FCC MAIL SECTION

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

In the Matter of	)	
	)	
Amendment of Part 22 of the Commission's Rules To Benefit the Consumers of Air-Ground Telecommunications Services	)	WT Docket No. 03-103
	)	
Biennial Regulatory Review—Amendment of Parts 1, 22, and 90 of the Commission's Rules	)	
	)	
Amendment of Parts 1 and 22 of the Commission's Rules To Adopt Competitive Bidding Rules for Commercial and General Aviation Air-Ground Radiotelephone Service	)	WT Docket No. 05-42
	)	
Application of Verizon Airfone Inc. for Renewal of 800 MHz Air-Ground Radiotelephone License, Call Sign KNKG804	)	File No. 0001716212

ORDER ON RECONSIDERATION AND REPORT AND ORDER

Adopted: December 8, 2005 **Released:** December 9, 2005

By the Commission: Commissioners Copps and Adelstein approving in part, concurring in part, and issuing separate statements.

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I. INTRODUCTION

1. In the *Order on Reconsideration* below, we address the Petition for Clarification and Reconsideration of the *Air-Ground Order*[1] filed by Space Data Corporation (Space Data).[2] We deny Space Data's request to permit the provision of ancillary land mobile and fixed service in the 800 MHz air-ground band on a secondary basis.[3] We do, however, grant Space Data's request to clarify that stratospheric platforms, such as high-altitude balloons, may be used to provide air-ground services in the band.[4] In addition, we deny the Petition for Partial Reconsideration of the *Air-Ground Order* filed by AirCell, Inc. (AirCell).[5] Specifically, we deny AirCell's request to shorten from five to two years the term of the nonrenewable license granted to Verizon Airfone Inc. (Verizon Airfone or Airfone).[6] We also deny AirCell's request to abbreviate from two years to six months the transition period that the Commission adopted in order for Verizon Airfone to move its incumbent narrowband operations to one megahertz of spectrum in the 800 MHz air-ground band, which period will commence on the grant date of the first new license in the band.[7] Also, in order to help ensure the timely transition of Airfone's incumbent system to one megahertz of the band, we adopt certain reporting requirements as described below. Lastly, in the event that Airfone, or an affiliate of Airfone, wins an exclusive 3 MHz license, it will be subject to certain reporting requirements to enable the Commission to monitor Airfone's migration of its narrowband subscribers to a new broadband system.

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[1] Amendment of Part 22 of the Commission's Rules to Benefit the Consumers of Air-Ground Telecommunications Services, Biennial Regulatory Review—Amendment of Parts 1, 22, and 90 of the Commission's Rules, *Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 4403 (2005). In this item, we refer to the Report and Order in WT Docket No. 03-103 as the *Air-Ground Order* and to the concurrent Notice of Proposed Rulemaking in WT Docket No. 05-42 as the *Air-Ground Auction Notice*. *See also* Amendment of Part 22 of the Commission's Rules to Benefit the Consumers of Air-Ground Telecommunications Services, Biennial Regulatory Review—Amendment of Parts 1, 22, and 90 of the Commission's Rules, *Notice of Proposed Rule Making*, 18 FCC Rcd 8380 (2003).

[2] *See* Space Data Petition for Clarification and Reconsideration (filed May 13, 2005) (Space Data Petition). *See also* Reply of Space Data Corporation to Oppositions to Petition for Clarification and Reconsideration (filed June 29, 2005) (Space Data Reply).

[3] *See* Space Data Petition at 4-8.

[4] *Id.* at 2-4.

[5] *See* AirCell Petition for Partial Reconsideration (filed May 13, 2005) (AirCell Petition). *See also* Reply of AirCell to Opposition of Verizon Airfone (filed June 27, 2005) (AirCell Reply).

[6] *See* AirCell Petition at 8-10; *Air-Ground Order*, 20 FCC Rcd at 4440-4441 ¶¶ 79-82.

[7] *See* AirCell Petition at 2-8; *Air-Ground Order*, 20 FCC Rcd at 4438-4439 ¶¶ 75-76.

2. In the *Report and Order* below, we adopt competitive bidding rules for the 800 MHz commercial Air-Ground Radiotelephone Service and the 400 MHz general aviation Air-Ground Radiotelephone Service. We will conduct auctions of both commercial and general aviation air-ground licenses in conformity with the general competitive bidding rules set forth in Part 1, Subpart Q, of the Commission's Rules, and substantially consistent with the bidding procedures that have been employed in previous Commission auctions.[8] In addition, we adopt small business definitions and bidding credits for the 800 MHz air-ground service, and we conclude that bidding credits are unnecessary for the 400 MHz air-ground service.

II. BACKGROUND

3. On December 15, 2004, the Commission adopted the *Air-Ground Order*, WT Docket No. 03-103, and the *Air-Ground Auction Notice*, WT Docket No. 05-42.[9] In the *Air-Ground Order*, the Commission adopted a flexible regulatory approach to determine the future band configuration of the four megahertz of dedicated spectrum in the 800 MHz commercial Air-Ground Radiotelephone Service.[10] The Commission sought to promote the provision of new innovative wireless service, including broadband service, to the public onboard aircraft. Based on the band configuration proposals submitted by interested parties in the proceeding, the Commission decided to assign nationwide air-ground licenses under one of three alternative band configurations: (1) Band Plan 1, comprised of two overlapping, shared, cross-polarized 3 MHz licenses (licenses A and B, respectively),[11] (2) Band Plan 2, comprised of an exclusive 3 MHz license and an exclusive 1 MHz license (licenses C and D, respectively),[12] and (3) Band Plan 3, comprised of an exclusive 1 MHz license and an exclusive 3 MHz license (licenses E and F, respectively), with the blocks at opposite ends of the band from the second configuration.[13] Each of these band plans includes at least one 3 MHz license, which the Commission determined would enable a new licensee to provide broadband service to the flying public.[14] Because the three band configurations

[8] *See* 47 C.F.R. §§ 1.2101-1.2113.

[9] *See supra* note 1.

[10] The spectrum currently consists of an uplink band at 849-851 MHz and a downlink band at 894-896 MHz. 47 C.F.R. § 22.857.

[11] Licenses A and B would authorize transmission of radio waves that are vertically and horizontally polarized, respectively, and would initially share 1.5 MHz at 849.000-850.500 MHz paired with 1.5 MHz at 894.000-895.500 MHz. Once Verizon Airfone's incumbent system ceases operations in the upper 0.5 MHz of each band, licensee B would shift its operations to 1.5 MHz at 849.500-851.000 MHz paired with 1.5 MHz at 894.500-896.000 MHz. If band plan 1 is implemented, the parties may agree to a different implementation scheme.

[12] License C would be located in the lower 1.5 MHz portion of each 2 MHz band (1.5 MHz at 849.000-850.500 MHz paired with 1.5 MHz at 894.000-895.500 MHz). License D would be located in the upper 0.5 MHz portion of each 2 MHz band (0.5 MHz at 850.500-851.000 MHz paired with 0.5 MHz at 895.500-896.000 MHz).

[13] License E would be located in the lower 0.5 MHz portion of each 2 MHz band (0.5 MHz at 849.000-849.500 MHz paired with 0.5 MHz at 894.000-894.500 MHz). License F would be located in the upper 1.5 MHz portion of each 2 MHz band (1.5 MHz at 849.500-851.000 MHz paired with 1.5 MHz at 894.500-896.000 MHz).

[14] In order to promote competition in the 800 MHz air-ground band, the Commission prohibited any party from obtaining a controlling interest, either at auction or by a post-auction transaction, in more than three megahertz of spectrum (either shared or exclusive) in the band. No single party, therefore, may hold more than one license in any of the available band configurations. *See Air-Ground Order*, 20 FCC Rcd at 4424-4427 ¶¶ 39-44.

are mutually incompatible with one another, applicants that apply for licenses under different band plans will be considered to have filed mutually exclusive applications. If mutually exclusive applications are filed, the band plan that receives the highest gross aggregate bid in an auction will be implemented, and licenses composing that configuration will be awarded to winning bidders subject to long-form license application review.[15]

4. In the *Air-Ground Auction Notice,* the Commission requested comment on competitive bidding rules in the 800 MHz commercial Air-Ground Radiotelephone Service. In addition, the Commission sought comment on auction rules for the 400 MHz general aviation Air-Ground Radiotelephone Service.[16] As discussed in the *Air-Ground Auction Notice,* auction rules are necessary for the 400 MHz air-ground service to resolve previously filed mutually exclusive applications as well as any mutually exclusive 400 MHz air-ground applications that are filed in the future.[17]

III. ORDER ON RECONSIDERATION

A. Ancillary Land Mobile and Fixed Service Prohibition

5. In the *Air-Ground Order*, the Commission prohibited the provision of ancillary land mobile and fixed services in the 800 MHz air-ground band.[18] The Commission noted the claims of several commenters that ancillary land mobile and fixed use of this spectrum could potentially interfere with operations in adjacent spectrum bands.[19] The Commission determined that, in light of the small amount of spectrum dedicated for commercial air-ground service (only four megahertz), the public interest would be best served by ensuring that the band is devoted to the provision of air-ground service.[20] Space Data requests that we revisit this determination and permit licensees to provide ancillary land mobile and fixed service on a secondary basis in the band.[21] Space Data states that such service would have to accept

[15] *See Air-Ground Order*, 20 FCC Rcd at 4405-06 ¶ 1.

[16] *Air-Ground Auction Notice,* 20 FCC Rcd at 4464 ¶ 169. *See also* 47 U.S.C. § 309(j); Balanced Budget Act of 1997, Pub. L. No. 105-33, Title III, 111 Stat. 251 (1997). The Balanced Budget Act of 1997 amended Section 309(j) to require the Commission to resolve mutually exclusive applications for initial licenses or permits using competitive bidding procedures, with very limited exceptions. These exceptions are licenses and construction permits for public safety radio services, digital television service licenses and permits given to existing terrestrial broadcast licensees to replace their analog television service licenses, and licenses and construction permits for noncommercial educational broadcast stations and public broadcast stations under 47 U.S.C. § 397(6). *See* 47 U.S.C. §§ 309(j)(1) & (2).

[17] *Air-Ground Auction Notice,* 20 FCC Rcd at 4464 ¶ 169. There are currently pending nine groups of mutually exclusive general aviation applications. Because these are closed filing groups, the auction of the licenses for which these applications have been filed will be limited to the parties in each of the nine groups of applicants that have filed mutually exclusive applications. *Air-Ground Auction Notice,* 20 FCC Rcd at 4464 ¶ 169. *See also* 47 C.F.R. § 22.131. These parties will be required to file short-form applications (FCC Form 175) and submit upfront payments to participate in the auction. *Air-Ground Auction Notice,* 20 FCC Rcd at 4464 ¶ 169. *See also* 47 C.F.R. §§ 1.2105(a) & (b), 1.2106.

[18] *Air-Ground Order,* 20 FCC Rcd at 4431 ¶ 53.

[19] *Id.*

[20] *Id.*

[21] *See* Space Data Petition at 4-8.

harmful interference from primary users of the band and could not interfere with air-ground or adjacent band operations.[22] CTIA-The Wireless Association (CTIA), Nextel Communications, Inc. (Nextel), and The Boeing Company (Boeing) oppose Space Data's request and urge us to retain the prohibition on ancillary land mobile and fixed use of the 800 MHz air-ground band.[23]

6. We conclude that Space Data has failed to demonstrate sufficient grounds for revisiting the Commission's proscription on ancillary land mobile and fixed service use of the 800 MHz air-ground band. We agree with CTIA, Boeing, and Nextel that such ancillary use of the air-ground band could create the potential for harmful interference with users of adjacent spectrum bands.[24] Space Data claims that because it proposes ancillary use of the band on a secondary basis, the potential for harmful interference can be readily addressed.[25] We find that it is unnecessary, however, to resolve the parties' claims regarding the potential for interference arising from ancillary land mobile and fixed operations. Rather, we conclude that the Commission's goal to promote the provision of new and innovative wireless services to the flying public, including broadband services, will be best served by requiring that the four megahertz of spectrum in the band be devoted to the provision of air-ground service.[26] Boeing and Nextel agree that the limited amount of spectrum in the band should be devoted to air-ground services.[27] Limiting use of this spectrum to air-ground service will, moreover, provide new licensees much needed flexibility to design their systems to provide services to the flying public—without concern about possible interference from ancillary land mobile and fixed operations in the band, even if such operations would be secondary.

7. In support of its request, Space Data also argues that the need for wireless service in rural areas could increase following the February 18, 2008 sunset of the requirement that cellular licensees provide analog mobile phone service, and that the air-ground band could be used to serve rural America.[28] While we laud Space Data's objective to bring wireless services to rural and underserved areas, there is only four megahertz of spectrum in this band and, as noted above, limiting its use to the provision of air-ground services will promote the deployment of emerging broadband services to the flying public. We continue to rely on the availability of considerably more spectrum in other bands and our policies purposely designed to improve service to rural areas to help meet our goal of fostering service to rural and underserved areas.[29] We also note that it is premature to address the possibility that

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[22] *See* Space Data Reply at 6.

[23] *See* CTIA Opposition to Space Data Petition for Reconsideration (filed June 16, 2005) (CTIA Opposition); Boeing Opposition to Petition for Reconsideration (filed June 16, 2005) (Boeing Opposition); Nextel Opposition to Petition for Reconsideration (filed June 16, 2005) (Nextel Opposition).

[24] CTIA Opposition at 3-5; Boeing Opposition at 3-4; Nextel Opposition at 3-6.

[25] Space Data Petition at 7.

[26] We also find no basis in the record for CTIA's claim that permitting ancillary use of the band could render the 800 MHz rebanding process moot. *See* CTIA Opposition at 5.

[27] *See* Boeing Opposition at 1; Nextel Opposition at 3.

[28] Space Data Petition at 5-7. *See* 47 C.F.R. § 22.901(b) (analog sunset).

[29] *See, e.g.*, Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 19078 (2004).

other spectrum will be needed to serve rural areas following sunset of the analog cellular requirement.[30] In the event that cellular service to rural areas is threatened by this analog sunset, it would be appropriate to address such a concern in the context of our cellular rules rather than in this proceeding.[31]

B. Stratospheric Platforms

8. Space Data requests clarification that balloon-borne stratospheric platforms may be used to provide air-ground communications services in the 800 MHz air-ground band.[32] Space Data has developed a network comprised of inexpensive weather balloons, which carry miniature radio repeaters (SkySites) to nearly 100,000 feet (approximately two to three times higher than commercial aircraft).[33] The company states that its stratospheric network covers large geographic areas with broad antenna beams that it could use to provide commercial air-ground services.[34] Only Nextel opposes Space Data's request, asserting that the Commission has already concluded that stratospheric platforms may not be used to provide service in the 800 MHz air-ground band and claming that the use of such platforms could give rise to potential interference.[35] For the reasons stated below, we confirm that stratospheric platforms, as described by Space Data, may be used to provide service in the 800 MHz air-ground band. so long as licensees comply with the rules adopted in the *Air-Ground Order* and other applicable rules.

9. At the outset, we reject Nextel's assertion that the Commission has already forbidden the use of stratospheric platforms to provide service in the 800 MHz air-ground band. Nextel cites no statement in the *Air-Ground Order* that would support its contention, nor are we aware of any. In the *Air-Ground Order*, the Commission adopted a technologically neutral, flexible regulatory framework to enable licensees to provide air-ground services using any existing or future technology that could fit within their assigned spectrum block.[36] The Commission specified that licensees must provide service to airborne locations, but it did not proscribe the use of stratospheric platforms to provide such service. The Commission, in fact, favorably cited in the *Air-Ground Order* numerous filings by Space Data that

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[30] 47 C.F.R. § 22.901(b).

[31] We note that the sunset of the analog cellular requirement will not compel any carrier to discontinue the provision of analog service to the public. The Commission, moreover, has directed nationwide cellular carriers to report in 2006 and 2007 any plans to phase out analog service. *See* Year 2000 Biennial Regulatory Review—Amendment of Part 22 of the Commission's Rules To Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and Other Commercial Mobile Radio Services, *Report and Order*, 17 FCC Rcd 18401, 18419 ¶ 31 (2002), *Order on Reconsideration*, 19 FCC Rcd 3239 (2004). The Commission will use the information contained in these reports to determine whether or not to commence a proceeding regarding possible extension of the analog cellular requirement. *See id.*, 17 FCC Rcd at 18419 ¶ 32.

[32] *See* Space Data Petition at 2-4.

[33] *See id.* at 3. We note that in 2001 the Wireless Telecommunications Bureau granted Space Data a waiver to operate a balloon-borne stratospheric communications system on narrowband PCS spectrum. *See* Petition for a Declaratory Ruling, Clarification or, in the Alternative, a Waiver of Certain Narrowband Personal Communications Services (PCS) Rules as they Apply to a High-Altitude Balloon-Based Communications System, *Memorandum Opinion and Order*, 16 FCC Rcd 16421 (WTB 2001).

[34] *See* Space Data Petition at 3.

[35] *See* Nextel Opposition at 6-7.

[36] *See Air-Ground Order*, 20 FCC Rcd at 4406-4407 ¶ 2.

contemplated the use of stratospheric platforms to provide service.[37] The Commission's decision to afford interested parties an opportunity to bid on exclusive spectrum licenses in the band, moreover, was based partly on Space Data's showing that narrowband technology could be used in an exclusive spectrum block to provide air-ground service via stratospheric platforms.[38]

10. We also reject Nextel's claim that Space Data must demonstrate how the use of stratospheric platforms would comport with bilateral agreements between the United States and Canada and Mexico, which provide for the coordinated use of air-ground frequencies over North American airspace.[39] In the *Air-Ground Order*, the Commission specifically noted that these agreements, which are based on a narrow bandwidth channel scheme, may need to be renegotiated to provide for more flexible use of the air-ground band.[40] These agreements may have to be modified to accommodate the two licenses comprising the band configuration implemented as a result of the Commission's future auction of air-ground licenses,[41] as well as the technology deployed by each licensee. In the event that a future licensee in the band intends to deploy stratospheric platforms, the agreements could be modified—if necessary—to address such use. We caution, however, that to the extent that air-ground service via stratospheric platforms (as well as "traditional" air-ground service via terrestrial infrastructure) would be inconsistent with international agreements, licensees would assume the risk that those agreements might not be modified to accommodate such use.

11. Nextel also argues that Space Data must provide the Commission an analysis of potential interference that could arise from balloon-borne station transmissions.[42] We disagree and note that Nextel did not specify whether it is concerned about the potential for Space Data's airborne transmitters to cause interference to other air-ground services or to terrestrial services in adjacent bands. In the *Air-Ground Order*, the Commission found that the exclusive licensing approach advocated by Space Data could "be deployed without causing harmful interference to adjacent services . . . , provided that the licensees are aware of the potential for such interference and take necessary measures to comply with our rules to prevent such interference."[43] Nextel has presented no argument that would cause us to revisit that determination.

12. We note that in a July 26, 2005 *ex parte* written presentation, Nextel states that "if Space Data can somehow comply with the existing ATG rules, then Nextel would not oppose the introduction

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[37] *See, e.g., id.* at 4429 ¶ 49 n.178 (citing Space Data November 29 Analysis).

[38] *See id.* at 4424 ¶ 39 n.148 (citing Space Data November 16, 2004 Presentation).

[39] *See* Nextel Opposition at 7. *See* "Arrangement Between the Department of Communications of Canada and the Federal Communications Commission of the United States of America Concerning the Use of the Bands 849-851 and 894-896 MHz," signed August 18, 1992 (U.S.A.) and August 28, 1992 (Canada), Section 4. *See also* "Protocol Concerning the Use of the 849-851 and 894-896 MHz Bands for Public Air-To-Ground Radio Service," signed June 16, 1994 by the Government of the United States and the Government of Mexico, Article IV.

[40] *See Air-Ground Order*, 20 FCC Rcd at 4431 ¶ 52.

[41] The Commission will make licenses available at auction in three possible band configurations; licenses will be awarded to the two winning bidders for the licenses comprising the configuration that receives the highest aggregate gross bid, subject to long-form license application review.

[42] *See* Nextel Opposition at 6-7.

[43] *See Air-Ground Order*, 20 FCC Rcd at 4437 ¶ 70.

of a collection of balloon-based platforms into the ATG band for the purpose of providing ATG service."[44] We agree with Nextel that any stratospheric platform-based operations in the air-ground band must comply with the rules adopted in the *Air-Ground Order* as well as other applicable rules.[45] The air-ground rules provide "licensees flexibility to deploy any type of transmission technology, provided that the radio emissions produced fit within a licensee's assigned spectrum."[46] This requirement is codified in revised Section 22.861(a), which provides that "[t]he power of any emission outside of the authorized operating frequency ranges must be attenuated below the transmitting power (P) by a factor of at least 43 + 10 log (P) dB."[47] The Commission, moreover, reserved the right to require greater attenuation in the event that any emission from a transmitter operating in the service results in interference to users of another radio service.[48] We also grant Space Data's request that we clarify that, if a licensee were to deploy stratospheric platforms in the band, those operations would be subject to the 12 watt peak effective radiated power limit for airborne mobile station transmitters set forth in new Section 22.867(a) of the Commission's rules.[49] Together, these rules should ensure that any stratospheric operations in the band would not cause harmful interference to operations in adjacent spectrum bands.

C. Verizon Airfone Inc. License, File No. 0001716212

13. In the *Air-Ground Order*, the Commission granted Verizon Airfone—the only remaining service provider in the 800 MHz air-ground band[50]—a nonrenewable license to operate in the band for five years.[51] The license requires Airfone to move its narrowband operations from four to one megahertz of spectrum in the band within two years of the initial grant date of a new license in the band.[52] AirCell requests that we shorten the transition period to six months,[53] and reduce the license term to two years.[54] For the reasons stated below, we deny AirCell's requests.

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[44] Letter from Trey Hanbury, Senior Counsel, Nextel Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, dated July 26, 2005.

[45] *See* 47 C.F.R. §2.106 note 5.318 (specifying that "use of the band 849-851 MHz is limited to transmission from aeronautical stations and the use of the band 894-896 MHz is limited to transmissions from aircraft stations").

[46] *See Air-Ground Order*, 20 FCC Rcd at 4431 ¶ 54.

[47] 47 C.F.R. § 22.861(a).

[48] 47 C.F.R. § 22.861(d).

[49] *See* Space Data Petition at 4; 47 C.F.R. § 22.867(a).

[50] The former 800 MHz Air-Ground Radiotelephone Service rules contemplated six competing licensees providing voice and low-speed data services. Six entities were originally licensed under those rules. Only three of the six licensees built systems and provided service, and two of those failed for business reasons.

[51] *See Air-Ground Order*, 20 FCC Rcd at 4440-4441 ¶¶ 80-81.

[52] *See id.* at 4438-4439 ¶¶ 75-76.

[53] *See* AirCell Petition at 2-8; AirCell Reply at 1-3.

[54] *See* AirCell Petition at 8-10.

1. Transition Period

14. In the *Air-Ground Order*, the Commission concluded that unencumbered paired 1.5 MHz channels are appropriate to deploy broadband technologies in the 800 MHz air-ground band.[55] The Commission therefore included at least one 3 MHz license in each of the three alternative band configurations that will be made available at auction. In order to ensure that the air-ground spectrum could be used to provide broadband service in the near future, the Commission determined that Verizon Airfone must transition its incumbent narrowband operations from four to one megahertz of spectrum in the band within two years of the initial grant date of a new license in the band.[56]

15. AirCell claims that, based on its experience as an air-ground service provider,[57] relocation of Airfone's incumbent operations from four to one megahertz of spectrum could be concluded in six months.[58] AirCell bases this assertion on two flawed premises. First, AirCell believes that Airfone's ground stations could be remotely retuned to operate on one megahertz in the band.[59] According to Airfone, however, the software controlling each of its ground stations must be modified, tested, and deployed on-site, and each location needs to be evaluated for the possible installation of customized emission filters.[60] Second, AirCell assumes that moving Airfone's narrowband operations to one megahertz in the band would not require modification of end user equipment.[61] Airfone's service,

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[55] *See Air-Ground Order,* 20 FCC Rcd at 4421-4422 ¶ 31.

[56] *See id.* at 4438-4439 ¶ 75. If band plan 1 or 2 is the winning configuration at auction, Airfone's incumbent system must cease operations in the lower 1.5 MHz portion of each 2 MHz air-ground band within two years of the initial date of grant of a new license or licenses. Airfone may relocate its incumbent operations to the upper 0.5 MHz portion of each 2 MHz band (0.5 MHz at 850.500-851.000 MHz paired with 0.5 MHz at 895.500-896.000 MHz) and may continue to operate under the renewal authorization until the end of the five-year license term. If band plan 3 is the winning configuration at auction, Airfone's incumbent system must cease operations in the upper 1.5 MHz portion of each 2 MHz air-ground band within two years of the initial date of grant of a new license; Airfone may relocate to the lower 0.5 MHz portion of each 2 MHz band (0.5 MHz at 849.000-849.500 MHz paired with 0.5 MHz at 894.000-894.500 MHz) and may continue to operate under the renewal authorization until the end of the five-year license term.

[57] AirCell currently provides, with cellular licensee partners and pursuant to waiver, air-ground services to more than 1,400 general aviation aircraft using traditional cellular networks and frequencies. AirCell and its partners have been granted waivers of the Commission's rule, 47 C.F.R. § 22.925, prohibiting the use of cellular phones on airborne planes in order to implement an air-ground service. AirCell's system uses specially designed mobile units and ground equipment to allow users to access the existing networks of AirCell's cellular licensee partners without causing the harmful interference against which Section 22.925 was designed to protect. *See* AirCell, Inc., Petition, Pursuant to Section 7 of the Act, For a Waiver of the Airborne Cellular Rule, Or, in the Alternative, for a Declaratory Ruling, *Order*, 14 FCC Rcd 806 (WTB 1998), recon. granted in part, denied in part, *Order on Reconsideration*, 14 FCC Rcd 18430 (WTB 1999), app. for rev. denied, *Memorandum Opinion and Order*, 15 FCC Rcd 9622 (2000), affirmed in part and remanded in part sub nom., *AT&T Wireless Services, Inc., et al., v. FCC*, 270 F.3d 959, 968 (D.C. Cir. 2001), pet. for reh'g denied Jan. 29, 2002, *Order on Remand*, 18 FCC Rcd 1926 (2003), pet. for rev. denied sub nom., *AT&T Wireless Services, Inc. v. FCC*, 365 F.3d 1095 (D.C. Cir. 2004).

[58] AirCell Petition at 5.

[59] *Id.*

[60] Airfone Opposition at 5.

[61] *See* AirCell Petition at 6.

however, is installed on over 3,000 general aviation, military, and federal government aircraft that cannot be remotely contacted for reprogramming and therefore would require a maintenance visit.[62] In view of the foregoing, we find that there is no basis in the record to shorten the transition period to six months.[63]

16. AirCell also argues that the possibility that it could construct an air-ground system and begin to provide broadband service shortly after obtaining a license in the band warrants reducing the transition period to six months.[64] We find this argument unavailing. Even if AirCell or another new entrant could launch broadband service within a few months of obtaining a license in the band,[65] the transition of Airfone's system to one megahertz in the band may be far more complex than envisioned by AirCell.[66] In establishing the two-year transition period, the Commission carefully balanced the goal in this proceeding of enabling new entrants to deploy innovative wireless services to the flying public in the near future with the need for an orderly transition of Airfone's legacy narrowband system.[67] We find no basis in the record to revisit the reasonableness of the decision reached in the *Air-Ground Order* in weighing these competing public interest objectives.

17. We also reject AirCell's assertion that the two-year transition period would somehow act as a "perverse" bidding credit for Airfone by allowing the company to bid on a ten-year license, while other auction participants would be bidding on licenses with an effective eight-year term.[68] Even if Airfone were to obtain a new 3 MHz air-ground license, the company would have to move its incumbent narrowband operations from four to one megahertz of spectrum in the band before it could commence broadband operations. Moreover, if Airfone were to obtain either of the non-exclusive 3 MHz licenses comprising band plan 1, it and the other non-exclusive 3 MHz licensee would both have to wait the same interlude (the period it takes Airfone to move its incumbent operations) to commence service. Accordingly, we deny AirCell's request to reduce the transition period to six months.

18. Finally, we disagree with AirCell that Airfone's transition period should be shortened in light of the Commission's recent *Big LEO Spectrum Sharing Order*.[69] In that decision, the Commission added a fixed and mobile, except aeronautical mobile, services allocation to the 2495-2500 MHz band, already

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[62] *See* Airfone Opposition at 6.

[63] AirCell also has suggested that it may not be possible at all for Airfone to move its incumbent narrowband operations to one megahertz of spectrum in the band. *See* Letter from Michele C. Farquhar, counsel to AirCell, to Marlene H. Dortch, Secretary, Federal Communications Commission, dated July 20, 2005.

[64] *See* AirCell Petition at 3.

[65] *See id.*

[66] *See supra* para. 15.

[67] *See Air-Ground Order,* 20 FCC Rcd at 4438-4439 ¶ 75.

[68] *See* AirCell Petition at 4.

[69] *See id.* at 7-8, citing Review of the Spectrum Sharing Plan Among Non-Geostationary Satellite Orbit Mobile Satellite Service Systems in the 1.6/2.4 GHz Bands; Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems, *Report and Order, Fourth Report and Order, and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 13356 (2004) (Big LEO Spectrum Sharing Order), petition for reconsideration pending.

allocated to the mobile-satellite service (MSS).[70] The Commission did not discuss a transition period for the incumbent MSS operator in that band because the operator was not required to move its operations to a different portion of the band. Rather, MSS may continue to access the 2495-2500 MHz band by accepting any interference from the newly-allocated terrestrial services within the band.[71] We believe the *Big LEO Spectrum Sharing* decision is therefore inapposite.

19. Lastly, we note that AirCell has more recently urged the Commission to shorten the transition period to one year rather than six months.[72] For all of the foregoing reasons, we also deny AirCell's request to reduce the transition period to one year.

2. Transition Status Reports

20. AirCell states that, in order to help ensure that Airfone will timely conclude the transition of its incumbent narrowband operations from four to one megahertz of the 800 MHz air-ground band, we should establish milestones or benchmarks that Airfone must meet during the transition period and that we should require the company to regularly file reports regarding the status of the transition process.[73] In the *Air-Ground Order*, the Commission explained that a new broadband system could not concurrently operate on the same spectrum block as Airfone's narrowband system and that it is therefore paramount that Airfone effect the transition to one megahertz within the two-year period so that a new 3 MHz licensee could begin providing new and innovative services to the traveling public.[74] As explained above, the process of transitioning Airfone's incumbent system and its general aviation subscribers to operate on one megahertz of the band will be more complex than envisioned by AirCell.[75] We therefore conclude that imposing transition benchmarks or milestones that Airfone would have to meet by target dates would be impracticable and potentially burdensome.

21. We agree with AirCell that we should require Airfone to file regular transition status reports.[76] We find that such reports will serve the public interest by enabling FCC staff to closely monitor the transition of Airfone's narrowband system and to ensure that the transition is timely effected. We hereby delegate authority to the Wireless Telecommunications Bureau to adopt specific reporting requirements and direct it to issue a Public Notice enumerating such requirements within 60 calendar

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[70] *See Big LEO Spectrum Sharing Order*, 19 FCC Rcd at 13387 ¶ 69.

[71] *See id.*, 19 FCC Rcd at 13388-89 ¶¶ 72-74.

[72] *See* Letter from Michele C. Farquhar, counsel to AirCell, to Marlene H. Dortch, Secretary, Federal Communications Commission, dated December 1, 2005 (AirCell December 5 Ex Parte); Letter from Michele C. Farquhar, counsel to AirCell, to Marlene H. Dortch, Secretary, Federal Communications Commission, dated November 15, 2005 (AirCell November 15 Ex Parte); Letter from Michele C. Farquhar, counsel to AirCell, to Marlene H. Dortch, Secretary, Federal Communications Commission, dated November 9, 2005; Letter from Jack W. Blumenstein, Chairman and Chief Executive Officer, AirCell, to Kevin J. Martin, Chairman, Federal Communications Commission, dated November 2, 2005.

[73] *See* AirCell Reply at 4; AirCell December 5 Ex Parte at 2.

[74] *See Air-Ground Order*, 20 FCC Rcd at 4438-4439 ¶ 75.

[75] *See supra* para. 15.

[76] AirCell December 5 Ex Parte at 2. AirCell notes that such reports have the potential to facilitate transparency and potential negotiations among the incumbent and new entrant(s). *Id.*

days of the adoption of this order. We envision that each report will provide specific details regarding the status of Airfone's transition of its base stations and its subscribers' aircraft so that they may operate on one megahertz of the 800 MHz air-ground band. At a minimum, each report should provide the number and percentage of each type of aircraft (commercial, general aviation, and government) and base stations that have been transitioned to operate in the one megahertz portion of the band. Airfone must file its initial transition status report with the Commission six months from the date of the grant of any new license in the band and at each of the three six-month intervals thereafter. Airfone is not required to submit any classified information regarding government aircraft in its reports. We also note that the company may seek confidential treatment of information contained in the transition reports in accordance with the Commission's rules and policies.[77]

22. In addition, if Airfone, or an affiliate of Airfone, wins an exclusive 3 MHz license at auction, it shall include in each status report—and file additional reports at six-month intervals from the conclusion of the two-year transition period until the expiration of its five-year nonrenewable license—information regarding the transition of its existing subscribers from its narrowband system to a broadband system. We hereby delegate authority to the Wireless Telecommunications Bureau to adopt specific reporting requirements and direct it to issue a Public Notice enumerating such requirements within 60 calendar days of the grant of an exclusive 3 MHz license to Airfone. At a minimum, Airfone must specify the number and percentage of each type of aircraft (commercial, general aviation, and government) and base stations that have been configured to operate in the three megahertz portion of the band. The report must also delineate which aircraft have been transitioned from Airfone's 4 MHz narrowband system directly to a 3 MHz broadband system, and which aircraft have been transitioned from the 4 MHz narrowband system to a 1 MHz narrowband system and then to a 3 MHz broadband system. As noted above, Airfone is not required to submit any classified information regarding government aircraft in its reports, and the company may seek confidential treatment of the reports in accordance with the Commission's rules and policies.

3. License Term

23. AirCell argues that grant of a five-year license to Verizon Airfone is antithetical to the Commission's goal in this proceeding to promote competition in the 800 MHz air-ground band and, therefore, "vulnerable to challenge" under the Administrative Procedure Act.[78] We disagree. To the contrary, the Commission granted Airfone a *nonrenewable* five-year license, rather than a renewable ten-year license, in order to promote the introduction of competition and new services in the 800 MHz air-ground band.[79] The Commission, in fact, rejected Airfone's claim that it must afford the company a hearing under Section 316 of the Act in the event that it modified its license to operate in the 800 MHz air-ground band.[80]

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[77] 47 CFR § 0.459.

[78] *See* AirCell Petition at 8-9.

[79] *Air-Ground Order,* 20 FCC Rcd at 4438-4440 ¶¶ 73-82.

[80] *Id.* at 4440 ¶ 79. We note that Airfone filed an Opposition to the AirCell Petition on June 27, 2005, in which it defends its five-year license by asserting that it in fact should have received a ten-year license term and compensation to move its incumbent operations to one megahertz in the band. *See* Airfone Opposition at 1, 9. While Airfone presents this point as a counter to Aircell's attack on the five-year license, we observe that had Airfone actually requested in its Opposition that the Commission grant such relief, the request would have been procedurally defective. Specifically, the appropriate vehicle for Airfone to have asserted such a claim would have (continued....)

24. AirCell claims that if Airfone were to obtain an exclusive 3 MHz license, the winner of the corresponding 1 MHz license could be prevented from commencing operations until the end of the five-year license term.[81] The Commission recognized this possibility in the *Air-Ground Order* and noted that the holder of a 1 MHz license might have to share spectrum with Airfone's incumbent system until the end of the company's five-year license term.[82] The Commission also noted that, depending on its desired system configuration, the holder of a 1 MHz license might not find it technically optimal to operate an air-ground system while sharing spectrum with the incumbent narrowband system and, therefore, did not adopt a construction requirement for either of the 1 MHz licenses that will be made available at auction.[83] We therefore reject AirCell's proposal to abbreviate Airfone's nonrenewable license term as well as its more recent proposal that, in the event that Airfone wins an exclusive 3 MHz license at auction, we should require it to vacate the remaining 1 MHz portion of the band before the end of its nonrenewable license term.[84]

25. AirCell also argues that we should shorten the term of Airfone's license because, if band plan 1 is implemented (*i.e.*, two overlapping 3 MHz licenses), the licensees would have to overlap their systems 100 percent while the incumbent system operates in one megahertz of the band.[85] AirCell now claims that, with 100 percent spectrum overlap, isolation between two 3 MHz networks would be degraded and the licensees would have to extensively coordinate site locations.[86] During the course of this proceeding, however, AirCell urged the Commission to adopt shared spectrum licensing in the band, noting that parties with overlapping licenses would act with "enlightened self-interest" and cooperate in the site selection process,[87] and that there would be minimal degradation of the signal to interference plus noise ratio (SINR) of even fully overlapped systems in the band due to wave cross-polarization.[88] AirCell's arguments, however, do not warrant reducing the term of the five-year license granted to Verizon Airfone. The Commission granted Airfone a five-year license term (which commenced on May 13, 2005), rather than a ten-year license term, to promote the introduction of new services in the 800

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been to file a written request rejecting the license grant as made, which was required to be filed by June 13, 2005, 30 days from the effective date of the license grant. *See* 47 C.F.R. § 1.110; *see also* In the Matter of the Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State And Local Public Safety Agency Communication Requirements Through the Year 2010, Establishment of Rules and Requirements for Priority Access Service, *Second Memorandum Opinion and Order*, 15 FCC Rcd 16844, 16862 ¶ 37 n.113 (2000) (noting that certain contentions were untimely presented in an opposition pleading, rather than being timely raised in a formal petition for reconsideration); 47 C.F.R. § 1.4(j) (when the 30-day deadline falls on a Sunday, parties are permitted to file on the next business day).

[81] AirCell Petition at 9.

[82] *See Air-Ground Order,* 20 FCC Rcd at 4442 ¶ 85.

[83] *See id.*

[84] *See, e.g.*, AirCell Talking Points at 1(attached to AirCell November 15 Ex Parte).

[85] *See* AirCell Petition at 10.

[86] *See id.*

[87] *See* AirCell Further Notes on the Deployment of Two Cross-Polarized Systems in the ATG Band and Response to Verizon Airfone/Telcordia at 3 (Nov. 23, 2004).

[88] Deployment of Two Cross-Polarized Systems in the ATG Band at 3-5, 7 (Oct. 20, 2004).

MHz air-ground band.[89] The possibility that full spectrum sharing—during the period from when Airfone transitions to one megahertz in the band and the end of Airfone's license term—may not be optimal does not cause us to reconsider this decision. We therefore reject AirCell's request to shorten the license term to two years.

IV. REPORT AND ORDER

A. Incorporation by Reference of the Part 1 Standardized Auction Rules

26. In the *Air-Ground Auction Notice,* the Commission proposed to conduct auctions of both commercial and general aviation air-ground licenses in conformity with the general competitive bidding rules in Part 1, Subpart Q, of the Commission's Rules, and substantially consistent with the bidding procedures that have been employed in previous Commission auctions.[90] Specifically, the Commission proposed to employ the Part 1 rules governing, among other things, designated entities, application and payment procedures, collusion issues, and unjust enrichment. Under this proposal, such rules would be subject to any modifications that the Commission may adopt in its Part 1 Competitive Bidding proceeding.[91] The Commission noted that because alternative band plans are being made available in the 800 MHz air-ground service, with the selection of the final band configuration to be determined by applicants' bids in the auction, the determination of whether individual applications are mutually exclusive for purposes of Section 309(j) of the Communications Act will be based on whether different applicants have applied for licenses in different band configurations as well as on whether different applicants have applied for the same licenses.[92] The Commission tentatively concluded, however, that this and any other differences from its past auctions do not necessitate any changes to the Part 1 competitive bidding rules, and that the Wireless Telecommunications Bureau can address such differences through its standard practice of seeking comment on and establishing procedures for specific auctions.[93]

27. We adopt our proposal to auction both 800 MHz commercial and 400 MHz general aviation air-ground licenses in conformity with the general competitive bidding rules set forth in Part 1, Subpart Q, of the Commission's Rules. The only party that commented on this proposal, Space Data, supports the use of our Part 1 competitive bidding rules for the commercial air-ground service, indicating that the use of these well-established rules provides auction participants with consistent guidance, reduces the burden on the public and the Commission of developing service-specific auction requirements, and ensures that the commercial air-ground auction will not be unduly delayed.[94] Space Data also states that

[89] *Air-Ground Order,* 20 FCC Rcd at 4438-4439 ¶¶ 75-76.

[90] *Air-Ground Auction Notice,* 20 FCC Rcd 4403, 4464-65 ¶ 170. *See also* 47 C.F.R. §§ 1.2101-1.2113.

[91] The Commission has, for example, recently adopted a Notice of Proposed Rule Making that seeks comment on changes to the Part 1 rules in connection with implementation of the Commercial Spectrum Enhancement Act, Pub. L. No. 108-494, 118 Stat. 3986, Title II (2004), and other measures designed to update these rules. Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, *Declaratory Ruling and Notice of Proposed Rule Making,* 20 FCC Rcd 11268 (2005).

[92] *See* 47 U.S.C. § 309(j)(1).

[93] *Air-Ground Auction Notice,* 20 FCC Rcd at 4465 ¶ 171.

[94] Space Data Comments at 2-3.

any differences from past auctions resulting from the ability to bid under alternative band configurations do not necessitate changes to the Part 1 competitive bidding rules.[95] We agree that using our Part 1 rules provides auction participants, the public, and the Commission with significant benefits, and we believe that they should be applied absent any demonstrated need to alter them for particular circumstances. Because we find no need to change them here, we will apply these rules to both commercial and general aviation air-ground auctions.

B. Provisions for Designated Entities

28. In the *Air-Ground Auction Notice,* we tentatively concluded that small business bidding credits are appropriate for the commercial air-ground service, notwithstanding that the Commission has declined in the past to adopt provisions for designated entities in certain nationwide services,[96] and that in previous auctions of nationwide licenses in which the Commission offered bidding credits to designated entities, none of the nationwide licenses was won by a designated entity.[97] For the commercial air-ground service, we proposed to define a small business as an entity with average annual gross revenues for the three preceding years not exceeding $40 million, and to define a very small business as an entity with average annual gross revenues for the three preceding years not exceeding $15 million. We proposed a 15 percent bidding credit for small businesses and a 25 percent bidding credit for very small businesses, as set forth in our standardized schedule of bidding credits at 47 C.F.R. § 1.2110(f)(2).[98] We also sought comment on whether small business bidding credits would be appropriate for the 400 MHz general aviation air-ground service. We noted, however, that general aviation air-ground licenses are specialized licenses that are generally held by relatively small businesses that appear unlikely to have difficulty obtaining the capital needed to participate in an auction.[99]

29. Space Data and AirCell support the use of small business bidding credits for the commercial air-ground service. Stating that "[a]n auction often provides the best opportunity for qualified designated entities to acquire wireless licenses," Space Data argues that this is particularly true in the case of the commercial air-ground service because only two licenses will be assigned and therefore it is unlikely that

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[95] *Id.* at 3.

[96] *Air-Ground Auction Notice,* 20 FCC Rcd at 4466-67 ¶¶ 173-74. The Commission has not offered bidding credits in auctions of Direct Broadcast Satellite (DBS) or Digital Audio Radio Satellite (DARS) licenses. *See* Revision of Rules and Policies for the Direct Broadcast Satellite Service, *Report and Order*, 11 FCC Rcd 9712 (1995); Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Band, *Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 5754 (1997).

[97] *Air-Ground Auction Notice,* 20 FCC Rcd at 4466-67 ¶¶ 173-74. Designated entities are small businesses, businesses owned by members of minority groups and/or women, and rural telephone companies. 47 C.F.R. § 1.2110(a).

[98] *Air-Ground Auction Notice,* 20 FCC Rcd at 4467 ¶ 175. We sought consultation regarding these proposed size standards with the U.S. Small Business Administration (SBA), as required by the Small Business Act, 15 U.S.C. § 632(a)(2)(c), and 13 C.F.R. §§ 121.901-903. On January 26, 2005, the SBA indicated that these size standards appeared reasonable and that it had no specific comments. *See* Letter from Gary M. Jackson, Assistant Administrator for Size Standards, U.S. Small Business Administration, to Gary D. Michaels, Deputy Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated January 26, 2005.

[99] *Air-Ground Auction Notice,* 20 FCC Rcd at 4467-68 ¶ 178.

designated entities will be able to obtain a license through other means.[100] AirCell contends that although air-ground licenses are nationwide, they "are uniquely suited for small businesses because of the anticipated low development and operational costs relative to other nationwide spectrum licenses."[101] Both Space Data and AirCell urge us, however, to adopt bidding credits that are higher than those we proposed in the *Air-Ground Auction Notice.* Specifically, both Space Data and AirCell request that we adopt a 25 percent bidding credit for small businesses and a 35 percent bidding credit for very small businesses.[102]

30. Boeing and Verizon Airfone submitted reply comments in response to the comments of Space Data and AirCell. Boeing is not opposed to the Commission's proposal to offer a 15 percent bidding credit to small businesses and a 25 percent bidding credit to very small businesses, but opposes Space Data's and AirCell's request that we adopt bidding credits of 25 percent for small businesses and 35 percent for very small businesses.[103] According to Boeing, the circumstances of certain of the auctions cited by Space Data and AirCell for which the Commission has offered bidding credits higher than those set forth in the Part 1 rules—*i.e.*, auctions of 39 GHz, Local Multipoint Distribution Service (LMDS), and narrowband Personal Communications Service (PCS) licenses—were different from the circumstances present here.[104] Boeing also argues that the fact that small businesses have not acquired spectrum licenses in previous auctions of nationwide licenses with bidding credits "is attributable to the high implementation costs of those services as opposed to the credit level."[105]

31. Unlike Boeing, Airfone opposes the adoption of any bidding credits in the commercial air-ground service. Airfone argues that bidding credits are not appropriate for this service because, like DBS and DARS, services for which the Commission has not adopted bidding credits, it is a nationwide service that requires a significant initial outlay of capital to implement.[106] Airfone further asserts that Space Data and AirCell have not attempted to quantify the costs of implementing a nationwide air-ground service and that they have provided no meaningful factual support for bidding credits.[107] Finally, Airfone contends that the precedents cited by Space Data and AirCell do not support the adoption of any bidding credits because the licenses involved "were not truly nationwide" and the spectrum was not comparable to that of the air-ground service.[108]

32. We conclude that it is appropriate to offer bidding credits in the commercial air-ground service. As we stated in the *Air-Ground Auction Notice,* no commercial air-ground license will authorize

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[100] Space Data Comments at 4.

[101] AirCell Comments at 2.

[102] Space Data Comments at 5-6; AirCell Comments at 2-7.

[103] Boeing Reply Comments at 1-2, 5.

[104] *Id.* at 2-3.

[105] *Id.* at 3-4. *See also* Airfone Reply Comments at 4.

[106] Airfone Reply Comments at 2-4, 7.

[107] *Id.* at 4-5. *See also* Boeing Reply Comments at 4 (arguing that Space Data and AirCell have provided no basis for increasing the proposed bidding credits).

[108] Airfone Reply Comments at 5-7.

the use of as much spectrum as other nationwide services for which the Commission has declined to adopt small business bidding credits.[109] In addition, we continue to believe that the operation of a commercial air-ground service may require lower capital expenditures than other nationwide services.[110] We disagree, for example, with Airfone's suggestion that the capital outlays necessary to provide commercial air-ground service are comparable to those needed to launch a satellite-based service such as DBS or DARS. Therefore, we find that bidding credits should be made available to small businesses to assist them with attracting capital.

33. We received no comments opposing our specific proposal in the *Air-Ground Auction Notice* to define a small business as an entity with average annual gross revenues for the three preceding years not exceeding $40 million, and a very small business as an entity with average annual gross revenues for the three preceding years not exceeding $15 million, for the commercial air-ground service. We also received no comments proposing any other small business definitions. We continue to believe that, although the capital requirements of air-ground operations should be lower than those of certain other nationwide services and therefore should not constitute a basis for making bidding credits unavailable, such operations may be more capital intensive than other services provided to smaller geographic areas. We therefore believe that the small business definitions we proposed in the *Air-Ground Auction Notice,* which are the same as those we have adopted for other services that serve large geographic areas, are appropriate for this service. We therefore adopt our proposed small business definitions. Thus, for this service we will define a small business as an entity with average annual gross revenues for the three preceding years not exceeding $40 million, and we will define a very small business as an entity with average annual gross revenues for the three preceding years not exceeding $15 million.[111]

34. We turn now to Space Data's and AirCell's arguments in favor of establishing higher bidding credit levels than proposed in the *Air-Ground Auction Notice.* According to Space Data, increased bidding credits will help small companies attract financing, and "[e]ffective competition for [air-ground] licenses will only be accomplished by providing small companies with increased bidding credits."[112] According to AirCell, in order to be effective, bidding credits must be tailored for the specific circumstances in each auction; the past failure of small businesses to win licenses in Commission auctions of nationwide licenses is an indication that the bidding credits offered were too small, not an indication that small businesses are inherently incapable of providing nationwide services; and the

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[109] *Air-Ground Auction Notice,* 20 FCC Rcd at 4466 ¶ 174.

[110] As we indicated in the *Air-Ground Auction Notice,* air-ground service may require fewer ground (base) stations than other terrestrial services that are provided on a nationwide basis, such as broadband PCS. 20 FCC Rcd at 4466 ¶ 174 n. 479. According to AirCell, a nationwide air-ground network requires only 135 cell sites. Letter from Michele C. Farquhar, Counsel to AirCell, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, dated November 2, 2005; Letter from Michele C. Farquhar, Counsel to AirCell, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, dated October 19, 2005; Letter from Michele C. Farquhar, Counsel to AirCell, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, dated October 11, 2005; Letter from Michele C. Farquhar, Counsel to AirCell, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, dated September 30, 2005.

[111] On September 19, 2005, the SBA approved the Commission's request to adopt the proposed small business size standards for the commercial air-ground service. *See* Letter from Hector V. Barreto, Administrator, U.S. Small Business Administration, to Gary D. Michaels, Deputy Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated September 19, 2005.

[112] Space Data Comments at 6.

Commission has adopted bidding credits different from the Part 1 schedule for various auctions.[113] AirCell also argues that "the Commission never intended a 'blanket application' of the default bidding credits in Part 1 to all license auctions. Instead, the Commission regularly solicits comments and adopts bidding credits 'specifically tailored' to each service."[114]

35. AirCell further argues that, in the absence of increased bidding credit levels, commercial air-ground licenses will be more difficult for a small business to acquire than licenses in other nationwide services because the opportunity to acquire an exclusive license in Band Plan 2 or 3 gives large companies a particular incentive to outbid smaller bidders, and because large bidders with terrestrial wireless affiliates will have yet another incentive to place substantial bids in the auction.[115] According to AirCell, the Commission should take steps to "neutralize the effects of the exclusive license option and the advantageous competitive position enjoyed by bidders with terrestrial wireless affiliates."[116]

36. We agree with AirCell that the Commission did not intend to apply the Part 1 bidding credit schedule automatically to all auctions without any opportunity for the consideration of alternative bidding credits. However, the Commission adopted the Part 1 schedule for the specific purpose of providing consistency and predictability. Thus, in adopting this schedule, the Commission stated: "We believe that standardizing the rules regarding definitions of eligible entities, unjust enrichment and bidding credits will assist small, minority and women-owned businesses because the rules' predictability will facilitate the business planning and capital fundraising process."[117] The Commission further said: "[W]e believe that an approach in which we provide certainty for future auctions about the size of available bidding credits will benefit small businesses because potential bidders will have more information well in advance of the auction than previously about how such levels will be set."[118] Although there may be cases in which we find that bidding credits other than those prescribed in the Part 1 schedule are appropriate, the Commission has concluded that the consistency and predictability that this schedule offers is advantageous to small businesses.

37. In addition, the Commission has determined that the Part 1 schedule generally provides bidding credits that are effective in helping small businesses attract investment capital to participate in auctions.[119] Since the adoption of the Part 1 schedule, the Commission therefore has followed the

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[113] AirCell Comments at 2-5.

[114] *Id.* at 4, citing Letter from Margaret W. Wiener, Chief, Auctions and Spectrum Access Division, Federal Communications Commission, to Elizabeth R. Sachs, Counsel, American Mobile Telecommunications Association, 18 FCC Rcd 25149, 25152 (2003).

[115] AirCell Comments at 5-6.

[116] *Id.* at 6.

[117] Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures, *Third Report and Order and Second Further Notice of Proposed Rule Making,* 13 FCC Rcd 374, 386 ¶ 14 (1997) *(Competitive Bidding Third R&O).*

[118] *Id.* at 402-03 ¶ 45.

[119] *See, e.g.,* Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, *Report and Order,* 18 FCC Rcd 25162, 25219-20 ¶ 148 (2003); Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules to License Fixed Services at 24 GHz, *Report and Order,* 15 FCC Rcd 16934, 16968 ¶¶ 79-80 (2000). *See also* Section 257 Triennial Report to Congress; Identifying and Eliminating Market Entry Barriers For Entrepreneurs and Other Small Businesses, *Report,* 19 FCC Rcd 3034, 3083-85 ¶¶ 161-62 (2004).

practice of defining small businesses on a service-specific basis, taking into account the capital requirements and other characteristics of each particular service, and then adopting bidding credits consistent with the Part 1 schedule.[120] Although AirCell and Space Data cite examples of services in which the Commission has offered bidding credits different from the Part 1 bidding credit schedule, in all of these services the Commission had adopted these bidding credits prior to establishment of the Part 1 schedule.

38. In Auction No. 55, for example, the Commission offered levels of bidding credits that were different from those specified in the Part 1 schedule because those levels had been established for the 900 MHz Specialized Mobile Radio (SMR) service in a rulemaking proceeding that preceded adoption of the Part 1 schedule and had not been revised or superseded.[121] In LMDS, also cited by AirCell and Space Data, bidding credits were established prior to the Commission's adoption of the Part 1 schedule. Moreover, the Commission adopted higher bidding credit levels for LMDS specifically to compensate for its simultaneous elimination of the installment payment program that had previously been adopted for LMDS.[122] Similarly, all of the other bidding credits AirCell and Space Data cite as examples of bidding credits that are higher than those in the Part 1 schedule—*i.e.*, bidding credits for the regional narrowband PCS auction held in 1994 and for the Wireless Communications Service and the 39 GHz band—were adopted prior to the establishment of the Part 1 schedule.[123] Moreover, the Commission has denied requests for bidding credits higher than the Part 1 levels in the case of broadband PCS C and F block licenses subject to open bidding,[124] narrowband PCS licenses,[125] and 24 GHz licenses.[126]

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[120] The Commission's practice of adopting service-specific small business definitions was established in Implementation of Section 309(j) of the Communications Act—Competitive Bidding, *Second Memorandum Opinion and Order,* 9 FCC Rcd 7245, 7269 ¶ 145 (1994), and affirmed in the *Competitive Bidding Third R&O,* 13 FCC Rcd at 388 ¶ 18.

[121] Letter from Margaret W. Wiener, Chief, Auctions and Spectrum Access Division, Federal Communications Commission, to Elizabeth R. Sachs, Counsel, American Mobile Telecommunications Association, 18 FCC Rcd 25149 (2003).

[122] *See* Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Second Order on Reconsideration,* 12 FCC Rcd 15082, 15095-96 ¶¶ 19-20 (1997).

[123] *See* Implementation of Section 309(j) of the Communications Act—Competitive Bidding, Narrowband PCS, *Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking,* 10 FCC Rcd 175 (1994); Amendment of the Commission's Rules to Establish Part 27, the Wireless Telecommunications Service ("WCS"), *Report and Order,* 12 FCC Rcd 10785 (1997); 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 Proposed Rule Making,* 12 FCC Rcd 18600 (1997).

[124] Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Sixth Report and Order and Order on Reconsideration,* 15 FCC Rcd 16266, 16287-88 ¶ 145 (2000). *See also* Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Order on Reconsideration,* 16 FCC Rcd 1343, 1353 ¶ 20 (2001).

[125] Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS; Implementation of Section 309(j) of the Communications Act—Competitive Bidding, (continued....)

39. We also note that the Commission has established a bidding credit of 35 percent as part of the Part 1 schedule, but it has determined that this level of bidding credit is appropriate for businesses with average annual gross revenues for the three preceding years not exceeding $3 million.[127] Thus, the Commission has provided for the highest bidding credit AirCell and Space Data request but has found that this level of bidding credit is suitable for businesses with lower gross revenues than businesses to which AirCell and Space Data propose to apply it.

40. AirCell cites a Declaration by economist Paul London that it had submitted in a previous *ex parte* filing to support its arguments that (1) the availability of an exclusive license provides an incentive for a larger company to use its resources to win such a license,[128] and (2) large bidders with terrestrial wireless affiliates will have an additional incentive to place substantial bids in the auction because they will want to use air-ground service to promote their terrestrial services.[129] We are not persuaded by these arguments. AirCell's first point rests on the assumption that Band Plans 2 and 3 would result in a single provider of air-ground services because the 1 MHz license "will not be adequate to provide competitive broadband services."[130] Dr. London further argues that when a license provides an opportunity for the winning bidder to operate as a sole provider of services in the market, bidders will be willing to pay more for the license in order to capture the additional future monopoly profits.[131] We disagree with the premise of this argument, however, that the license for an exclusive 3 MHz license is in essence a license to operate as a monopoly provider of air-ground services. As we discussed in the *Air-Ground Order*, we believe that air-ground service providers operating in the 800 MHz band will face competition from satellite-based operators and potentially from providers operating in other spectrum bands.[132] Furthermore, also as discussed in the *Air-Ground Order*, we believe that operators using a 1 MHz license can provide a number of related services that may compete with the offerings of a provider with a 3 MHz license.[133]

(Continued from previous page)
Narrowband PCS, *Second Report and Order and Second Further Notice of Proposed Rule Making*, 15 FCC Rcd 10456, 10477-78 ¶¶ 43-44 (2000).

[126] Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules to License Fixed Services at 24 GHz, *Report and Order*, 15 FCC Rcd 16934, 16967-68 ¶¶ 77-80 (2000).

[127] 47 C.F.R. § 1.2110(f)(2)(i).

[128] AirCell Comments at 5-6, citing Declaration of Dr. Paul A. London (London Declaration), Attachment to Letter from Michele Farquhar, Counsel, AirCell, to Marlene H. Dortch, Secretary, Federal Communications Commission, dated December 8, 2004, at ¶¶ 12-14.

[129] AirCell Comments at 5-6, citing London Declaration at ¶ 20.

[130] AirCell Comments at 5, note 14. AirCell's argument that bidding credits will affect marketplace competition, included in *ex parte* presentations, also rests on this assumption. Letter from Michele C. Farquhar, Counsel to AirCell, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, dated November 2, 2005, Attachment at 1; Letter from Michele C. Farquhar, Counsel to AirCell, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, dated October 19, 2005, Attachment at 1.

[131] London Declaration at ¶ 12.

[132] *Air-Ground Order*, 20 FCC Rcd at 4425 ¶ 40.

[133] *Id.* at 4425-26 ¶ 41.

41. We also disagree with AirCell's argument that bidders with terrestrial wireless affiliates will have a disproportionate incentive to place substantial bids in the auction in order to promote their terrestrial services. This argument also rests on an assumption of market power that we do not believe will be characteristic of the market for broadband air-ground services. Dr. London's statement, which AirCell cites, discusses "how [Verizon] is using its current monopoly to promote its own terrestrial cellular service."[134] However, notwithstanding the current state of the market for air-ground voice services, we believe that the band plans made available and the flexible service rules adopted in this proceeding, along with new airborne services being developed on satellite-based platforms, will lead to a competitive market for broadband air-ground services.

42. We conclude that neither Space Data nor AirCell has provided sufficient support for departing from our Part 1 bidding credit schedule in the 800 MHz air-ground service. Although Space Data asserts that increased bidding credits would help small companies attract financing, it provides no facts that would indicate that our standard schedule of bidding credits will be insufficient to assist small entities in attracting capital. As we have explained, we have found this schedule to be effective in promoting the participation of small entities in auctions, and we continue to find that the consistency of a standardized schedule is helpful to small businesses in that it enables them to formulate plans well in advance of auctions. If we were to raise or lower bidding credits on the basis of the number of licenses available, or the possible incentives large entities might have to bid substantial sums for licenses, it would be difficult for us to maintain a coherent bidding credit program and the predictability of our current program would be undermined. We therefore conclude that, absent more specific facts to justify a departure from our Part 1 schedule, we should not deviate from it here.

43. Finally, no parties filed comments on the issue of whether small business bidding credits would be appropriate for the 400 MHz general aviation Air-Ground Radiotelephone Service. As discussed in the *Air-Ground Auction Notice,* general aviation air-ground licenses are generally held by relatively small businesses, and larger telecommunications providers do not routinely apply for them. Moreover, the initial auction for the nine general aviation licenses for which we have received applications will be limited to those parties with applications already on file. Given these circumstances, we conclude that bidding credits are unnecessary in the auction of these licenses. If in the future we are presented with evidence of a need for bidding credits in the 400 MHz air-ground service, we will reconsider this issue, but we find no need for bidding credits in this service under current circumstances.

V. PROCEDURAL MATTERS

A. Congressional Review Act

44. The Commission will send a copy of this Order on Reconsideration and Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

B. Final Regulatory Flexibility Analysis

45. Pursuant to the Regulatory Flexibility Act,[135] the Final Regulatory Flexibility Analysis (FRFA) for the Report and Order is set forth in Appendix C. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of the Report and Order,

[134] London Declaration at ¶ 20.

[135] *See* 5 U.S.C. § 604.

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

C. Paperwork Reduction Act of 1995

46. This Order on Reconsideration and Report and Order does not contain either new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

D. Contact Information

47. The primary Wireless Telecommunications Bureau contact for this proceeding is Richard Arsenault, Chief Counsel of the Wireless Telecommunications Bureau Mobility Division (202-418-0920, Richard.Arsenault@fcc.gov). For auctions-related issues, contact Lynne Milne (202-418-7055, Lynne.Milne@fcc.gov). Press inquiries should be directed to Chelsea Fallon, Wireless Telecommunications Bureau, at (202) 418-7991, TTY at (202) 418-7233, or e-mail at Chelsea.Fallon@fcc.gov.

VI. CONCLUSION

48. In this Order on Reconsideration, we deny Space Data's request that we permit the provision of ancillary land mobile and fixed service in the 800 MHz air-ground band on a secondary basis. However, we clarify that stratospheric platforms, such as high-altitude balloons, may be used to provide air-ground services in the band. We deny AirCell's request to shorten from five to two years the term of the nonrenewable license granted to Verizon Airfone, as well as AirCell's request to abbreviate from two years to six months the transition period that the Commission adopted in order for Verizon Airfone to move its incumbent narrowband operations to one megahertz of spectrum in the 800 MHz air-ground band. However, we will require Airfone to file regular status reports regarding the transition of its incumbent system to one megahertz of the band. In addition, in the event that Airfone, or an affiliate of Airfone, wins an exclusive 3 MHz license, it will be subject to certain reporting requirements to enable the Commission to monitor Airfone's migration of its narrowband subscribers to a new broadband system.

49. In this Report and Order, we adopt competitive bidding rules for the 800 MHz commercial Air-Ground Radiotelephone Service and the 400 MHz general aviation Air-Ground Radiotelephone Service. We will employ the general competitive bidding rules set forth in Part 1, Subpart Q, of the Commission's Rules for both services. For the 800 MHz air-ground service, we will define a small business as an entity with average annual gross revenues for the three preceding years not exceeding $40 million, and a very small business as an entity with average annual gross revenues for the three preceding years not exceeding $15 million. We will make available a 15 percent bidding credit for small businesses and a 25 percent bidding credit for very small businesses, as set forth in our standardized schedule of bidding credits at 47 C.F.R. § 1.2110(f)(2). Finally, we conclude that bidding credits are unnecessary for the 400 MHz air-ground service.

VII. ORDERING CLAUSES

50. Accordingly, IT IS ORDERED THAT, pursuant to the authority contained in Sections 1, 4(i), 11, 303(r) and (y), 308, 309, and 332 of the Communications Act of 1934, as amended, 47 U.S.C.

§§ 151, 154(i), 161, 303(r), 303(y), 308, 309, and 332, this ORDER ON RECONSIDERATION and REPORT AND ORDER is hereby ADOPTED.

51. IT IS FURTHER ORDERED, pursuant to Sections 1, 4(i), and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), and 154(j), and Section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, that the Petition for Clarification and Reconsideration, filed by Space Data Corporation on May 13, 2005, IS GRANTED IN PART AND DENIED IN PART, to the extent indicated herein.

52. IT IS FURTHER ORDERED, pursuant to Sections 1, 4(i), and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), and 154(j), and Section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, that the Petition for Partial Reconsideration, filed by AirCell, Inc. on May 13, 2005, IS DENIED.

53. IT IS FURTHER ORDERED, pursuant to Sections 1, 4(i), and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), and 154(j), and Sections 0.201 and 0.331 of the Commission's rules, 47 C.F.R. §§ 0.201 and 0.331, that the Wireless Telecommunications Bureau shall, within 60 calendar days of the date of the adoption of this order, issue a Public Notice that specifies the reporting requirements imposed on Verizon Airfone pursuant to paragraph 21 of the ORDER ON RECONSIDERATION.

54. IT IS FURTHER ORDERED, pursuant to Sections 1, 4(i), and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), and 154(j), and Sections 0.201 and 0.331 of the Commission's rules, 47 C.F.R. §§ 0.201 and 0.331, that in the event an exclusive 3 MHz license is granted to Verizon Airfone, or an affiliate of Verizon Airfone, the Wireless Telecommunications Bureau shall, within 60 calendar days of the grant thereof, issue a Public Notice that specifies the reporting requirements imposed on Verizon Airfone pursuant to paragraph 22 of the ORDER ON RECONSIDERATION.

55. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 303(c), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(c), 303(r) and 309(j), that Part 22 of the Commission's Rules IS AMENDED as specified in Appendix B, effective 60 days after publication in the Federal Register.

56. IT IS FURTHER ORDERED THAT the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this ORDER ON RECONSIDERATION AND REPORT AND ORDER, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Marlene H. Dortch
Secretary

Appendix A—Commenting Parties

WT Docket No. 03-103

Petitions for Reconsideration and/or Clarification
AirCell, Inc (AirCell)
Space Data Corporation (Space Data)

Oppositions and Comments
CTIA-The Wireless Association (CTIA)
LiveTV, Inc.
Nextel Communications, Inc. (Nextel)
The Boeing Company (Boeing)
Verizon Airfone Inc. (Airfone)

Replies
AirCell
Space Data

Ex Partes
AirCell
Airfone
Boeing
Continental Airlines
Nextel
Wiley Rein & Fielding LLP

WT Docket No. 05-42

Comments
AirCell
Space Data

Reply Comments
Airfone
Boeing

Ex Partes
AirCell
Airfone

Appendix B—Final Rules

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

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

Authority: 47 U.S.C. 154, 222, 303, 309 and 332.

2. Add a new Section 22.881 to read as follows:

§ 22.881 Air-Ground Radiotelephone Service subject to competitive bidding.

Mutually exclusive initial applications for general aviation Air-Ground Radiotelephone Service licenses and mutually exclusive initial applications for commercial Air-Ground Radiotelephone Service licenses are subject to competitive bidding. The general competitive bidding procedures set forth in part 1, subpart Q, of this chapter will apply unless otherwise provided in this subpart.

3. Add a new Section 22.882 to read as follows:

§ 22.882 Designated entities.

(a) Eligibility for small business provisions in the commercial Air-Ground Radiotelephone Service.

(1) A small business is an entity that, together with its affiliates, its controlling interests and the affiliates of its controlling interests, has average gross revenues that are not more than $40 million for the preceding three years.

(2) A very small business is an entity that, together with its affiliates, its controlling interests and the affiliates of its controlling interests, has average gross revenues that are not more than $15 million for the preceding three years.

(b) Bidding credits in the commercial Air-Ground Radiotelephone Service.

(1) A winning bidder that qualifies as a small business, as defined in this section, or a consortium of small businesses may use a bidding credit of 15 percent, as specified in § 1.2110(f)(2)(iii) of this chapter, to lower the cost of its winning bid on a commercial Air-Ground Radiotelephone Service license.

(2) A winning bidder that qualifies as a very small business, as defined in this section, or a consortium of very small businesses may use a bidding credit of 25 percent, as specified in § 1.2110(f)(2)(ii) of this chapter, to lower the cost of its winning bid on a commercial Air-Ground Radiotelephone Service license.