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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of	)	
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Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service	)	WT Docket No. 98-169
	)	

SECOND ORDER ON RECONSIDERATION OF THE REPORT AND ORDER AND MEMORANDUM OPINION AND ORDER

Adopted: November 22, 2000 **Released: December 13, 2000**

By the Commission:

I. INTRODUCTION

1. On September 10, 1999, the Federal Communications Commission ("Commission") issued the *218-219 MHz Order,* which modified the regulations governing the licensing of the 218-219 MHz Service (formerly known as the Interactive Video and Data Service ("IVDS")) to maximize the efficient and effective use of the band.[1] The *218-219 MHz Order*, among other things, modified service and

[1] Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Report and Order and Memorandum Opinion and Order*, FCC 99-239, WT Docket No. 98-169, RM-8951, 15 FCC Rcd. 1497, 1499 ¶ 2 (1999)("*218-219 MHz Order*"), *on recon, Order*, 14 FCC Rcd 21078 (1999)("*218-219 MHz Recon. Order*"). Initially designated as IVDS, the service was redesignated the 218-219 MHz Service to reflect the breadth of services available in this spectrum. *See* Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service and Amendment of Part 95 of the Commission's Rules to Allow Interactive Video and Data Service Licensees to Provide Mobile Services (proceeding terminated), *Order, Memorandum Opinion and Order, and Notice of Proposed Rulemaking*, 13 FCC Rcd. 19064, 19075 ¶ 16 (1998)("*218-219 MHz Flex Order*," "*218-219 MHz Flex M.O&O.*," or "*218-219 MHz Flex NPRM*").

technical rules for the band and extended the license term from five to ten years, eliminated the three- and five-year construction benchmarks, and adopted a "substantial service" analysis to be assessed at the expiration of the 218-219 MHz license term as a condition of renewal.[2] The Commission also adopted a restructuring plan for existing licensees that had participated in the installment payment program and that: (i) were current in installment payments as of March 16, 1998; (ii) were less than ninety days delinquent on the last payment due before March 16, 1998; or (iii) had properly filed grace period requests under the former installment payment rules ("Eligible Licensees").[3] Those licensees that had paid in full are not eligible to participate in the restructuring plan as they no longer owe a debt to the Commission and no public policy goal would be served by allowing them to participate. Pursuant to the restructuring plan, Eligible Licensees must make elections on a per license basis, choosing among three options: (i) Reamortization and Resumption of Payments; (ii) Amnesty; or (iii) Prepayment (Prepayment-Retain or Prepayment-Return).[4] If an Eligible Licensee elects Reamortization and Resumption of Payments the licensee retains one or more of its licenses and remains in the installment payment plan. The loan will be "reamortized" over the remaining term of the license. If an Eligible Licensee elects Amnesty its license is returned to the Commission in exchange for debt forgiveness of the outstanding principal balance and all interest payments due thereon. The Commission retains the down payment. If an Eligible Licensee elects Prepayment it may return or retain as many licenses as it wishes. The Prepayment option applies to all of the licenses held by a licensee and cannot be combined with Amnesty or Reamortization/Resumption.

2. "Ineligible Entities" are those entities that made first and second down payments and: (i) made some installment payments, but were not current in their installment payments as of March 16, 1998, and did not have a grace period request on file in conformance with the former installment payment rules; or (ii) never made any installment payments and did not have a timely filed grace period request on file, in conformance with the former rules.[5] Ineligible Entities are not eligible to make elections, but will be granted debt forgiveness for any outstanding balances owed and have previously paid installment payments refunded.[6]

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[2] *218-219 MHz Order*, 15 FCC Rcd. at 1517, 1537-1538 ¶¶ 31, 68, 70.

[3] *See Id.* 15 FCC Rcd. at 1518, 1520 ¶¶ 34, 37. The installment payment grace period rules previously in effect were changed in Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374 (1997) ("*Part 1 Third Report and Order*"). More recently, the Commission further modified these rules. Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, WT No. 97-82, FCC No. 00-274 (rel. August 14, 2000)("*Order on Reconsideration of the Part 1 Third Report and Order*").

[4] *See generally Id.* 15 FCC Rcd. at 1515-1518 ¶¶ 26-33.

[5] 47 C.F.R. § 95.816(d)(3) (1994) (incorporating by reference 47 C.F.R. § 1.2110 (1994)).

[6] *218-219 MHz Order*, 15 FCC Rcd. at 1520-1521 ¶ 38. This debt treatment is subject to the following provisions:

3. On November 24, 1999, on our own motion, we adopted the *218-219 MHz Recon. Order*, which modified our *218-219 MHz Order*. We eliminated the provision allowing an Eligible Licensee electing the Amnesty option to obtain a credit for seventy percent of its down payment and forego, for a period of two years from the start date of the next auction of the 218-219 MHz Service, eligibility to reacquire the surrendered licenses through either auction or any secondary market transaction.[7]

4. In response to the rulings in the *218-219 MHz Order*, we received seven petitions for reconsideration, one opposition to the petitions, and no replies.[8] We note that we did not receive any petitions for reconsideration in response to our *sua sponte 218-219 MHz Recon Order*. After considering the arguments raised in the filings, we affirm the *218-219 MHz Order*, as modified by the *218-219 MHz Recon. Order*, in its entirety. Additionally, we respond to certain requests for clarification contained in the filings and we make technical modifications to the rules.

II. EXECUTIVE SUMMARY

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

- Affirm that the restructuring plan is limited to existing licensees that: (i) were current in installment payments as of March 16, 1998; (ii) were less than ninety days delinquent on the last payment due before March 16, 1998; or (iii) had properly filed grace period requests under the former installment payment rules;
- Decline to expand the options offered in the restructuring plan to include disaggregation;
- Decline to expand the options offered in the restructuring plan to include the return of the down payment;

31 U.S.C. § 3711 and 31 U.S.C. § 3720B. Under the Debt Collection Improvement Act no person may obtain any federal financial assistance if the person had an outstanding debt with any federal agency that is in a delinquent status, as determined under standards prescribed by the Secretary of Treasury. Pub. L. No. 104-134, § 3100(j)(1), 110 Stat. 1321 (1996), codified at 31 U.S.C. § 3720B. On March 1, 2000, the Department of Justice authorized the reduction of debt owed to the United States in accordance with the debt relief provisions of the *218-219 MHz Order*. Implementation Procedures For The Report And Order And Memorandum Opinion And Order Addressing The 218-219 MHz Services (Formerly Known As Interactive Video And Data Services (IVDS)), *Public Notice*, DA 00-900 (rel. April 20, 2000) ("*Implementation Procedures PN*").

[7] *218-219 MHz Recon.Order,* 14 FCC Rcd. 21078 (1999).

[8] A list of the parties that filed pleadings in response to the *218-219 MHz Order*, and the abbreviations used to refer to such parties, is attached as Appendix A. For the sake of consistency, we refer to filings as oppositions if they were filed at the time opposition were due, even if they are supportive of arguments raised in the petitions.

- Affirm that the twenty-five percent bidding credit granted to all winning small business bidders in the 1994 auction of this service will not be extended to all winning bidders in the 1994 auction of this service; and

- Affirm that the new Part 1 rules regarding installment payments will apply to licensees in this service.

III. BACKGROUND

6. The 218-219 MHz Service is a short distance communications service that allows one- and two-way communications for both common carrier and private operations on a fixed or mobile basis.[9] The *1992 Allocation Report and Order*[10] established the 218-219 MHz Service with a 500 kilohertz frequency segment for two licenses in each of the 734 cellular-defined service areas.[11]

7. We issued 218-219 MHz Service licenses by both random selection (lottery)[12] and competitive bidding (auction). In the Omnibus Budget Reconciliation Act of 1993 ("*1993 Budget Act*"), Congress authorized the Commission to award licenses for spectrum-based services by auction.[13] We subsequently determined that 218-219 MHz Service licenses should be awarded by competitive bidding and adopted rules and procedures for this licensing structure.[14] Using these procedures, we held the first

[9] 47 C.F.R. §§ 95.803(a), 95.807(a).

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

[11] *1992 Allocation Report and Order*, 7 FCC Rcd. at 1630-33. The 218.0-218.5 MHz block is frequency segment A, and the 218.5-219.0 MHz block is frequency segment B. 47 C.F.R. § 95.853(a). These service areas consist of 306 Metropolitan Statistical Areas (MSAs) and 428 Rural Service Areas (RSAs). Thus, a total of 1468 licenses — consisting of 612 MSA licenses and 856 RSA licenses — were allocated for this service.

[12] On September 15, 1993, eighteen 218-219 MHz Service system licenses were awarded by lottery. They were granted on March 28, 1994. Interactive Video and Data Service Licenses Granted, *Public Notice*, Mimeo No. 42412 (rel. Mar. 30, 1994).

[13] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, S 6001(a)(3), 107 Stat. 312 (enacted August 10, 1993); 47 U.S.C. § 309(j).

[14] Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd. 2348 (1994) ("*Competitive Bidding Second Report and Order*"), *on recon.*, *Second Memorandum Opinion and Order*, 9 FCC Rcd. 7245 (1994) (determining that 218-219 MHz Service licenses should be awarded through competitive bidding and prescribing certain general rules and procedures to be

auction in the 218-219 MHz Service on July 28 and 29, 1994 (Auction No. 2).[15] On January 18, 1995, February 28, 1995, and May 17, 1995, the Commission conditionally granted licenses to the winning bidders, subject to the bidder satisfying the terms of the auction rules, including down payment requirements.[16]

8. Under the Commission's competitive bidding rules in effect at the time of Auction No. 2, winning bidders that qualified as small businesses were allowed to pay twenty percent of their net bid(s) as a down payment and the remaining eighty percent in installments over the five-year term of the license(s), with interest-only payments for the first two years, and interest and principal payments amortized over the remaining three years.[17] The first interest-only payment, due March 31, 1995, was deferred to June 30, 1995, pursuant to administrative action by the Office of Managing Director.[18] Subsequently, the Wireless Telecommunications Bureau ("Bureau") further stayed the date for making the initial interest-only payments pending Commission resolution of licensees' substantive requests related to the payment requirements.[19] The Commission lifted the stay effective January 5, 1996, on which date licensees were required to make the interest-only payments back-due from March 31, 1995

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used for all auctionable services); Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Fourth Report and Order*, 9 FCC Rcd. 2330 (1994) ("*Competitive Bidding Fourth Report and Order*"), *on recon.*, *Sixth Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd. 19341 (1996) ("*Competitive Bidding Sixth M.O.&O.*") (establishing specific auction procedures for the 218-219 MHz Service, setting forth auction methodology and payment procedures, incorporating by reference many of the general rules and procedures set forth in the *Competitive Bidding Second Report and Order*, such as the installment payment and associated grace period rules, and establishing provisions such as installment payments to ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women, collectively -- "designated entities," are afforded a meaningful opportunity to participate in 218-219 MHz Service auctions).

[15] Announcing High Bidders for 594 Interactive Video and Data Service (IVDS) Licenses, *Public Notice*, Mimeo No. 44160 (rel. Aug. 2, 1994), *erratum*, *Public Notice*, Mimeo No. 44265 (rel. Aug. 9, 1994). A total of 594 MSA licenses were auctioned in the 298 MSAs that had not been licensed by lottery.

[16] *See* News Release, Interactive Video and Data Service (IVDS) Applications to be Granted January 18, 1995, Mimeo No. 51403 (rel. Dec. 29, 1994) (listing first group of grants); Interactive Video and Data Service (IVDS) Applications to be Granted February 28, 1995, *Public Notice*, 10 FCC Rcd. 3388 (1995) (listing second group of grants); Interactive Channel, Inc., Adjustment of Down Payment for Interactive Video and Data Service (IVDS) Licenses, *Order*, 10 FCC Rcd. 4522 (1995)(final license grant from Auction No. 2).

[17] 47 C.F.R. § 95.816(d)(3) (1994) (incorporating by reference 47 C.F.R. § 1.2110 (1994)).

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

[19] Interactive Video and Data Service (IVDS) Licensees, Request for Stay to Postpone Commencement of Installment Payment Program, *Order*, DA 95-2029, 11 FCC Rcd. 3031 (1995) (WTB) ("*WTB IVDS Order*").

and June 30, 1995.[20] Although the interest-only payments due September 30, 1995 and December 31, 1995 remained uncollected,[21] we denied requests to set back the installment payment date and the first principal and interest payments were due on March 31, 1997.[22]

9. The Commission, in the *1995 IVDS Omnibus Order,* and the Bureau in the *IVDS Grace Period PN*, cautioned licensees that, in accordance with section 1.2110(e)(4)(ii)[23] of our Rules, if they individually required financial assistance, they should request a three- or six-month grace period during the first ninety days following any missed installment payments.[24] The Bureau further cautioned licensees that if a licensee failed to make timely payments, absent the filing of a grace period request, the license would be in default.[25] The Commission's rules in effect at that time provided that any licensee whose installment payment was more than ninety days past due was in default, unless the licensee properly filed a grace period request.[26] Under the Commission's rules, licensees with properly filed grace period requests would not be held in default during the pendency of their requests and the interest accruing would be amortized by adding it to the other interest payments over the remaining term of the license.[27] Upon expiration of any grace period without successful resumption of payment, or upon default with no such request submitted, the license would cancel automatically.[28] The Commission amended the installment payment rules in 1998 to provide for two automatic grace periods of ninety

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[20] Interactive Video and Data Service (IVDS) Licensees, Various Requests by Auction Winners, *Order*, 11 FCC Rcd. 1282, 1284 note 23, 1285 ¶ 19 (1995) ("*1995 IVDS Omnibus Order*").

[21] In the *218-219 MHz Flex NPRM*, these interest payments were referred to as "Suspension Interest."

[22] *218-219 MHz Order*, 15 FCC Rcd. at 1505 ¶ 11.

[23] 47 C.F.R. § 1.2110(e)(4)(ii)(1994).

[24] *1995 IVDS Omnibus Order,* 11 FCC Rcd. at 1285 ¶ 19; Wireless Telecommunications Bureau Staff Clarifies "Grace Period" Rule for IVDS "Auction" Licensees Paying By Installment Payments, *Public Notice*, DA 95-1617, 10 FCC Rcd. 10724 (1995) (WTB) ("*IVDS Grace Period PN*"); *see also* Wireless Telecommunications Bureau Staff Responds to Questions About the Broadband PCS C Block Auction, *Public Notice*, Mimeo 54270 (1995)(clarified grace period rule in the context of Personal Communications Services auction)("*PCS Grace Period PN*").

[25] *IVDS Grace Period PN*, 10 FCC Rcd. 10724 ("IVDS Licensees that elect to pay for their license in installments will have their license conditioned upon full and timely performance of all installment payment obligations. The Commission's rules provide that a licensee will be deemed in default on its installment payments if it is more than 90 days delinquent in making a payment to the government.").

[26] 47 C.F.R. § 1.2110(e)(4)(ii) and (iii)(1994); *see also* 47 C.F.R. § 95.816(c)(6)(1994) for references to default (incorporating by reference 47 C.F.R. § 1.2104 (1994)).

[27] *218-219 MHz Order*, 15 FCC Rcd. at 1505 ¶ 12 (*citing* 47 C.F.R. § 1.2110(e)(4)(ii)(iii) (1994)).

[28] *Id.; see also IVDS Grace Period PN*, 10 FCC Rcd. 10724; *PCS Grace Period PN*, Mimeo 54270.

days, subject to late fees.[29] The 1998 amendment of the installment payment rules did not affect pending grace period requests filed by 218-219 MHz Service licensees.[30]

10. We have previously noted that deployment of the 218-219 MHz Service has not been successful despite previous steps we had taken to promote development of the 218-219 MHz Service.[31] Moreover, those licensees actually deploying services are providing service different than that originally envisioned when the service was established.[32] To promote full utilization of the service, we issued the 1998 *218-219 MHz Flex NPRM* that proposed changes to the 218-219 MHz Service licensing and technical rules.[33] The *218-219 MHz Flex NPRM* also suspended, for the pendency of this rulemaking, the late payment fee and automatic cancellation provisions of Section 1.2110(f)(4) of our Rules for licensees that were current in installment payments as of March 16, 1998; stayed decisions on grace period requests properly filed under the Part 1 rules previously in effect; and proposed payment restructuring options.[34] In the *218-219 MHz Order*, we substantially adopted our proposals.

11. Additionally, in the *218-219 MHz Order*, we eliminated the minority- and women- owned business credits previously provided in Auction No. 2. At that same time, to harmonize our treatment of licensees in this service with the treatment of licensees in other services, we granted a bidding credit ("Remedial Bidding Credit") to all winning bidders that met the small business qualifications for Auction No. 2.[35]

12. In the *218-219 MHz Order*, we determined that it would serve the public interest to provide a variety of relief mechanisms to assist current 218-219 MHz Service licensees that were experiencing difficulties in meeting their financial obligations under the installment payment plan. We stated our belief that the mechanisms adopted afforded relief to current licensees while at the same time preserving

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[29] *Part 1 Third Report and Order*, 13 FCC Rcd. at 436; *see also* 47 C.F.R. § 1.2110(f)(4)(ii)(iii) (1998).

[30] *Part 1 Third Report and Order*, 13 FCC. Rcd. at 441-442 ¶ 113; *218-219 MHz Flex Order*, 13 FCC Rcd. at 19072 ¶ 30.

[31] *218-219 MHz Order*, 15 FCC Rcd. at 1505-1506 ¶ 13.

[32] *218-219 MHz Order*, 15 FCC Rcd. at 1506, note. 39, ¶ 13 (*citing* Community Teleplay's contention that after being unable to develop interactive television applications, it instead focused on wireless data applications for the 218-219 MHz service); *see also* Celtronix Telemetry, Inc., Application for Private Land Mobile Radio Services licenses in the 218-219 MHz Band and Request for Waiver of Sections 90.127(b) and 90.155(a) of the Commission's Rules, *Order*, DA. 00-4000 (2000).

[33] *218-219 MHz Flex NPRM*, 13 FCC Rcd. 19064.

[34] *218-219 MHz Flex Order, MO&O, and NPRM*, 13 FCC Rcd. at 19066 & 19073.

[35] *218-219 MHz Order*, 15 FCC Rcd. at 1532-1534 ¶¶ 59-63.

the integrity of the auction process.[36] We also recognized that for licensees whose licenses had cancelled, enforcement of the payment obligations would be unduly harsh in light of the totality of the circumstances.[37] Thus, we recommended that those entities whose licenses had cancelled should receive debt forgiveness for their outstanding principal balance and accrued interest owed.[38] We continue to believe that the approach adopted in the *218-219 MHz Order* best serves the public interest. Thus, we affirm the *218-219 MHz Order*, as modified by the *218-219 MHz Reconsideration Order*. Below we discuss the particular issues raised by the petitioners, clarify certain points in the *218-219 MHz Order*, and make technical modifications to the rules.

IV. DISCUSSION

13. The petitioners have made a number of requests that fall into four general categories. The first category includes requests to change the options available under the restructuring plan. The second category includes requests to expand the definition of entities eligible to participate in the restructuring program. The third category consists of miscellaneous requests relating to the restructuring plan. The fourth category consists of requests to expand the remedial bidding credit to all current and former licensees.

A. Options Available in the Restructuring Plan

i. Disaggregation

14. Background. As noted above, the restructuring plan offers Eligible Licensees three options: (i) Reamortization and Resumption of Payments; (ii) Amnesty; or (iii) Prepayment (Prepayment-Retain or Prepayment-Return).[39] Disaggregation[40] was not proposed or adopted as a restructuring option.

15. Originally, disaggregation was not allowed in this service. However, in the *218-219 MHz Flex Order*, we proposed allowing spectrum aggregation, disaggregation, and partitioning as part of our overall effort to maximize the efficient and effective use of the 218-219 MHz frequency band.[41] In doing

[36] *218-219 MHz Order,* 15 FCC Rcd. at 1520-1521 ¶¶ 37-38.

[37] *218-219 MHz Order,* 15 FCC Rcd. at 1520-1521 ¶ 38.

[38] *Id.*; *See* note 6.

[39] *See generally 218-219 MHz Order*, 15 FCC Rcd. at 1518-1529 ¶¶ 33-54.

[40] Disaggregation is the assignment of discrete portions or blocks of spectrum licenses to a qualifying entity. Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Service Licensees, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 96-474, WT Docket No. 96-148, 11 FCC Rcd. 21831, 21833, n. 2 (1996) ("*Partitioning Report and Order*")

[41] *218-219 MHz Flex Order*, 13 FCC Rcd. at 19066 ¶¶ 2, 50, 53.

so, we recognized that we have already adopted, and proposed adopting, disaggregation, and partitioning for a number of services.[42] The proposal in *218-219 MHz Flex Order* to allow spectrum aggregation – in which a licensee could hold both 500 kHz block licenses in a 218-219 MHz Service market – received widespread support.[43] Few commenters addressed disaggregation specifically. Those commenters that supported disaggregation did so based upon the general principle that regulatory parity with other wireless services would benefit licensees. However, one commenter believed that disaggregation would be impractical for such a small amount of spectrum,[44] and another suggested that smaller amounts of spectrum would lower entry barriers for small businesses, but did not discuss what applications, if any, could be supported in the disaggregated spectrum.[45]

16. In adopting partitioning and disaggregation in the 218-219 MHz Service, we concluded that the benefits identified in the *Partitioning Report and Order*, which we had extended to other wireless services, would likewise benefit the 218-219 MHz Service. In doing so, we noted that partitioning the geographic area of a license might provide sufficient flexibility to allow entry into the market by entities that lack sufficient resources to participate in the original auction.[46]

17. Discussion. Under Celtronix's proposal, an Eligible Licensee would elect to retain a portion of the spectrum for a given market and return the remainder to the Commission.[47] This procedure, Celtronix suggests, would encourage parties to use spectrum more efficiently and speed service to unserved and underserved areas. Celtronix says it could provide service on 250 kHz – one half the

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[42] *218-219 MHz Flex Order*, 13 FCC Rcd. at 19092 ¶¶ 51, 52; *see also 218-219 MHz Order*, 15 FCC Rcd. at 1546-1547 ¶¶ 92-94; *Partitioning Report and Order*, 11 FCC Rcd. 21831; Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by Private Land Mobile Radio Service, *Fourth Report and Order*, FCC 97-225, PR Docket No. 89-552, 12 FCC Rcd. 13453 (1997); Rule Making 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 Rues and Policies for Local Multipoint Distribution Service and Fixed Satellite Services, *Fourth Report and Order*, FCC 98-77, CC Docket No. 92-297, 13 FCC Rcd. 11655 (1998).

[43] *See, e.g.*, comments of ITV, Inc. and IVDS Affiliates, LLC at 13 ("The short answer here is that the current restriction could well have been part of the problem with the development of [the 218-219 MHz] service."); *see also* comments of Commercial Reality St. Pete, Inc. at 5; Dispatch Interactive Television Company at 5; and reply comments of Kingdon Hughes at 8.

[44] 218-219 MHz Licensees comments at 14-15 ("[T]he 218-219 MHz Licensees support the Commission's proposal to allow partitioning on the same terms as other wireless licensees, but believes that disaggregation is impractical for such a small amount of spectrum.")

[45] *See, e.g.*, comments of Gary Petty.

[46] We did not make the same conclusion with respect to disaggregation. *218-219 MHz Order*, 15 FCC Rcd. at 1546-1547 ¶ 94.

[47] Petition of Celtronix at 3.

bandwidth it is currently licensed to use,[48] and notes that 220 MHz SMR frequencies are licensed in blocks smaller than 500 kHz.

18. Although Celtronix's filings at an earlier stage of the proceeding supported a change in the rules to allow disaggregation, it first proposed disaggregation as a restructuring option in its petition for reconsideration.[49] No other commenters or petitioners requested disaggregation as a restructuring option and, as noted above, several actually claimed that the existing 500 kHz blocks are insufficiently small for licensees to develop innovative services that will allow them to compete in the marketplace or to provide optimal interference protection.[50]

19. We believe that we have provided ample flexibility in the restructuring options offered. We recognize these options may not suit every licensee's particular business plan. We decline to modify the restructuring options without a substantial record demonstrating a broad-based need or desire for such a change. Based on the minimal record – as well as the outright skepticism of some commenters that channel blocks smaller than 500 kHz are practical for innovative uses – we are doubtful that service will be developed in the portion of a channel block that would remain after a licensee elects disaggregation as a restructuring option. However, if, in the private marketplace, a licensee (such as Celtronix) and a third party can identify 218-219 MHz Service applications for which disaggregated spectrum is practical, our rules allow and we would encourage such a transaction because it would promote the rapid development of an entire 500 kHz channel block.

20. Finally, we distinguish the 218-219 MHz spectrum from the 220 MHz SMR frequencies identified by Celtronix. Although Celtronix is correct in pointing out that 220 MHz SMR frequencies are licensed in blocks smaller than 500 kHz, 218-219 MHz Service licensees, unlike 220 MHz Service licensees, have TV Channel 13 protection requirements. Because disaggregated spectrum would provide a licensee with more limited interference protection options, we are even less confident that the marketplace would support the auction of disaggregated spectrum blocks in the 218-219 MHz Service. Accordingly, we decline to adopt Celtronix's proposal.

ii. Refunds of Down Payments

21. Background. The *218-219 MHz Order* allows for refunds of payments in three instances. First, Eligible Licensees that elect Amnesty will receive a refund of installment payments. Second, Ineligible Entities will receive a refund of installment payments. Third, Eligible Licensees that elect Prepayment, depending upon the number of licenses they return, might be entitled to a refund of excess

[48] Petition of Celtronix at 2.

[49] *Compare* Comments of Community Teleplay, Inc. (Celtronix' previous name) and Reply Comments of Community Teleplay *with* Petition of Celtronix.

[50] Comments of IVDS/RLV, L.L.C. and Friends of IVDS, L.L.C. at 2.

installment payments. In the *218-219 MHz Order*, we specifically declined to provide for the refunds of down payments.[51] Two petitioners, Celtronix and Houston, request that we refund down payments.[52] Specifically, Celtronix requests that we refund the down payments of those Eligible Licensees electing Amnesty. Houston alternatively suggests that we provide a credit equal to the down payments that may be used in future auctions. In essence, both petitioners are requesting that the Commission completely unwind the transaction and provide a full refund.

22. Discussion. We decline to adopt the proposal to refund down payments as part of the restructuring plan as it would place the Eligible Licensees electing Amnesty in virtually the same position they would have occupied had the auction never taken place. In support of its proposal, Celtronix argues that it is inconsistent to allow Eligible Licensees that elect Prepayment-Return to get an 85 percent credit on the down payments for the returned license, when Eligible Licensees that elect Amnesty are not provided with a full refund on the down payments.[53] Houston supports its proposal by alleging that investors in the service "were victimized by slick promoters."[54]

23. Providing a refund of down payments to those electing the Amnesty option, without an adequate counterbalancing public interest benefit, would undermine the integrity of the auction process by relieving participants of even the most basic obligation of their participation.[55] Such an approach would not only be unfair to the other participants in the original auction, but it would encourage speculation in future auctions. In the *218-219 MHz Order*, we considered and rejected a request to return a portion of the down payment.[56] Our decision to allow licensees that elect Prepayment-Return to get an 85 percent credit on the down payment is justified by the public interest benefit of speeding service to the public. Presumably, only a licensees that reasonably believes it has access to adequate sources of capital and a viable business plan will elect Prepayment-Return. Presumably, these licenses will provide service

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[51] Except to the extent the remedial bidding credit is viewed as a refund.

[52] Petition of Celtronix at 4; Petition of Houston at 3.

[53] Petition of Celtronix at 4.

[54] Petition of Houston at 3.

[55] *218-219 MHz Order*, 15 FCC Rcd. at 1527 ¶ 49; *see also* Amendment of the Commission's Rules Regarding Installment Payment Financing of Personal Communications (PCS) Licensees, WT Docket No. 97-82, *Second Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd. 16436, 16462-63, ¶ 55 (1997) ("*C Block Second Report and Order*"); and Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT docket No. 97-82, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd. 8345, 8359-8360 ¶ 36-37 (1998) ("*C Block First Reconsideration Order*") (collectively, the "*C Block Restructuring Orders*") (discussing the rational against refunding down payments in the context of the C Block restructuring plan).

[56] *218-219 MHz Order*, 15 FCC Rcd. at 1527 ¶49.

to the public earlier then licenses from a subsequent auction. Thus, this option speeds service to the public. However, no such public interest benefit would accrue from providing a full refund to Eligible Licensees electing Amnesty. While we are sympathetic to Houston's allegations regarding "slick promoters," we note that the Commission's present restructuring plan offers significant relief and that the Commission is not responsible for the actions of third parties. Accordingly, as the public interest is not served by giving licensees a complete refund, we reject petitioners' request.

B. Entities Eligible to Participate in the Restructuring Plan.

i. Definition of Eligible Licensees

24. Background. As noted above, the *218-219 MHz Order* adopted, among other things, a restructuring plan for existing licensees that participated in the installment payment plan and that: (i) were current in installment payments as of March 16, 1998; (ii) were less than ninety days delinquent on the last payment due before March 16, 1998; or (iii) had properly filed grace period requests under the former installment payment rules ("Eligible Licensees").[57] Other relief has been extended to Ineligible Entities.[58]

25. Discussion. One petitioner, Vista, requests that we modify the definition of Eligible Licensees. In support of its request, Vista argues that it is inequitable to allow licensees that had made no installment payments, but had filed a timely grace period request to retain their license, while refusing to permit licensees that made "substantial payments" to retain their licenses.[59] Vista also argues that the payment instructions provided by the Commission were conflicting, thus justifying a licensee's failure to make payments on its license or justifying a licensees failure to timely file a grace period request.[60] Thus, Vista requests that the standard be modified so that the definition of Eligible Licensees also includes those licensees that have made "substantial payments" as of September 7, 1999, the date that the *218-219 MHz Order* was adopted.[61] In the alternative, Vista requests that former licensees be able to make a retroactive payment sufficient to be deemed "current as of March 16, 1998."[62] As explained below, we reject these arguments and conclude that the approach we have adopted in the *218-219 MHz Order* is equitable and is consistent with the treatment afforded licensees in other services. Accordingly, we decline to change the definition of Eligible Licensees.

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[57] *See 218-219 MHz Order,* 15 FCC Rcd. at 1520 ¶ 37.

[58] *218-219 MHz Order*, 15 FCC Rcd. at 1520-1521 ¶ 38.

[59] Petition of Vista at 3.

[60] Petition of Vista at 2-4.

[61] Petition of Vista at 5.

[62] Petition of Vista at 6.

26. In the *218-219 MHz Order*, the Commission attempted to balance the need to maintain the integrity of the auction system, with the desire to assist licensees that might be experiencing financial difficulties. In doing so, we recognized the unique factual history of the 218-219 MHz Service.[63] At the same time, we looked to the treatment afforded licensees in other services. Our decision to allow licensees that were current in installment payments (*i.e.* less than 90 days delinquent) as of March 16, 1998 to retain their licenses recognized that these licensees complied with our rules and attempted to fulfill their obligations to the Commission. Similarly, our decision to allow licensees that had timely filed grace period requests to retain their licenses stems from the licensees' ability to recognize their obligation to the Commission and take appropriate steps under our rules to request relief from their obligations in a timely manner. Allowing licensees that had timely filed grace period requests to retain their licenses is also consistent with the treatment afforded licensees in other services under the *Part 1 Third Report and Order*.[64]

27. The test proposed by Vista is inherently subjective and would be unfair to licensees in other services. Administering such a subjective test would be difficult and would invite challenge on the basis of being arbitrary. Further, allowing licensees that failed to abide by the Commission's rules, but had made "substantial payments" to retain their licenses is inconsistent with the Commission's requirement that a licensee make full and timely payments. From such a rule current licensees, in this or other services, might conclude that no consequences would flow from failure to make full and timely payment. Accordingly, we decline to adopt the "substantial payments" test advocated by Vista.

28. Additionally, we also reject Vista's argument that myriad factors created substantial confusion and uncertainty about licensees' payment obligations.[65] Although the date for the initial payment was postponed for a period of time, even the most favorable reading of the Commission's orders and letters to licensees would not lead a licensee to believe that it was excused from its obligation to make payments, or that it did not need to file a grace period request if it determined that it could not make timely payments. To the extent there was any confusion as to the precise date a particular payment was due, the Commission took that into account by defining Eligible Licensees as existing licensees that had participated in the installment payment program and "were current in installment payments as of March 16, 1998." Thus, Vista has failed to provide a reasonable explanation of a licensees' failure to either make payments or file a timely grace period request.

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[63] *218-219 MHz Order*, 15 FCC Rcd. at 1505-1506, 1520 ¶¶ 13, 14, 38.

[64] At the time the *Part 1 Third Report and Order* was adopted, there were grace period requests currently pending before the Commission. In order to avoid disruption in the services, the Commission determined that licensees would not be "deemed to be in default on these licenses until such time as the Bureau issues a decision on these grace period requests." *Part 1 Third Report and Order*, 13 FCC. Rcd. at 441-442 ¶ 113.

[65] Petition of Vista at 4-5.

29. Finally, we decline to adopt Vista's request that licensees be able to make retroactive payments sufficient to be deemed "current as of March 16, 1998." Vista's suggestion would undermine the Commission's rules that timely and full payment are a condition of retaining the license. In light of the ample notice provided licensees regarding the payment rules,[66] and the generous provisions for Ineligible Entities provided in the *218-219 MHz Order*, Vista's suggestion at this late date that it be allowed to make retroactive payments is unsupportable. Thus, we reject Vista's proposal to allow former licensees to make retroactive payments.

ii. Paid in Full Licensees are not Eligible to Participate in the Restructuring Plan.

30. Background. The restructuring options in the *218-219 MHz Order* are limited to those entities that met the small business qualifications of the auction, availed themselves of the installment payment plan, and have not paid in full.[67] Two petitioners, Hughes and Hot Topics, have requested that all licensees be allowed to turn in a license and receive a refund.[68]

31. Discussion. We decline to adopt the petitioners' request as no public policy interest would be served by allowing all licensees to return their licenses and receive a refund. In support of its proposal, Hughes argues that the Commission has insufficient evidence before it to conclude that installment payment licensees were experiencing financial difficulties, and that alternatively, some licensees may have simply chosen to walk away from their financial responsibilities.[69] Thus, Hughes concludes that the Commission's action is arbitrary.[70] In the *218-219 MHz Order*, we have previously rejected Hughes arguments.[71] Hot Topics contends that as the technology for the service never developed, a refund to all licensees is appropriate.[72]

32. For licensees utilizing installment payments, we offered a combination of debt restructuring for those entities that wish to retain their licenses and debt forgiveness to a limited number of current and former licensees. The relief is similar to that offered in the *C Block Restructuring Orders*, where the Commission chose to offer limited relief to licensees participating in the installment payment program,

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[66] 47 C.F.R. § 1.2110(e)(4)(ii)(1994); *IVDS Grace Period PN*, 10 FCC Rcd. 10724; *see also 1995 IVDS Omnibus Order*, 11 FCC Rcd. at 1285 ¶ 19.

[67] *218-219 MHz Order*, 15 FCC Rcd. at 1520, 1521 ¶¶ 37, 39.

[68] Petition of Hughes at 1-2; Petition of Hot Topics at 1.

[69] Petition of Hughes at 2.

[70] Petition of Hughes at 2.

[71] *218-219 MHz Order*, 15 FCC Rcd. at 1521 ¶ 39.

[72] Petition of Hot Topics at 1.

but not to those that paid in full.[73] The restructuring plan fulfills the public policy goal of ensuring that the entity best qualified to provide service holds the license, and allows the market to determine the highest use for the license. However, where a licensee has paid in full for the license, nothing would prohibit the licensee from selling the license on the open market. Neither Hughes nor Hot Topics has established that a public policy goal would be fulfilled by unwinding the auction. By contrast, we risk considerable harm in adopting the proposal as it might create the false expectation in bidders in future auctions in this, or other services, that the Commission would compensate a licensee for any perceived loss in the value of its license. The Commission does not ensure the success of a service or the value of a license in the secondary market. Although, in a secondary market transaction, the licensee might receive less than the amount paid for the license, no public policy concerns would be raised by such a loss. As mandated by Section 309(j) of the Communications Act, the Commission established a competitive bidding process that ensures that licenses are awarded to those that value them most highly as indicated by submitting the highest bid.[74] To grant petitioners' request would encourage bidders to engage in insincere bidding with the expectation that the Commission would ensure against market difficulties encountered after license award.

33. Finally, contrary to Hughes's suggestion, the Commission has considered evidence of the unique financial difficulties experienced by the 218-219 MHz Service licensees participating in the installment payment plan. For example, to our knowledge at least two licensees have filed for bankruptcy.[75] Additionally, in the comments filed by the licensees in response to the *218-219 MHz Flex Order*, and in the various grace period requests received by the Commission, licensees alleged that they have encountered financial difficulties particularly in raising capital. Accordingly, for the reasons discussed above, we decline to allow licenses that have paid in full to participate in the restructuring plan.

C. Miscellaneous Requests Relating to the Restructuring Plan

i. Grace Periods.

34. In the *Part 1 Third Report and Order*, we modified the installment payment grace period and late payment fee provisions of our Rules as applied to all licensees participating in an installment payment plan at that time.[76] One petitioner, Celtronix, proposes to exempt 218-219 MHz Service

[73] *See C Block Second Report and Order*, 12 FCC Rcd. 16436, at 16450 (1997); *C Block First Reconsideration Order*, 13 FCC Rcd. at 8358-60.

[74] 47 U.S.C. § 309(j).

[75] These licenses are IVDS Interactive Acquisition Partners, Case No. SV 95-19539 AG (Bankr. C.D.Cal.), and P.A.W. Inc., Case No. 96-1011 (Bankr. N.D. Ohio); *see also* Comments of MKS at para 7, page 3.

[76] *Part 1 Third Report and Order*, 13 FCC Rcd. at 434-42 ¶¶ 103-113.

licensees from the modified installment payment grace period and late payment fee provisions of the new Part 1 rules. Celtronix's petition in this proceeding offers the same argument that it previously offered in its petition for reconsideration of the *Part 1 Third Report and Order*. Specifically, Celtronix argues that applying these rules to 218-219 MHz Service licensees constitutes impermissible retroactive rulemaking.[77] We rejected this argument in the *Order on Reconsideration of the Part 1 Third Report and Order*[78] and concluded that our new Part 1 rules do not violate the prohibitions on retroactivity under the Administrative Procedure Act ("APA").[79] We see no reason to revist this issue in this proceeding.

ii. Notes and Security Agreements.

35. Background. In the *218-219 MHz NPRM* we indicated that "[e]very licensee electing to continue making installment payments would be required to execute appropriate loan documents, that may include a note and security agreement, as a condition of reamortization of its installment payment plan under the revised ten-year term, pursuant to Section 1.2110(f)(3) of the Commission's rules."[80] In the *218-219 MHz Order,* we indicated that Eligible Licensees electing resumption "may be required to execute loan documents."[81] The *Implementation Procedures PN*, in turn, indicated that those Eligible Licensees electing Reamortization/Resumption would be "required to execute loan documents in the form of an Installment Payment Acknowledgement."[82] In general, the acknowledgement contains a restatement of the amount of the debt owed, the payment terms under the *218-219 MHz Order*, and references other Commission rules and regulations related to the payment of installment debt. The *Implementation Procedures PN* also notes that "licensees may also be required to execute a Uniform Commercial Code financing statement (UCC-1)."[83] The *Implementation Procedures PN* further informs Eligible Licensees that failure to fully and timely execute and deliver the requisite loan document(s) as of ten business days from receipt will result in the automatic cancellation of the license.[84]

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[77] Petition of Celtronix at 5.

[78] *Order on Reconsideration of the Part 1 Third Report and Order*, ¶¶ 18, 20-22.

[79] 5 U.S.C. § 701 *et. seq.*

[80] *218-219 MHz Order,* 15 FCC Rcd. at 1521 ¶ 39.

[81] *218-219 MHz Order*, 15 FCC Rcd. at 1524-1525 ¶ 44.

[82] *Implementation Procedures PN*, 15 FCC Rcd. 7329 (2000).

[83] *Id.*

[84] *Id.*

36. Discussion. One petitioner, In-Sync, argues that requiring loan documents, specifically notes and security agreements, is unnecessary and would constitute a retroactive rulemaking.[85] We reject this argument. As discussed in the *Implementation Procedures PN*, the Bureau has determined not to require notes and security agreements, but will require the execution of other loan documents that evidence that the licensee understands and agrees to the restructured financing terms. Those licensees that do not wish to execute the required documents may elect Amnesty or elect Prepayment.[86]

37. The APA's definition of "rule" provides that a rule "means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedures, or practice requirements of an agency . . ."[87] By definition, a rule has legal consequences only for the future.[88] Thus, absent explicit statutory authority to the contrary, the APA precludes an agency from issuing rules that alter the past legal consequences of past actions. The requirement that Eligible Licensees execute loan documents does not violate this proscription. We have not gone back to past transactions and imposed penalties for conduct that was previously allowed. Rather, we are establishing prospective procedures to allow licensees to continue to meet their previously established payment obligation to the Commission. The mere fact that these rules deal with past transactions does not constitute unlawful retroactive rulemaking under the APA.[89] Further, the Bureau's decision to require the execution of loan documents by Eligible Licensees that elect Reamortization and Resumption of Payments is based upon the reasonable concern that the

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[85] Petition of In-Sync at 4-5.

[86] Under the terms of the original loans, the licensee was obligated to have paid off the balance of the loan by five years from the grant date. Thus, licensees granted licenses on January 18, 1995 should have paid off the loan by January 18, 2000, licensees granted licenses on February 28, 1995 should have paid off the loan by February 28, 2000, and licensees granted licenses on May 17, 1995 should have paid off the loan by May 17, 2000. If an Eligible Licensee strongly disagrees with executing new loan documents, it is always at liberty to pay off its original obligation in full immediately.

[87] 5 U.S.C. § 551(4).

[88] *Retail, Wholesale and Department Store Union, AFL-CIO v. NLRB*, 466 F.2d 380, 388 (D.C. Cir.1972); *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 216 (1988)(concurrence).

[89] *See e.g.*, *Bowen*, 488 U.S. at 219-220, where Justice Scalia gave the following illustration of a regulation that was not impermissibly retroactive under the APA:

> The Treasury Department might prescribe, for example, that for purposes of assessing future income tax liability, income from certain trusts that has previously been considered nontaxable will be taxable – whether those trusts were established before or after the effective date of the regulation. That is not retroactivity in the sense at issue here, *i.e.*, in the sense of altering the past legal consequences of past actions. Rather, it is what has been characterized as "secondary" . . . A rule with exclusively future effect . . . . can unquestionably affect past transactions (rendering previously established trusts less desirable in the future), but it does not for that reason cease to be a rule under the APA.

Government's interests are adequately protected in the event of default. Accordingly, we agree with the approach adopted by the Bureau and reject petitioner's request.

iii. Interest Calculation.

38. Background. In the *218-219 MHz Flex Order*, the Commission suspended the automatic cancellation rules.[90] The effect of this was not to suspend the obligation of licensees to make payments; rather it merely suspended the consequences of failing to make payment. As the underlying debt remained, a licensee was still permitted to make payments. In fact, some licensees have continued to make payments during the suspension period. However, licensees that failed to make payments did not face automatic cancellation.

39. Discussion. Two petitioners, In-Sync and Celtronix, argue that interest should not have continued to accrue during the suspension period.[91] In-Sync argues that as the *218-219 MHz Flex Order* suspended the obligation to make the payments as of March 1998, interest should have not have continued to accrue during the period since March 1998.[92] Additionally, both In-Sync and Celtronix argue that the *218-219 MHz Order* is unclear and, accordingly, interest should not be calculated for the suspension period.[93] Specifically, Celtronix points to the fact that in the *218-219 MHz Order* the Commission stated that it will capitalize all "accrued and unpaid" interest into the principal amount as of the election date.[94] However, in section 95.816(c)[95] of our Rules, we stated that "all unpaid interest" from the grant date through the election date will be capitalized into the principal. From this, Celtronix concludes that we did not intend interest to accrue. Both petitioners are mistaken. As the underlying debt remained, the interest continued to accrue. The fact that the Commission relieved the licensees of one consequence of failing to make timely payments does not mean that the Commission intended to also relieve the licensees of all the consequences of failing to make payments. Further, given the sums involved, for at least some licensees, it would require approval by the Department of Justice to forgive the interest incurred during the suspension period.[96] We note that the licensees had the use of the licenses during this period of time. As the petitioners have failed to provide any basis to forgive the

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[90] *218-219 MHz Flex Order,* 13 FCC Rcd. at 19098-19099 ¶ 68. This suspension period took effect on March 16, 1998 and will continue until after the Election Date.

[91] Petition of In-Sync at 7; Petition of Celtronix at 5.

[92] Petition of In-Sync at 7.

[93] Petition of Celtronix at 5; Petition of In-Sync at 6-7.

[94] Petition of Celtronix at 6, In-Sync at 6-7.

[95] 47 C.F.R. § 95.816(c).

[96] *See* 31 U.S.C. §§ 3711, 3720B.

interest, the Commission is not inclined to request debt forgiveness on this issue. Accordingly, petitioners' request is rejected.

D. Remedial Bidding Credit

40. Background. Pursuant to statutory mandate,[97] our auction rules have included provisions to encourage participation by minority- and women-owned entities, small businesses, and rural telephone companies.[98] Thus, when the auction for what is now the 218-219 MHz Service was conducted on July 28 and 29, 1994, (Auction No. 2), Part 95 of the Commission's rules included provisions that allowed small businesses to pay eighty percent of their winning bids in installments.[99] Businesses owned by minority- and or women-owned entities were also entitled to a twenty-five percent bidding credit that could be applied to one of the two licenses available in each market.[100] Bidders that were both small businesses and minority- and or women-owned entities received bidding credits and were allowed to participate in the installment plan.[101]

41. At the time our rules were adopted for Auction No. 2, the standard of review applied to federal programs designed to enhance opportunities for racial minorities and women was an "intermediate scrutiny standard."[102] In June 1995, almost a year after the conclusion of Auction No. 2, the U.S. Supreme Court decided *Adarand Constructors v. Pena*, holding that racial classifications are

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[97] 47 U.S.C. § 309(j); 1993 Budget Act, Congress enjoined the Commission to ensure that businesses owned by minorities and women are given the opportunities to participate in the provision of spectrum based services and in this regard, directed us to consider the use of among other things bidding credits. *See* 47 U.S.C. § 309(j)(4)(D). Specifically, the statute provides that in establishing eligibility criteria and bidding methodologies the Commission shall "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."

[98] *See* 47 C.F.R. §§ 1.2110, 95.816(d)(3); *Competitive Bidding Fourth Report and Order*, 9 FCC Rcd. 2330 at ¶¶ 34-35 (IVDS).

[99] 47 C.F.R. § 95.816(d)(3) (1994)(incorporating by reference 47 C.F.R. § 1.2110(1994)).

[100] 47 C.F.R. § 95.816(d)(1); *see also Competitive Bidding Second Report and Order*, 9 FCC Rcd. at 2391-2392 ¶¶ 242-243 (describing the general designated entity bidding credit); *Competitive Bidding Fourth Report and Order*, 9 FCC Rcd. at 2336 ¶ 36 (218-219 MHz rules).

[101] In fact, all minority- and women-owned entities that received a bidding credit also participated in the installment payment plan.

[102] *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 564-65 (1990)(". . . benign race-conscious measures mandated by Congress . . . are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.").

subject to "strict scrutiny" and will be found unconstitutional unless "narrowly tailored" and in furtherance of "compelling governmental interests."[103] The following term, the Court decided in *United States v. Virginia*, that to successfully defend a gender based program, the government must demonstrate an "exceedingly persuasive justification" for the program.[104] As explained in the *218-219 MHz Order*, after Auction No. 2, Graceba and others raised constitutional questions concerning the bidding credits used in the 218-219 MHz service.[105] In addition, the Commission, in the *Competitive Bidding Sixth Report and Order*, and the *Competitive Bidding Sixth Memorandum Opinion and Order*, questioned whether the record was sufficiently developed to support the race and gender-based provisions of the C block competitive bidding rules and the competitive bidding rules of other services under a strict scrutiny standard.[106] In order to avoid delay of two scheduled auctions, the Commission decided to eliminate the race and gender based provisions for those auctions and instead employ a similar provision for small businesses.[107] However, in light of the Commission's statutory mandate, the Commission commenced a series of studies to examine the minority and female ownership of telecommunications and electronic

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[103] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

[104] *United States v. Commonwealth of Virginia (VMI)*, 518 U.S. 515 (1996).

[105] *218-219 MHz Order*, 15 FCC Rcd. at 1503 ¶ 9. Graceba Total Communications, Inc. (Graceba) – a winning bidder on two markets – filed two petitions challenging the 218-219 MHz Service auction methodology as artificially inflating prices and questioned the constitutionality of the bidding credits that were awarded in the auction. Graceba did not qualify for a bidding credit. Graceba requested a twenty-five percent reduction in its total bid amount. In December 1995, the Commission denied Graceba's petitions; *see* Interactive Video and Data Service (IVDS) Licenses, *Order*, 11 FCC Rcd. 1282 (1995). Upon appeal by Graceba, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) remanded the constitutional issue to the Commission for further consideration. *Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038 (D.C. Cir. 1997). In the course of Graceba's litigation, two other parties – Community Teleplay, Inc. (Community) and the IVDS Coalition (Coalition) – intervened in support of Graceba's constitutional arguments. Graceba subsequently filed a petition for review of the *218-219 MHz Order* with the D.C. Circuit. Before the appellate court, Graceba principally sought a 25 percent bidding credit over and above the 25 percent bidding credit afforded in the *218-219 MHz Order*. In addition, Graceba sought attorneys' fees under a variety of theories including the Equal Access to Justice Act, 28 U. S.C. § 2412, 5 U.S.C. § 504, the fee shifting provisions of 42 U.S.C. § 1982, and the common fund doctrine. In a memorandum opinion denying the petition for review, the appellate court rejected all of Graceba's arguments, including its request for an additional bidding credit and its request for attorneys' fees. *Graceba Total Communications, Inc. v. FCC*, No. 99-1437 (D.C. Cir. Dec. 5, 2000).

[106] Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Sixth Report and Order, 11 FCC Rcd 136, 143 (1995); *Erratum*, 11 FCC Rcd. 5433 (1995) ("*Competitive Bidding Sixth Report and Order*"); *Competitive Bidding Sixth M.O. &O.*, 11 FCC Rcd. at 19367 ¶ 62 (tentatively concluding that the record was insufficient to withstand strict scrutiny); *see also* Implementation Of Section 309(j) Of The Communications Act - Competitive Bidding, *Tenth Report and Order*, PP Docket No. 93-253, FCC 96-447, 11 FCC Rcd. 19,974 ¶ 18 (1996) (changes IVDS rules for the second auction in the service).

[107] *Competitive Bidding Sixth M.O. &O.*, 11 FCC Rcd. at 19369 ¶ 67 (rules for the then planned second IVDS auction); *Competitive Bidding Sixth Report and Order*, 11 FCC Rcd. 136, 161, 167 ¶¶ 1, 47, 59 (C Block rules).

media facilities in the Unites States.[108] Despite these efforts, in establishing rules for auctions in other services, we have continued to note that the record remains insufficient to support any racial or gender based provision under the standard established by the Supreme Court in *Adarand* and *VMI*.[109]

42. In the *218-219 MHz Order*, consistent with the modifications made to the rules governing the auction of licenses in other services, we eliminated the minority- and women-owned business bidding credit previously afforded licensees in the first 218-219 MHz auction. Thus, all minority- and women-owned businesses lost the bidding credit they had previously received in the original auction in the 218-219 MHz Service conducted in 1994. At the same time, recognizing that we have provided bidding credits in other services to small businesses, we determined to grant a twenty-five percent bidding credit to the accounts of every winning bidder in the 1994 auction "that met the small business qualifications for that auction."[110]

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[108] Studies currently underway by the Commission's Office of Communications Business Opportunities ("OCBO") include demographic reviews of the sale and transfer of wireless facilities and broadcast stations.

[109] *See e.g.,* Service Rules For The 746-764 And 776-794 MHz Bands, And Revisions To Part 27 Of The Commission's Rules, *First Report and Order*, WT Docket No. 99-168, 15 FCC Rcd. 476, 531 ¶ 136 (2000); Service Rules For The 746-764 And 776-794 MHz Bands, And Revisions To Part 27 Of The Commission's Rules, *Second Report And Order,* WT Docket No. 99-168, 2000 WL 263689, 15 FCC Rcd. 5299, 5345 ¶ 110 (2000); Amendment Of The Commission's Rules Regarding Multiple Address Systems, *Report And Order*, WT Docket No. 97-81, FCC 99-415, 2000 WL 35680 ¶ 126 (2000); 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, *Memorandum Opinion And Order On Reconsideration*, PP Docket No. 93-253, FCC 99-270, 14 FCC Rcd. 17556, 17597 ¶ 86 (1999); Amendment Of Part 90 Of The Commission's Rules To Facilitate Future Development Of SMR Systems In The 800 MHz Frequency Band, PR Docket No. 93-144 RM-8117, RM-8030, RM-8029, Implementation Of Sections 3(N) And 322 Of The Communications Act – Regulatory Treatment Of Mobile Services, GN Docket No. 93-252, Implementation Of Section 309(J) Of The Communications Act – Competitive Bidding, *Second Report And Order*, PP Docket No. 93-253, FCC 97-223, 12 FCC Rcd. 19079, 19167 ¶ 271 (1997); Implementation Of Section 309(j) Of The Communications Act --Competitive Bidding For Commercial Broadcast And Instructional Television Fixed Service Licenses, MM Docket No. 97-234, Reexamination Of The Policy Statement On Comparative Broadcast Hearings, GC Docket No. 92-52, Proposals To Reform The Commission's Comparative Hearing Process To Expedite The Resolution Of Cases, *First Report And Order,* GN Docket No. 90-264, FCC 98-194, 13 FCC Rcd. 15920, 15994 ¶ 189 (1998); 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, RM-8553, Implementation Of Section 309(j) Of The Communications Act – Competitive Bidding, 37.0-38.6 GHz And 38.6-40.0 GHz, *Report And Order And Second Notice Of Proposed Rule Making,* PP Docket No. 93-253, FCC 97-391, 12 FCC Rcd. 18600, 18661 ¶ 148 (1997).

[110] *218-219 MHz Order*, 15 FCC Rcd. 1533-1534 ¶ 61.

43. Discussion. A few petitioners have requested that the 25 percent credit granted to small business be applied to the accounts of all winning bidders regardless of whether they met the small business qualifications for the auction.[111] One petitioner, Ad Hoc Coalition, argues that the provision of the remedial bidding credit, although facially neutral, was impermissibly motivated by a desire to assist women and minority businesses and is thus constitutionally flawed under *Hunt v. Cromartie*.[112] Another petitioner, Hughes, argues that the Commission's response to the constitutional issue is inequitable as "all bidders in the auction suffered from the inflated prices of the licenses caused by the bidding credits."[113] Hughes concludes that "all winning bidders, whether they paid in full or not should be afforded a remedy."[114] For the reasons discussed below, we reject these arguments and decline to expand the remedial bidding credit to all winning bidders in Auction No. 2.

44. The arguments of Hughes and Ad Hoc Coalition are based upon the assumption that we accorded bidding credits to all small business as a direct remedy for race and gender discrimination. That is incorrect. In order to address the questions raised concerning the constitutionality of race- and gender-based bidding credits, we eliminated those credits. This was the extent of the "remedy" provided for Graceba's concerns. However, as this issue was not raised until after the auction closed, we determined that it would be disruptive and unfair not to provide some form of bidding credit in this service, as licensees had crafted business plans in reliance upon the credit. Therefore, consistent with our practice in subsequent auctions, we choose to afford all small businesses an after the fact bidding credit. Thus, in effect, we leveled the bidding credit benefit upward. In doing so, we minimized the potential for disruption to entities that had previously qualified for the credit, we equalized the regulatory treatment between the 218-219 MHz Service and the many other services in which we have extended bidding credits to all small businesses, and we fulfilled our statutory mandate of encouraging participation of entrepreneurs, rural telephone companies, and businesses owned by members of minority groups and women.[115] The credit accorded small businesses thus solved a multi-faceted and complex set of regulatory issues. Those issues are not presented with respect to larger businesses such as Hughes and those represented by the Coalition, for Congress has not directed us to take special steps to ensure the participation of large companies. We, therefore, have no obligation to extend to such companies the same approach we have adopted toward smaller businesses.

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[111] Petition of Kingdom Hughes at 3-4; Petition of Ad Hoc Coalition a 5-9.

[112] Petition of Ad Hoc Coalition (*citing Hunt v. Cromartie*, 119 S. Ct. 1545 (1999)(facially neutral policy may violate constitution if it is impermissibly motivated)).

[113] Petition of Hughes at 4

[114] Petition of Hughes at 4.

[115] 47 U.S.C. § 309(j).

45. The remedial bidding credit affords 218-219 MHz Service licensees treatment similar to that afforded licensees in other services.[116] Because the credit is not based on racial or gender classifications, it is not subject to a strict scrutiny analysis. Instead, our policy operates in a neutral manner and does not subject anyone to unequal treatment on the basis of race or gender.[117] It therefore should be evaluated on the more deferential rational basis review.

46. Under rational basis review, government action is permissible unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes the government's actions are deemed irrational. In areas of social and economic policy, a classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.[118]

47. As we have stated previously with respect to small business credits, the remedial bidding credit for small businesses furthers Congress's objective of disseminating licenses among a wide variety of applicants.[119] That reasonable objective is the basis for our decision to grant small business credits whether prospectively or retroactively as in this instance.[120] Thus, the Commission's decision to grant remedial bidding credits to small businesses is entirely permissible. The fact that the pool of licensees eligible for the credit includes all the licensees that had previously been afforded the minority- and women-owned bidding credit is immaterial to the lawfulness of our approach. Indeed, that correspondence is not surprising because women and minority businesses are frequently, although not exclusively, small businesses. Accordingly, we reject Ad Hoc Coalition's argument that the bidding credits were impermissibly motivated.

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[116] *See* note 110 above.

[117] A facially neutral law warrants strict scrutiny only if it can be proved that the law was "motivated by a racial purpose or object," *Miller v. Johnson*, 515 U.S. 900, 913 (1995), or if it is "'unexplainable on grounds other than race'," *Shaw v. Reno*, 509 U.S. 630, 644 (1993)(citations omitted). In order to prove that a facially neutral rule, such as the one involved here, violates equal protection guarantees, a challenger must demonstrate a racially discriminatory purpose behind the rule. *Washington v. Davis*, 426 U.S. 229, 239 (1976).

[118] *See Sullivan v. Stroop*, 496 U.S. 478, 485 (1990); *Bowen v. Gilliard*, 483 U.S. 587, 600-603, (1987); *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 174-179 (1980); *Dandridge v. Williams*, 397 U.S. 471, 484-485 (1970).

[119] Service Rules For The 746-764 And 776-794 MHz Bands, And Revisions To Part 27 Of The Commission's Rules, *First Report and Order, Eighth Report an Order, and Second Further Notice of Proposed Rulemaking*, WT Docket No. 99-168, 11 FCC Rcd. 1463, at 1524¶ 110 (1995).

[120] *See Omnipoint Corp. v. FCC*, 78 F. 3d 620 (D.C. Cir. 1996)(upholding the Commission's determination to eliminate race and gender based provisions of the C block competitive bidding rules and instead employ similar provisions for small businesses).

48. With respect to Hughes comments that the existence of bidding credits inflated the prices paid by licensees, such a contention is wholly speculative. Hughes has failed to provide any evidence indicative of inflation in the bidding due to the existence of bidding credits, nor has it provided an analysis that would distinguish such inflation in the bidding price due to bidding credits from other factors. Further, as explained above, the elimination of the race- and gender-based bidding credits was the "remedy" provided for any alleged constitutional concerns. Even had Hughes provided an evidentiary basis, we would decline to offer the relief requested. Thus, as Hughes' comment is purely speculative, we dismiss it as such.

D. Technical Modifications to the Rules

49. On our own motion, we make several technical modifications to conform our rules to the *218-219 MHz Order*. Among these changes, we correct the cross-reference to Section 95.815(a) contained in Section 95.861 of our Rules to specify the interference plan discussed in the text of the *218-219 MHz Order*, clarify that CTSs provide fixed service, and specify that the general Part 1 transfer and assignment procedures apply to all 218-219 MHz Service licensees, regardless of how they obtained their license. Although Section 1.902 of the Rules makes these transfer and assignment procedures broadly applicable to all the Wireless Radio Services, we conclude that the inclusion of a specific cross-reference to Section 1.948 of the Rules in Part 95 will aid 218-219 MHz Service licensees in meeting their obligations under our general Part 1 rules. We also remove the individual licensing requirements for CTSs that may have an environmental effect or require obstruction marking and lighting, because we already collect this information elsewhere in our rules.

V. ORDERING CLAUSES

50. Accordingly, IT IS ORDERED that, pursuant to the authority granted 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), and 309(j), the petitions for reconsideration filed in response to the *218-219 MHz Order* are DENIED.

51. IT IS FURTHER ORDERED, that pursuant to that authority granted 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), and 309(j), the technical modifications to the Commission's rules, as described herein and in Appendix B, ARE HEREBY ADOPTED. These modifications shall become effective 60 days after publication of this *Second Order on Reconsideration of the Report and Order and Memorandum Opinion and Order* in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

APPENDIX A

List of Petitioners

1. In-Sync Interactive Corporation and Loli Inc., Bay Interactive Ventures, Inc., ABR Communications, Inc., Faycomm, Inc., IVDS On-Line Partnership, Cyberforce, LLC., Southeast Equities, Inc.
2. Vista Communications, Inc.
3. Ad Hoc Coalition. The Ad Hoc Coalition consists of the following entities: Celtronix Telemetry, Inc.; TV-Active, L.L.C.; Texas Interactive Network, Inc.; Hispanic & Associates; Zarg Corporation; IVDS Interactive Acquisition Partners; United Interactive Partners, Inc.; and G. Ray Hale.
4. Celtronix Telemetry, Inc.
5. Letter from Philip M. Brown regarding Tise Partners.
6. Kingdon R. Hughes.
7. Hot Topics Network.
8. Houston Spectrum Associates, L.L.C.

APPENDIX B

Part 2 – Frequency Allocations and Radio Treaty Matters; General Rules and Regulations

1. Footnote US317 in Section 2.106, the Table of Frequency Allocations, is revised to read as follows:

§ 2.106 Table of Frequency Allocations

* * * * *

US 317 The band 218.0-219.0 MHz is allocated on a primary basis to 218-219 MHz Service operations.

* * * * *

Part 95 – Personal Radio Services

2. Section 95.803 is revised to read as follows:

§ 95.803 218-219 MHz Service description.

(a) The 218-219 MHz Service is authorized for system licensees to provide communication service to subscribers in a specific service area.

(b) The components of each 218-219 MHz Service system are its administrative apparatus, its response transmitter units (RTUs), and one or more cell transmitter stations (CTSs). RTUs may be used in any location within the service area. CTSs provide service from a fixed point, and certain CTSs must be individually licensed as part of a 218-219 MHz Service system. *See* § 95.811 of this part.

(c) Each 218-219 MHz Service system service area is one of the cellular system service areas as defined by the Commission, unless modified pursuant to § 95.823 of this part.

3. Section 95.807 is amended by revising paragraphs (a), (a)(1), and (a)(4) to read as follows:

§ 95.807 Requesting regulatory status.

(a) Authorizations for systems in the 218-219 MHz Service will be granted to provide services on a common carrier basis or a private (non-common carrier and/or private internal-use) basis.

(1) Initial applications. An applicant will specify on FCC Form 601 if it is requesting authorizations to provide services on a common carrier, non-common carrier or private internal-use basis, of a combination thereof.

* * * * *

(4) Pre-existing licenses. Licenses granted before [effective date of rules] are authorized to provide services on a private (non-common carrier) basis. Licensees may modify this initial status pursuant to Paragraph (a)(3) of this Section.

* * * * *

4. Section 95.811 is amended by revising paragraph (b) and adding paragraph (e) to read as follows:

§ 95.811 License requirements.

* * * * *

(b) Each CTS where the antenna does not exceed 6.1 meters (20 feet) above ground or an existing structure (other than an antenna structure) and is outside the vicinity of certain receiving locations (see § 1.924 of this chapter) is authorized under the 218-219 MHz System license. All other CTS must be individually licensed.

* * * * *

(e) Each CTS (regardless of whether it is individually licensed) and each RTU must be in compliance with the Commission's environmental rules (see part 1, subpart I of this chapter) and the Commission's rules pertaining to the construction, marking and lighting of antenna structures (see part 17 of this chapter).

5. Section 95.812 is amended by revising paragraph (a) to read as follows:

§ 95.812 License term.

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

* * * * *

6. Section 95.816 is amended by revising the last sentence in paragraph (b) and revising paragraphs (c)(3) and (c)(5) to read as follows:

§ 95.816 Competitive bidding procedures.

* * * * *

(b) * * * The interest rate will equal the rate for five-year U.S. Treasury obligations at the grant date.

(c) * * *

(3) For purposes of determining whether an entity meets either of the definitions set forth in paragraph (c)(1) or (c)(2) of this section, the gross revenues of the entity, its affiliates, and controlling interests shall be considered on a cumulative basis and aggregated.

* * * * *

(5) A consortium of small businesses (or a consortium of very small businesses) is a conglomerate organization formed as a joint venture between or among mutually independent business firms, each of which individually satisfies the definition in paragraph (c)(1) of this section (or each of which individually satisfies the definition in paragraph (c)(2) of this section). Where an applicant or licensee is a consortium of small businesses (or very small businesses), the gross revenues of each small business (or very small business) shall not be aggregated.

* * * * *

7. Section 95.819 is revised to read as follows:

§ 95.819 License transferability.

(a) A 218-219 MHz Service system license, together with all of its component CTS licenses, may be transferred, assigned, sold, or given away only in accordance with the provisions and procedures set forth in § 1.948 of this chapter. For licenses acquired through competitive bidding procedures (including licenses obtained in cases of no mutual exclusivity), designated entities must comply with §§ 1.2110 and 1.2111 of this chapter (see § 1.948(a)(3) of this chapter).

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

8. Section 95.861 is amended by revising paragraph (c) to read as follows:

§ 95.861 Interference.

* * * * *

(c) A 218-219 MHz Service licensee must provide a copy of the plan required by § 95.815 (a) of this part to every TV Channel 13 station whose Grade B predicted contour overlaps the licensed service area for the 218-219 MHz Service system. The 218-219 MHz Service licensee must send the plan to the TV Channel 13 licensee(s) within 10 days from the date the 218-219 MHz Service submits the plan to the Commission, and the 218-219 MHz Service licensee must send updates to this plan to the TV

Channel 13 licensee(s) within 10 days from the date that such updates are filed with the Commission pursuant to § 95.815 of this part.

* * * * *