursement parameters.[164]

54. We reject Chadmoore and Genesee's arguments and decline to lengthen the cost recovery period from a five-year period to a ten-year period. Although some communications equipment may have a ten-year life expectancy, that fact alone does not justify lengthening the period for reimbursement of increased operating and maintenance costs. We continue to believe that five

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[157] *800 MHz Second Report and Order*, 12 FCC Rcd at 19113, ¶ 94.

[158] *Id.* at 19113-14, ¶ 95.

[159] *Id.*

[160] *Id.* This approach is consistent with the approach we have adopted for microwave relocation. *See* Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, WT Docket No. 95-157, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd. 8825, ¶ 31 (1996) (*Microwave Relocation Cost Sharing First Report and Order*).

[161] Chadmoore Reply to Opposition at 6-7; Genesee Petition at 4-5.

[162] *Id.*

[163] Nextel Opposition at 8.

[164] *Id.*

years is a sufficient period for the EA licensees to be responsible for increased operating costs caused by relocation. A five-year time period will facilitate the speedy resolution of relocation issues. Because a determination of whether increased costs are attributable to relocation becomes more difficult over time, maintaining this five-year period will prevent EA licensees from being overburdened with costs which may not be attributable to relocation.

55. Further, we believe the rationale we provided in the *Microwave Relocation Cost Sharing First Report and Order* is equally applicable to the relocation of SMR facilities.[165] The five-year cost recovery period is not unfair to incumbent licensees because, after five years, many incumbent licensees would have been forced to bear some of these costs themselves if they had not been relocated by the EA licensee.[166] We also noted that a five-year period is sufficient because it provides incumbent licensees adequate time to budget, plan and allocate resources to meet these expenses upon the expiration of the five-year period.[167]

56. Thus, we remain convinced that the five-year cost recovery period strikes an appropriate balance between the interests of the EA licensees and the incumbent licensees. Because the five-year period is not unfair to EA licensees, we also decline to reduce the period to three years as requested by Nextel.[168] We disagree that costs incurred beyond a three-year period would be "speculative and beyond the realm of [the] cost reimbursement parameters."[169] Thus, the cost recovery period will remain at five years.

3. Other Payment Issues

a. Timing of Payments to Incumbents

57. Background. In the *800 MHz Second Report and Order,* we stated that reimbursement payments for relocation are due (a) when the incumbent licensee has been fully relocated, and (b) the frequencies are free and clear.[170]

58. Discussion. AMTA and PCIA contend that incumbent licensees should be reimbursed for the cost of relocation as those expenses are incurred.[171] We disagree, and reiterate that payment of relocation costs will not be due until the incumbent has been fully relocated and the frequencies are

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[165] *Microwave Relocation Cost Sharing First Report and Order*, 11 FCC Rcd at 8843, ¶ 31.

[166] *Id.* We noted that increased rents was one such cost.

[167] *Id.*

[168] Nextel Opposition at 8.

[169] *Id.*

[170] *800 MHz Second Report and Order*, 12 FCC Rcd at 19123, ¶ 124.

[171] PCIA Petition at 9-10; AMTA Reply to Opposition at 2-4.

free and clear. We continue to believe that this approach promotes a more expeditious relocation process by establishing a definite time at which reimbursement is due. EA licensees have made substantial payments to serve their markets. Thus, they have a large financial incentive to relocate the incumbent licensees, construct their facilities, and begin operating. We believe that this approach strikes an appropriate balance between the rights and responsibilities of EA licensees and incumbent licensees during the course of the relocation. We further note that parties are free to negotiate when reimbursement of relocation costs will occur, and may agree to reimbursement as such expenses are incurred.

b. Compensable Costs

59. Background. In the *800 MHz Second Report and Order*, we concluded that reimbursable relocation costs could include incumbent transaction expenses such as legal and consulting fees, configuration of antennas, increased rental space, and administrative costs.[172] However, because we wanted to encourage a fast relocation process free of disputes, we determined that the bulk of compensable costs should be tied as closely as possible to actual equipment costs.[173] Therefore, we required EA licensees to reimburse incumbents only for those transaction expenses that are directly attributable to the relocation, subject to a cap of two percent of the hard costs involved.[174]

60. Discussion. Genesee maintains that the Commission did not provide compensation to the end user for service interruptions when vehicle radio units are out of service for realignment and retuning to the new frequencies.[175] Genesee questions how the Commission will compel end users to comply with mandatory retuning without providing any incentives for end users to cooperate.[176] We reject Genesee's suggestion to compensate end users of incumbent licensee systems, because such compensation would be inconsistent with our determination that the bulk of compensable costs should be tied as closely as possible to the licensee's actual equipment costs. The Commission's purpose is not to compel end users to receive service from one licensee as opposed to another licensee. Our goal in mandating relocation is to promote competition, provide SMR licensees with flexibility to deploy multiple technologies, establish regulatory symmetry among similar CMRS licensees and ensure that use of the 800 MHz SMR spectrum is in the public interest.

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

61. Background. In the *800 MHz Second Report and Order*, the Commission adopted flexible partitioning and disaggregation rules for all licensees in the 800 MHz and 900 MHz SMR

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[172] *800 MHz Second Report and Order*, 12 FCC Rcd at 19120-122, ¶¶ 115, 118.

[173] *Id.* at 19121-122, ¶ 118.

[174] *Id.*

[175] Genesee Petition at 4.

[176] *Id.* at 6.

services. Specifically, the Commission extended partitioning to all incumbent and EA licensees on both the upper 200 and lower 230 channels of the 800 MHz SMR service and to all incumbent and Major Trading Area (MTA) licensees on the 200 channels of the 900 MHz service.[177] Similarly, the Commission concluded that all incumbent and EA licensees in the 800 MHz SMR service and all incumbent and MTA licensees in the 900 MHz SMR service should be allowed to disaggregate portions of their spectrum.

62. Discussion. Entergy and Delmarva request clarification that our geographic partitioning and spectrum disaggregation rules apply to PMRS licensees in the 800 MHz and 900 MHz SMR services. In the *800 MHz Second Report and Order*, we determined that our partitioning and disaggregation rules should apply to all licensees in all SMR channel blocks.[178] We made no distinction on the basis of licensees' regulatory classification as PMRS or CMRS, and we see no reason to prohibit PMRS licensees on either SMR channels or General Category Channels from partitioning and disaggregating spectrum. Application of the partitioning and disaggregation rules to PMRS licensees will result in more efficient use of the spectrum by allowing licensees to transfer part of their spectrum to a party that more highly values it.

E. Competitive Bidding Issues

1. Auctionability

63. Background. In the *800 MHz Second Report and Order*, we concluded that competitive bidding is an appropriate licensing mechanism for the General Category and lower 80 channels of the 800 MHz SMR service.[179] We concluded that the 800 MHz SMR service satisfies the criteria set forth by Congress for determining when competitive bidding should be used. We noted that competitive bidding will further the public interest requirements of the Communications Act by promoting rapid deployment of services, fostering competition, recovering a portion of the value of the spectrum for the public, and encouraging efficient spectrum use.[180] We further noted that under Commission rules a diverse group of applicants including incumbent licensees and potential new providers of this service will be able to participate in the auction process because we have decided not to restrict eligibility for EA licenses.[181] Finally, we adopted special provisions for small businesses seeking EA licenses.[182]

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[177] *See 800 MHz Second Report and Order*, 12 FCC Rcd at 19134, ¶ 156.

[178] *Id.* at 19128-29, ¶ 141. *See* 47 C.F.R. §§ 90.813, 90.911.

[179] *800 MHz Second Report and Order*, 12 FCC Rcd at 19153-19154, ¶¶ 228-229.

[180] *Id.*

[181] *Id.*

[182] *Id.* at 19152-19153, ¶¶ 224-227.

64. Discussion. Several petitioners request that the Commission use procedures other than competitive bidding to license 800 MHz SMR.[183] In essence, petitioners contend that this band does not fit within the Congressional criteria for auctions because the General Category and lower 80 channels of the 800 MHz SMR band do not meet the original statutory criteria governing auctionability contained in Section 309(j) of the Communications Act,[184] or the criteria as amended by the enactment of the Balanced Budget Act of 1997.[185] In opposition to the petitioners, Nextel supports the Commission's decision to license 800 MHz SMR by competitive bidding.[186]

65. We reaffirm our conclusion that competitive bidding is the appropriate tool to resolve mutually exclusive license applications for the General Category and lower 80 channels of the 800 MHz SMR service.[187] No commenters raise any new arguments that persuade us to change our conclusion that making the 800 MHz SMR spectrum available for public use through auction will lead, most efficiently and effectively, to the deployment of new technologies and services to the public. We continue to believe that competitive bidding furthers the public interest by promoting rapid development of service, fostering competition, recovering a portion of the value of the spectrum for the public, and encouraging efficient spectrum use.[188]

66. Several petitioners contend that Section 309(j)(6)(E) of the Communications Act prohibits the Commission from conducting an auction unless it first attempts alternative licensing

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[183] SBT Petition at 14; UTC Comments at 2-3; ACSC Petition at 7; ITA Petition at 4-6.

[184] Under 47 U.S.C. § 309(j), as originally enacted by the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act"), the Commission was authorized to grant initial licenses through competitive bidding if mutually exclusive applications are accepted for filing, the principal use of the spectrum is a subscription service, and the system of competitive bidding promotes the objectives of 47 U.S.C. § 309(j)(3). These objectives include: (i) development and rapid deployment of new technologies and services; (ii) avoiding processing delays and excessive concentration of licenses; (iii) promoting economic opportunity; and (iv) the efficient use of the spectrum. 47 U.S.C 309(j)(3). *See* ACSC Petition at 7.

[185] Balanced Budget Act of 1997, P.L. No. 105-33, 111 Stat. 251 (1997), to be codified in relevant part at 47 U.S.C. §§ 309(j)(1), (2) ("Balanced Budget Act").

[186] Nextel Opposition to Petitions for Reconsideration at 3.

[187] SBT also seeks clarification on the method that we would use to assign licenses for partitioned or disaggregated 800 MHz and 900 MHz band spectrum that is returned to the Commission when a licensee's failure to meet the applicable construction or coverage requirement results in the automatic cancellation of its license. SBT Petition at 8. Our decision to implement geographic area licensing and competitive bidding in these bands applies both to spectrum being licensed for the first time and spectrum returned to the Commission when an existing license is cancelled.

[188] *See 800 MHz Second Report and Order*, 12 FCC Rcd at 19154-19156, ¶¶ 229-233; *800 MHz First Report and Order*, 11 FCC Rcd at 1540, ¶ 149. *See Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 970-71 (D.C. Cir. 1999) (Commission acted within its discretion in deciding to award geographic area licenses in the 800 MHz band by auction).

mechanisms to avoid mutual exclusivity.[189] The Commission has previously construed Section 309(j)(6)(E) to mean that it has an obligation to attempt to avoid mutual exclusivity by the methods prescribed therein only when it would further the public interest goals of Section 309(j)(3).[190] In the course of this proceeding, we have evaluated the appropriateness of various licensing mechanisms for the 800 MHz SMR service. For example, we found that "first-come, first-served" licensing in the 800 MHz SMR service (as a means to avoiding mutual exclusivity) leads to processing delays.[191] For the General Category and lower 80 channels of the 800 MHz SMR frequency band, the use of geographic area licensing combined with competitive bidding will provide for expeditious resolution of the large number of applications that are expected.[192]

67. We do not agree with the contention of some petitioners that the administrative procedures associated with assigning geographic area licenses through auctions are not as efficient as site-specific licensing.[193] We previously addressed the advantages to both the Commission and licensees of geographic area licensing.[194] Petitioners do not raise any new arguments that would persuade us to reconsider the adoption of EA licensing for the 800 MHz SMR service. We again emphasize that geographic area licensing offers a flexible licensing scheme that eliminates the need for many of the complicated and burdensome licensing procedures that hampered SMR development in the past.[195] Therefore, we reject once again other licensing procedures for the lower 800 MHz SMR spectrum. By determining that it would not be in the public interest to implement other licensing

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[189] 47 U.S.C. § 309(j)(6)(E) provides: "Nothing in this subsection, or in the use of competitive bidding, shall... be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings." *See* SBT Petition at 14-15; Entergy/Delmarva Petition at 3; ACSC Petition at 6-7; ITA Petition at 7-9; UTC Comments at 2-3.

[190] *See DIRECTV, Inc. v. FCC*, 110 F.3d 816, 828 (D.C. Cir. 1997) ("Nothing in § 309(j)(6)(E) requires the FCC to adhere to a policy that it deems outmoded 'to avoid mutual exclusivity in ... licensing proceedings'"); *800 MHz Second Report and Order*, 12 FCC Rcd at 19104, 19154 ¶¶ 62, 230; *800 MHz Memorandum Opinion and Order*, 12 FCC Rcd at 10009-10 ¶ 115 (Section 309(j)(6)(E) does not prohibit Commission from conducting an auction without first attempting alternative licensing mechanisms to avoid mutual exclusivity). *See also* Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Report and Order and Second Notice of Further Rule Making*, 12 FCC Rcd 18600, 18647, ¶ 101 (1997) (previous rules that arguably avoided mutual exclusivity were no longer adequate for other reasons).

[191] *800 MHz First Report and Order*, 11 FCC Rcd at 1541, ¶ 150.

[192] *CMRS Third Report and Order*, 9 FCC Rcd at 8140, ¶¶ 341-42. *See also 800 MHz Second Report and Order*, 12 FCC Rcd at 19087-88, ¶¶ 10-12.

[193] PCIA Petition at 3; Delmarva/Entergy Petition at 3.

[194] *CMRS Third Report and Order*, 9 FCC Rcd at 8042-8044, ¶¶ 95-97.

[195] *Id.*

schemes or processes that avoid mutual exclusivity, the Commission has fulfilled its obligation under Section 309(j)(6)(E).[196]

68. In the *800 MHz Second Report and Order*, we concluded that mutually exclusive applications for the lower 80 and General Category Channels were auctionable under the auction authority provided the Commission by the 1993 Budget Act.[197] This conclusion is unchanged by the Balanced Budget Act of 1997, which amended Section 309(j) to expand the Commission's auction authority.[198] The Commission is now required to assign initial licenses by competitive bidding whenever mutually exclusive applications are accepted for filing, with certain limited exceptions.[199] We have concluded in other proceedings that the revised statute does not require us to re-examine our determinations that specific services or frequency bands were auctionable under the more restrictive definition of the 1993 Budget Act.[200]

69. ACSC and UTC contend that the Commission failed to grant emergency road service providers and other public safety licensees an exemption from the 800 MHz auction, contrary to Section 309(j)(2) of the Communications Act.[201] Section 309(j)(2) identifies classes of licenses that are exempt from the competitive bidding process, including licenses for public safety radio services. The Balanced Budget Act of 1997 defined public safety radio services to include "private internal radio services used by State and local governments and non-government entities, and including emergency road services provided by not-for-profit organizations, that (i) are used to protect the safety of life, health, or property; and (ii) are not made commercially available to the public."[202] We have

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[196] *See* Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, *Memorandum Opinion and Order on Reconsideration and Third Report and Order*, FCC 99-98, ¶ 11 (rel. May 24, 1999).

[197] *800 MHz Second Report and Order*, 12 FCC Rcd at 19153-19156, ¶¶ 228-234.

[198] Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3002, 111 Stat. 251 (1997) (amending 47 U.S.C. § 309(j)). *See also Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 970-71 (D.C. Cir. 1999).

[199] See 47 U.S.C. §§ 309(j)(1), (2). *See also* Implementation of Sections 309(j) and 337 of the Communications Act of 1934, as amended, WT Docket No. 99-87, *Notice of Proposed Rulemaking*, FCC 99-52, 14 FCC Rcd 5206 (1999) ("*BBA NPRM*").

[200] *See BBA NPRM* at ¶ 24 (stating that consistent with previous proceedings, the NPRM will not re-examine the Commission's previous determinations that specific services or frequency bands were auctionable under the 1993 Balanced Budget Act); Amendment of the Commission's Rules Concerning Maritime Communications, PR Docket No. 92-257, *Third Report and Order and Memorandum Opinion and Order*, 13 FCC Rcd 19853, 19882-83 at ¶¶ 60-61 (1998) (earlier finding that public coast service is subject to competitive bidding is unchanged by Balanced Budget Act); Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, PR Docket No. 93-61, *Second Report and Order*, 13 FCC Rcd 15182, 15187-88 ¶ 9 (1998).

[201] ACSC Petition at 2-3; UTC Comments at 4-5. *See* 47 U.S.C. § 309(j)(2).

[202] 47 U.S.C. § 309(j)(2)(A).

previously determined that the public safety radio services exemption does not entitle individual users to remove licenses from auctions licensing simply by claiming a public safety use.[203] Thus, contrary to ACSC's contentions, the exemption does not apply to spectrum that is allocated for SMR use and which has already been determined to be auctionable.[204] We emphasize, however, that the Commission is committed to making available sufficient spectrum to accommodate efficient, effective telecommunications facilities and services to satisfy public safety communications needs into the 21st century. To this end, the Commission commenced a rulemaking proceeding to evaluate and plan for present and future public safety communications requirements, and recently reallocated for public safety services 24 MHz of spectrum between 746 and 806 MHz.[205]

2. Eligibility

70. Background. In the *800 MHz Second Report and Order* and the *800 MHz Memorandum Opinion and Order* we concluded that General Category and lower 80 channels would be licensed on a geographic basis and subject to competitive bidding to resolve mutually exclusive applications.[206] Earlier, in the *800 MHz SMR First Report and Order*, we concluded based on comments in the proceeding and on our licensing records that the primary demand for General Category channels came from SMR operators.[207] When we froze General Category licensing in 1995, we noted that the number of SMR applications for these channels had risen markedly[208] and, as such, we believed that such activity is itself an indication that demand for the spectrum exists. Moreover, as a result of geographic area licensing on the upper 200 channels, there is a substantial demand for General Category channels among legitimate small SMR operators, including incumbents that relocate from the upper 200 channels.

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[203] Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, PR Docket No. 93-61, *Order on Reconsideration of the Second Report and Order*, FCC 99-3, 14 FCC Rcd 1339, 1343, ¶ 6 (Jan. 21, 1999).

[204] *See 800 MHz Memorandum Opinion and Order on Reconsideration*, 12 FCC Rcd at 10003-04, ¶¶ 100-102.

[205] *See* The Development of Operational, Technical and Spectrum Requirements For Meeting Federal, State and Local Public Safety Agency Communications Requirements Through the Year 2010, WT Docket No. 96-86, *First Report and Order and Third Notice of Proposed Rulemaking*, FCC 98-191, 14 FCC Rcd 152 (1998); Reallocation of Television Channels 60-69, the 746-806 MHz Band, ET Docket No. 97-157, *Report and Order*, 12 FCC Rcd 22953 (1998).

[206] *800 MHz Second Report and Order*, 12 FCC Rcd at 19086-19088, ¶¶ 8-12; *800 MHz SMR Memorandum Opinion and Order*, 12 FCC Rcd at 10003-10004, ¶ 101.

[207] *800 MHz First Report and Order*, 11 FCC Rcd at 1535, ¶ 137.

[208] Licensing of General Category Frequencies in the 806-809.750/851-854.750 MHz Bands, *Order*, 10 FCC Rcd 13190 (1995).

71. Discussion. Based on the factors discussed above, and on the more extensive record developed in the course of the 800 MHz proceeding, we continue to believe that the lower 80 and General Category channels of 800 MHz SMR service should be licensed through our competitive bidding process and open to all parties, as opposed to incumbents solely, consistent with all recent auctions.[209] Thus, we disagree with the parties that contend that the Commission should limit participation in the 800 MHz SMR auction to SMR and/or non-SMR incumbents.[210] PCIA, for example, believes that the Commission should limit eligibility for geographic area licenses to those incumbent licensees who provide coverage to 70% of their market areas. It further argues that the rules adopted in the *Second Report and Order* will encourage the filing of applications for anti-competitive or speculative purposes, which may result in high license costs and degradation of service to the public.[211] We have fully considered PCIA's proposal but have determined that we will maintain open eligibility and the requirement that incumbents participate in competitive bidding regardless of the extent of their coverage. We believe that open eligibility will foster competition and result in a diverse group of 800 MHz SMR providers, and that the competitive bidding process will adequately deter speculation. These rules are consistent with the rules for other CMRS services, and encourage the participation of diverse providers that are serious enough to meet the requirements of the competitive bidding process.

72. We also reject petitioners' view that our approach will harm the interests of non-commercial licensees by requiring them to compete for spectrum with commercial systems.[212] As we noted in the *800 MHz Second Report and Order*, there are several ways in which non-SMRs can benefit from our geographic licensing rules.[213] For example, non-commercial operators may not only apply individually for geographic area licenses, but may also participate in joint ventures (with other non-commercial operators or with commercial service providers) or obtain spectrum through partitioning and disaggregation to meet their spectrum needs. We also expect that geographic area licensing of SMR and General Category spectrum will free up non-SMR spectrum in the 800 MHz band, providing more options for non-commercial operators where availability of General Category spectrum is limited.[214] Finally, we are continuing with our initiatives to provide sufficient spectrum for non-commercial operations through our *Refarming* proceeding.[215]

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[209] *See generally, 800 MHz First Report and Order, 800 MHz Memorandum Opinion and Order*, and *800 MHz Second Report and Order.*

[210] PCIA Petition at 3; Entergy/Delmarva Petition at 3; PCIA Reply Comments at 1.

[211] PCIA Petition at 3-6.

[212] ACSC Petition at 3-4; ITA at 6-7; UTC Reply Comments at 2-3.

[213] *800 MHz Second Report and Order* at 19087-19088, ¶ 12.

[214] *Id.*

[215] Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them, PR Docket No. 92-235, *Second Report and Order*, FCC 97-61, 12 FCC Rcd 14307 (1997); The Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and

73. Entergy/Delmarva ask that the Commission clarify that non-SMRs are eligible to bid on the lower 80 channels.[216] As discussed above (*see* ¶ 71, *supra*), the auction of lower 80 channels is open to all parties with no limit on eligibility.[217] While we conclude that non-SMRs are eligible for licensing, we emphasize that this in no way affects our decision to license the General Category and lower 80 channels geographically, with mutually exclusive applications resolved through competitive bidding with open eligibility. We have not altered our conclusion in the *800 MHz First Report and Order* and the *800 MHz Memorandum Opinion and Order* that General Category and lower 80 channels are subject to competitive bidding under Section 309(j).

3. Competitive Bidding Design

a. License Grouping

74. Background. In the *800 MHz Second Report and Order*, we stated that to expedite the process of auctioning the lower 80 and General Category EA licenses, we would auction these licenses using the five regional groups that were used for the regional narrowband Personal Communications Services (PCS) auction: Northeast, South, Midwest, Central, and West.[218]

75. Discussion. On reconsideration, we amend the method by which we will group licenses for auction. While we continue to believe that licenses should be grouped for competitive bidding purposes in a manner that will reduce the administrative burden on auction participants, particularly small businesses, we will not use the five regional groups based on Basic Trading Areas that were used in the regional narrowband PCS auction. Instead, we will direct the Bureau to determine, pursuant to its delegated authority,[219] what groups, if any, should be established for auctioning the lower 80 and General Category EA licenses. The Balanced Budget Act of 1997 provides that "before the issuance of bidding rules," the Commission must provide adequate time for

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Local Public Safety Agency Communication Requirements Through the Year 2010, WT Docket No. 96-86, *Second Notice of Proposed Rulemaking*, FCC 97-373, 12 FCC Rcd 17706 (1997).

[216] Entergy/Delmarva Petition at 6-7.

[217] Although non-SMR operators are eligible to hold licenses in the lower 80 SMR channels, these channels continue to be designated for SMR use only. *See supra* paragraph 34.

[218] *800 MHz Second Report and Order*, 12 FCC Rcd at 19157, ¶ 238.

[219] *See* Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, WT Docket No. 97-82, *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, FCC 97-60, 12 FCC Rcd 5686, 5697, ¶ 16 (1997) ("*Part 1 Order*"); Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, WT Docket No. 97-92, *Third Report and Order and Second Further Notice of Proposed Rule Making*, FCC 97-413, 13 FCC Rcd 374, 448-49, ¶ 125 (1997) ("*Part 1 Third Report and Order*"). The Bureau has the discretion to establish and vary the sequence in which the lower 80 and General Category licenses will be auctioned. *See* 47 C.F.R. § 90.903(a) (1997).

parties to comment on proposed auction procedures.[220] It has been the Bureau's practice to issue a Public Notice seeking comment on auction-specific operational issues well in advance of the application deadline for each auction.[221] We therefore conclude that the Bureau, under its existing delegated authority and in accordance with the Balanced Budget Act of 1997, should seek further comment on license grouping and auction sequence, prior to the start of the 800 MHz auction.

b. Upfront Payments

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

77. Discussion. PCIA contends that permitting bidders to check the "all markets" box creates artificial mutual exclusivity contrary to the requirements of Section 309(j)(6)(E) of the Communications Act.[222] It also argues that, since bidders' upfront payments need only correspond to the "largest combination of activity units on which the bidder anticipates being active in any single round,"[223] the ability to check the "all markets" box encourages the participation of speculators in the auctions.[224] To deter speculation, they suggest that the Commission should require each bidder to (1) specify licenses on which it seeks to bid, and (2) submit an upfront payment corresponding to the total licenses specified.[225] In opposition, Nextel argues that to adopt PCIA's proposal would be contrary to the public interest.[226]

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[220] Balanced Budget Act of 1997, § 3002(a)(1)(B)(iv) (codified at 47 U.S.C. § 309(j)(3)(E)(i)).

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

[222] *See also* 47 U.S.C. § 309(j)(6)(E).

[223] *800 MHz Second Report and Order*, 12 FCC Rcd at 19163-19164, ¶¶ 257-258.

[224] PCIA Petition at 16-18.

[225] *Id.* at 17.

[226] Nextel Opposition at 6.

78. We will not adopt the proposal recommended by PCIA. The Commission has expressly rejected identical arguments made by commenters that opposed use of the "all markets" box.[227] A bidder must submit an upfront payment sufficient to meet the eligibility requirements for any combination of licenses on which it might wish to bid in a round. This rule forces bidders to make a payment that reflects their level of interest and protects against speculation. Moreover, we continue to believe that bidders should have the flexibility to pursue back-up strategies if they are unable to obtain their first choice of licenses. As demonstrated by all recent auctions, providing bidders flexibility is crucial to an efficient auction and optimum license assignment.[228] Because petitioners do not raise any arguments that have not been previously considered and rejected by the Commission, we will retain the current rules, which permit use of the "all markets" box and require an upfront payment that corresponds to the number of licenses on which a bidder anticipates bidding in any one round.

c. Delegated Authority

79. Background. In the *800 MHz Second Report and Order*, the Commission delegated to the Bureau the authority to implement many of the Commission's rules pertaining to auctions procedures.[229] This included the authority to conduct auctions; administer applications, payment, licenses grant and denial procedures; and determine upfront and down payment amounts.[230]

80. Discussion. SBT argues that any action by the Wireless Telecommunications Bureau to determine stopping rules and upfront payment amounts, pursuant to the Commission's delegation of authority, is a violation of the Administrative Procedures Act ("APA"), on the grounds that such determinations are substantive.[231] We disagree. Section 0.131 of the Commission's rules explicitly states that the Bureau has delegated authority to develop, recommend and administer policies, programs and rules concerning auctions of spectrum for wireless telecommunications.[232] In our Part 1 rulemaking, we clarified that pursuant to 0.131 of our rules, the Chief of the Wireless Telecommunications Bureau has delegated authority to implement all of the Commission's rules pertaining to auctions *procedures*.[233] This includes the authority to choose competitive bidding designs

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[227] Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Second Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 2732, 2793, ¶ 126 (1997).

[228] *See id.*

[229] *See 800 MHz Second Report and Order*, 12 FCC Rcd at 19158-19164, ¶¶ 241-258.

[230] 5 U.S.C. §§ 551 *et seq.*

[231] SBT Petition at 17-18.

[232] 47 C.F.R. § 0.131(c).

[233] *See Part 1 Order* at ¶ 16, where we noted that the Bureau should, to the extent possible, carry out its duties under this authority through the use of orders, public notices, bidder packages, notices disseminated through the electronic bidding system, and other reasonable means and with the benefit of public comment where

and methodologies, such as simultaneous multiple round auction or oral outcry auctions and remote electronic bidding or on-site bidding; conduct auctions; administer application, payment, license grant and denial procedures; and determine upfront and down payment amounts.[234] These kinds of decisions do not fall under the prohibited activities, set forth in Section 0.331 of the Commission's rules, which include acting upon complaints, petitions, requests, applications for review and notices of proposed rulemaking.[235] We conclude that the Commission's delegation of authority to the Bureau is valid as it concerns inherently procedural rather than substantive issues and is, therefore, in compliance with our rules.[236] Furthermore, the Commission's delegation of authority is in compliance with the APA. Pursuant to 5 U.S.C. § 553(b), an agency may modify procedural rules without notice and comment.[237] Because the actions delegated to the Bureau are procedural in nature and do not affect the substantive rights of interested parties, the Commission's delegation of authority falls within that exception.

4. Treatment of Designated Entities

a. Installment Payments

81. Background. In the *800 MHz Second Report and Order*, the Commission deferred to our Part 1 proceeding the decision on whether to adopt installment payments in the lower 80 and General Category channels.[238] The Commission determined in its *Part 1 Third Report and Order*, released in December of 1997, that installment payments should not be used in the immediate future as a means of financing small-business participation in our auction program.[239]

82. Discussion. AMTA contends that the Commission should retain installment payments for the lower 80 and General Category 800 MHz SMR licenses on the grounds that installment payments are the most significant option for the provision of meaningful small business participation in the spectrum auctions as they allow SMR operators to pay for the license out of the profits generated through the provision of SMR service.[240]

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appropriate. We also noted that the such Bureau actions would be subject to review by the full Commission. *See also Part 1 Third Report and Order* 13 FCC Rcd at 454-455, ¶ 139.

[234] *Id.*

[235] 47 C.F.R. § 0.331.

[236] *See* Amendment of Part 0 of the Commission's Rules to Reflect a Reorganization Establishing the Wireless Telecommunications Bureau and to Make Changes in Delegated Authority of Other Bureaus, *Order*, FCC 95-213, 10 FCC Rcd 12751 (1995).

[237] 5 U.S.C. § 553(b).

[238] *800 MHz Second Report and Order*, 12 FCC Rcd at 19170-19171, ¶ 279.

[239] *See Part 1 Third Report and Order*, 13 FCC Rcd at 399-400, ¶ 38.

[240] AMTA Petition at 10-12; AMTA Reply to Opposition at 1-2. *See also* SBT Reply to Opposition at 4-5.

83. In the *Part 1 Third Report and Order*, the Commission considered its use of installment payment plans for future auctions. On the basis of the record in that proceeding and the record developed on installment payment financing for the broadband PCS C block service and on recent decisions eliminating installment payment financing for LMDS and 800 MHz SMR (upper 200 channels), we concluded that, until further notice, the Commission should no longer offer such plans as a means of financing small businesses and other designated entities seeking spectrum licenses.[241] We note that this conclusion was subject to our request for comment in the Second Further Notice of Proposed Rulemaking portion of the *Part 1 Third Report and Order* on installment payment issues and means other than bidding credits and installment payments by which the Commission might facilitate the participation of small businesses in our spectrum auction program.[242]

84. We have carefully considered the use of installment payment plans for 800 MHz SMR licensees. On the basis of our experience as outlined in the *Part 1 Third Report and Order*,[243] we believe that the public interest is best served by going forward with the auction of the lower 80 and General Category channels without extending installment payments to licensees. In place of installment payments, we established larger bidding credits to provide for the interests of small business bidders.[244] We believe that our adoption of the larger bidding credit both fulfills the mandate of Section 309(j) to provide small businesses with the opportunity to participate in auctions and ensure that new services are offered to the public without delay.[245]

b. Designated Entity Provisions

85. Background. In the *Second Further Notice*, we sought comment on the type of designated entity provisions that should be incorporated into our competitive bidding procedures for the lower 80 and General Category channels.[246] We requested comment on the possibility that, in addition to small business provisions, separate provisions for women- and minority-owned entities should be adopted for the lower 80 and General Category channels. We requested that commenters discuss whether the capital requirements of the 800 MHz SMR service pose a barrier to entry by minorities and women and whether overcoming such a barrier, if it exists, would constitute a compelling governmental interest.[247] We also urged the parties to submit evidence about patterns or actual cases of discrimination in the 800 MHz SMR industry or in related communications services.

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[241] *Part 1 Third Report and Order*, 13 FCC Rcd at 400, ¶ 40.

[242] *Id.*

[243] *See Part 1 Third Report and Order*, 13 FCC Rcd at 399-400, ¶ 38.

[244] *800 MHz Second Report and Order*, 12 FCC Rcd at 19170, ¶ 277.

[245] *See Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 971 (D.C. Cir. 1999) (upholding Commission's decision to eliminate installment payment program with respect to 800 MHz SMR licenses).

[246] *Second Further Notice*, 11 FCC Rcd at 1620, ¶ 374.

[247] *Id.* at 1624-1625, ¶¶ 384-385.

86. In the *800 MHz Second Report and Order*, the Commission determined that it had not developed a record sufficient to sustain gender- and minority-based measures in the lower 80 and General Category licenses based on the standard established by the *Adarand* decision.[248] Additionally, we noted the record was insufficient to support any gender-based provisions under the intermediate scrutiny standard established in the *VMI* decision.[249] Based upon the record in that proceeding, we adopted bidding credits solely for applicants qualifying as small businesses.[250] We believed these provisions would provide small businesses with a meaningful opportunity to obtain licenses for the lower 80 and General Category channels. Moreover, many women- and minority-owned entities are small businesses and will therefore qualify for these provisions. As such, these provisions met Congress' goal of promoting wide dissemination of licenses in this spectrum.

87. Discussion. SBT contends that, by placing the burden of proof regarding past discrimination on the commenters, the Commission violated its congressionally-mandated obligation to give small businesses, rural telephone companies, and businesses owned by members of minority groups and women the chance to participate in the provision of spectrum-based services.[251] We disagree. Subsequent to the Budget Act, the Supreme Court issued the *Adarand* and *VMI* decisions, which raised legal uncertainty as to whether special auction provisions for minorities and women could withstand a constitutional challenge. In order to determine whether adequate evidence exists to support such provisions, the Commission's Office of Communications Business Opportunities ("OCBO") commenced a series of studies to examine the minority and female ownership of telecommunications and electronic mass media facilities in the United States ("OCBO Studies").[252] Until completion of the OCBO Studies, it is premature to formulate even tentative conclusions as to the sufficiency of the ownership data being compiled to justify provisions for minority- and women-

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[248] *Adarand Constructors, Inc. v. Peña*, 115 S.Ct. 2097 (1995) (constitutionality of all government-imposed racial classifications determined under a "strict scrutiny" standard of review).

[249] *See United States v. Virginia*, 518 U.S. 515 (1996) (Reviewing the single-sex admission policy of the Virginia Military Institute, the Supreme Court held that gender-based government action is subject to the intermediate scrutiny standard of review); *see also J.E.B. v. Alabama ex. re. T.B.*, 511 U.S. 127 (1994); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).

[250] *See* 47 C.F.R. § 90.910.

[251] SBT Petition at 18. SBT also contends that the Commission's failure to obtain approval of the small business size standards for the lower 80 and General Category channels tolls the effectiveness of the *800 MHz Second Report and Order*. SBT Supplement to Petition at 3. We disagree. First, SBT cites no authority, and we know of none, that supports their contention. Second, we note that on August 10, 1999, the Small Business Administration ("SBA"), by letter, approved the small business size standards adopted in the *800 MHz Second Report and Order* for the lower 80 and General Category channels. *See* Letter from Aida Alvarez, Administrator, Small Business Administration, to Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission (Aug. 10, 1999).

[252] Studies currently underway include demographic reviews of the sale and transfer of wireless facilities and broadcast stations.

owned entities. In light of the Supreme Court's decisions, the Commission considered its statutory obligations to (1) award spectrum licenses expeditiously and to promote the rapid deployment of new services to the public without judicial delays, and (2) disseminate licenses among a wide variety of applicants, including designated entities.[253] The designated entity bidding credits adopted for the 800 MHz service are gender- and minority-neutral but specifically target small businesses.[254] Auction results indicate that many of the small businesses participating in auctions are also women- and minority-owned, therefore effectively furthering Congress' objective of disseminating licenses among a wide variety of applicants.[255]

V. CONCLUSION

88. We believe that the revisions and clarifications of our rules adopted in this *Memorandum Opinion and Order on Reconsideration* are necessary to finalize our implementation of a new licensing framework for SMR systems that strikes a fair and equitable balance between the competing interests of 800 MHz SMR licensees who seek to provide local service and those desiring to provide geographic area service. We further believe that the revisions and clarifications of our rules will facilitate the rapid implementation of wide-area licensing in the SMR service and advance the public interest by fostering the economic growth of competitive new services.

VI. PROCEDURAL MATTERS

A. Regulatory Flexibility Act

89. 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 changes in its rules adopted in this *Memorandum Opinion and Order on Reconsideration*.[256] The Supplemental FRFA is set forth in Appendix C. The Office of Public Affairs, Reference Operations Division, will send a copy of the *Memorandum Opinion and Order on Reconsideration*, including the Supplemental FRFA, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with the RFA.

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[253] *See* Amendment of Part 1 of the Commission's Rules-- Competitive Bidding Procedures, *Third Report and Order and Second Further Notice of Proposed Rule Making*, WT Docket No. 97-82, 13 FCC Rcd 374, 472-475, ¶¶ 174-178 (seeking comment on how to modify our designated entity provisions consistent with the standards set forth in *Adarand* and *VMI*.)

[254] *800 MHz Second Report and Order*, 12 FCC Rcd at 19167-19168, ¶ 271.

[255] *See* FCC Report to Congress on Spectrum Auctions,WT Docket No. 97-150, *Report*, FCC 97-353 (rel. October 9, 1997) at 28.

[256] 5 U.S.C. § 604.

B. Paperwork Reduction Act of 1995 Analysis

90. This *Memorandum Opinion and Order on Reconsideration* contains a modified information collection that the Commission is submitting to the Office of Management and Budget requesting clearance under the Paperwork Reduction Act of 1995.

C. Further Information

91. For further information concerning this *Memorandum Opinion and Order on Reconsideration*, contact Donald Johnson or Scott Mackoul, Policy and Rules Branch, Commercial Wireless Division, Wireless Telecommunications Bureau at (202) 418-7240 or Gary D. Michaels, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau at (202) 418-0660.

VII. ORDERING CLAUSES

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

93. Accordingly, IT IS ORDERED that the petitions for reconsideration or clarification filed by the parties listed in Appendix A ARE GRANTED IN PART to the extent provided herein, and otherwise ARE DENIED.

94. 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 the Commission's rules, as amended in Appendix B, SHALL BECOME EFFECTIVE 60 days after publication of this *Memorandum Opinion and Order on Reconsideration* in the Federal Register.

95. 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*, including the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary