

threaten to engage in, affiliate favoritism to the detriment of non-network stations; that the established networks place or retain programming in their schedules because of their financial interests in or syndication rights to that programming, or for other than legitimate competitive reasons; or that the established networks have reduced the pool of suppliers of television programming through anticompetitive practices.

25. In addition, proponents of retaining the remaining fin/syn rules have provided no evidence unrelated to our fourteen factors that would cause us to question whether the conclusions we reached in 1993 remain valid today. Nor have they shown that the semi-annual reports submitted by the networks reveal ownership patterns that pose a threat to programming diversity. Moreover, there is persuasive evidence that the established broadcast television networks have faced increased competition for the acquisition of television programming from broadcast and non-broadcast television distributors since 1993, and there is evidence which suggests that the market power of the established networks, as determined by their prime time audience share, has decreased since 1993. We therefore decline to alter our 1993 decision to sunset the remaining fin/syn rules. In light of the fact that the commenters have not shown a need to retrain these rules, we also conclude that there is no justification for strengthening any of the rules, as the Coalition urges.

26. Finally, we note that both the Coalition and INTV urge us to retain, and indeed strengthen, our reporting requirements for the networks even if we allow the rest of the fin/syn rules to expire. These parties argue that it is important for the Commission to monitor the network's conduct following repeal of the remaining rules in order to assess the impact of such repeal. However, neither of these commenters has demonstrated the need to continue reporting requirements, and we decline to do so.

27. In our Notice, we sought comment on whether, in the event proponents of retention of the fin/syn rules failed to meet their burden of proving that retaining the rules is warranted, we should amend our rules to allow for an expiration date earlier than November 10, 1995. Commenters in this proceeding have failed to demonstrate that market conditions and networks behavior since 1993 justify retraining the rules. In addition, no evidence or argument has been submitted showing that repeal of the remaining rules before

November 10, 1995, would disrupt the conduct of business by parties relying on the rules, although we sought comment on this point. We also note, as discussed above, that the networks now face more competition than in 1993 for the acquisition of television programming from broadcast and non-broadcast television distributors. Moreover, we have described at length the negative effects of the fin/syn rules on production and distribution markets in our earlier decisions. Under these circumstances, we conclude that no public interest purpose would be served by allowing the rules to remain in effect until November 10, 1995. We thus conclude that all of the remaining fin/syn rules will be repealed immediately upon publication of this Order in the Federal Register.

#### Final Regulatory Flexibility Analysis

28. Pursuant to the Regulatory Flexibility Act of 1980, the Commission has set forth the following Final Regulatory Flexibility Analysis. The Secretary shall send a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with the Regulatory Flexibility Act, 4 U.S.C. § 601 et seq.

29. Need for and Purpose of this Action: This action is taken to accelerate the expiration of the Commission's remaining fin/syn rules—previously scheduled for November 10, 1995—so that the rules will expire upon publication of this Order in the Federal Register.

30. Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis: None.

31. Significant Alternatives Considered and Rejected: The Commission considered retaining the remaining fin/syn rules. However, after reviewing the comments submitted in this proceeding, the Commission concluded that the proponents of retaining the rules had not met their burden of proving that the rules are still needed to achieve the FCC's goals of source and outlet diversity in the television programming marketplace. One commenter in this proceeding argued that the fin/syn rules should be strengthened. The Commission considered this argument but concluded that it was without merit in light of the fact that no need for retaining the rules at all had been demonstrated. The Commission also considered leaving the remaining fin/syn rules in place until their previously scheduled expiration date of November 10, 1995, but

concluded that no evidence had been presented showing that earlier repeal would disrupt the conduct of business by parties relying on the rules. Given the increased competition facing the networks and the negative effects of the fin/syn rules on production and distribution markets, the Commission concluded that no public interest purpose would be served by waiting until November 10, 1995, to sunset the rules.

#### Ordering Clauses

32. Accordingly, It Is Ordered that pursuant to the authority contained in Sections 4(i), 4(j), 301, 303(i), 303(r), 313 and 314 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 301, 303(i), 303(r), 313 and 314, Sections 73.659 through 73.663 of Part 73 of the Commission's Rules, 47 CFR Part 73, Are Amended as set forth below, effective upon publication of this Order in the Federal Register.

33. In keeping with our recent decision in our PTAR proceeding, It Is Further Ordered that section 73.662 of Part 73 of the Commission's Rules, 47 CFR Part 73, Is Further Amended as set forth below, effective August 30, 1996.

34. It Is Further Ordered that MM Docket No. 95-39 Is Terminated.

#### List of Subjects in 47 CFR Part 73

Radio broadcasting.  
Federal Communications Commission.  
William F. Caton,  
*Acting Secretary.*

#### Rule Changes

Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

#### **PART 73—RADIO BROADCAST SERVICES**

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334.

2. Sections 73.659 through 73.661, and 73.663, are removed and reserved.

3. Sections 73.662 is amended by revising the heading and introductory text to read as follows:

#### **73.662 Definitions for television prime time access rules.**

For purposes of § 73.658(k):

\* \* \* \* \*

4. Effective August 30, 1996, § 73.662 is removed and reserved.

[FR Doc. 95-23366 Filed 9-20-95; 8:45 am]

BILLING CODE 6712-01-M

**47 CFR Part 90**

[PR Docket No. 89-553, PP Docket No. 93-253, GN Docket No. 93-252; FCC 95-395]

**SMR Systems in the 900 MHz Frequency Band**

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commission adopted a Second Order on Reconsideration and Seventh Report and Order, implementing final auction rules for the 900 MHz Specialized Mobile Radio (SMR) service. The Second Order on Reconsideration addresses reconsideration petitions concerning the service rule adopted in the Second Report and Order and Second Further Notice of Proposed Rule Making. The Seventh Report and Order sets forth the rules and procedures governing the 900 MHz SMR auction, including reduced down payments, bidding credits and installment payment plans for small businesses and partitioning for rural telephone companies. The intended effect of this action is to facilitate the development of SMR services and to promote competition in the wireless marketplace.

**EFFECTIVE DATE:** October 23, 1995.

**FOR FURTHER INFORMATION CONTACT:** Amy Zoslov (202) 418-0660. Wireless Telecommunications Bureau or Diane Law (202) 418-0660. Wireless Telecommunications Bureau.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Second Order on Reconsideration and the Seventh Report and Order, released September 14, 1995. The complete text of this Second Order on Reconsideration and Seventh Report and Order is available for inspection and copying during normal business hours in the FCC Dockets Branch, Room 239, 1919 M Street, N.W., Washington, D.C., and also may be purchased from the Commission's copy contractor, International Transcription Service, at (202) 857-3800, 2100 M Street, N.W., Suite 140, Washington, D.C. 20037.

Synopsis of the Second Order on Reconsideration and Seventh Report and Order

Adopted: September 14, 1995

Released: September 14, 1995

**I. Background**

When the Commission established the 900 MHz SMR service in 1986, it elected to use a two-phase licensing process. In Phase I, licenses were assigned in 46 "Designated Filing Areas" (DFAs) comprised of the top 50 markets. Phase

II licensing, for facilities outside the DFAs, was frozen after 1986, when the Commission opened its filing window for the DFAs. In 1989, the Commission adopted a Notice of Proposed Rule Making in PR Docket 89-533, 55 FR 744 (Jan. 9, 1990), proposing to begin Phase II licensing of 900 MHz SMR facilities nationwide. In 1993, the Commission adopted a First Report & Order and Further Notice of Proposed Rule Making in PR Docket 89-553, 58 FR 12176 (March 3, 1993), modifying its Phase II proposal and seeking comment on whether to license the 900 MHz SMR band to a combination of nationwide, regional, and local systems. Shortly thereafter, Congress amended the Communications Act to reclassify most SMR licensees as Commercial Mobile Radio Service (CMRS) providers and establish the authority to use competitive bidding to select from among mutually exclusive applicants for certain licensed services. The Commission deferred further consideration of Phase II and incorporated the 900 MHz docket into its CMRS proceeding.

In the CMRS Third Report & Order, PR Docket 89-553, 59 FR 59945 (Nov. 21, 1994), the Commission further revised its Phase II proposals and established the broad outlines for the completion of licensing in the 900 MHz SMR band. The Commission left the adoption of specific auction and service rules for the Phase II Order which the Commission adopted in the Second Report and Order and Second Further Notice, PR Docket 89-553, GN Docket No. 93-252, PP Docket No. 93-253, FCC 95-159, 60 FR 21987 and 60 FR 22023 (May 4, 1995), (Second R&O & Second Further Notice). In that proceeding, the Commission adopted final service rules, established technical and operational rules for the new MTA licensees, defined the rights of incumbent SMR licensees already operating in the 900 MHz band, and requested comment on proposed auction rules. The 900 MHz SMR band will be divided into 20 ten-channel blocks in each of 51 service areas based on Major Trading Areas (MTAs), which match the blocks previously licensed for the DFAs. Each MTA license will give the licensee the right to operate throughout the MTA on the designated channels except where a co-channel incumbent licensee already is operating. MTA licensees will be allowed to aggregate multiple blocks within an MTA and to aggregate blocks geographically in multiple MTAs. The Commission also addressed issues raised on reconsideration of the CMRS Third Report & Order pertaining

specifically to the 900 MHz SMR service. The Commission set forth proposals for new licensing rules and auction procedures for the service, including provisions for designated entities. The Commission later issued a Public Notice requesting further comment on the impact of the Supreme Court's subsequent decision in *Adarand Constructors, Inc v. Peña*, 115 S.Ct. 2097 (1995), on the proposed treatment of designed entities.

In this Second Order on Reconsideration & Seventh Report & Order the Commission affirms the coverage requirements for MTA licensees and the interference protections and loading requirements for incumbents, and clarifies secondary site licensing, finders' preference and foreign ownership waiver policies. The Order also adopts auction rules, including a tiered bidding credit and enhanced installment payment plans for small businesses and partitioning for rural telephone companies.

**II. Second Order on Reconsideration****A. Service Rules****Coverage Requirements**

As decided in the Second R&O & Second Further Notice, MTA licensees in this service will be required to meet coverage requirements of 1/3 of the population in the service area within three years of the initial license grant and 2/3 of the population within five years. Alternatively, a licensee may make a showing at five years that it is providing "substantial service." The Commission denies reconsideration of these benchmarks, and reiterates that MTA licensees must satisfy these requirements regardless of the area or percentage of the MTA population that is served by incumbent licensees. MTA licensees may consider options such as resale or management agreements to fulfill the coverage requirements.

**Treatment of Incumbents**

To ensure that incumbent licensees receive protection from interference by MTA licensees, Second R&O & Second Further Notice provides that MTA licensees either must maintain a minimum 113 kilometer (70 mile) geographic separation or comply with the Commission's short-spacing rules with respect to all incumbent facilities in their service area or in adjacent MTAs. The Commission affirms its intention to allow MTA licensees to use short-spacing rules to comply with interference protection standards, and does not believe it will result in a plethora of interference disputes at the Commission. The Commission also

affirms its adoption of the 40 dBu signal strength contour as the protected service area in which incumbents may modify or add facilities, and reject petitioners' requests to use the 22 dBu contour instead.

The Commission will allow incumbents to have their licenses reissued if they are not the successful bidder for the MTA in which they are currently operating. This procedure, which would be granted post-auction upon the request of the incumbent, would essentially convert their current site licenses to a single "partitioned" license, authorizing operations throughout the contiguous and overlapping 40 dBu signal strength contours of the multiple sites. All incumbents with reissued "partitioned" licenses will have to make a one-time filing of specific information for each of their external base sites that will assist the staff in updating the Commission's database after the close of the 900 MHz SMR auction. Incumbents cannot expand their 40 dBu signal strength contour, so they may make additions or modifications to their facilities without notifying the Commission. If incumbents seek to gain additional geographic coverage beyond the 40 dBu protected contour, they must apply for the MTA license.

#### Secondary Site Licensing/Finders' Preference

As decided in the Second R&O & Second Further Notice, no secondary site licenses will be granted once an MTA licensee has been selected. The Commission states that it is important to assure potential MTA bidders that the spectrum upon which they are bidding will not become subsequently encumbered with secondary sites. The Commission clarifies that all pending finders' preference requests for 900 MHz SMR licenses will be processed, but eliminates future finders' preferences for the 900 MHz SMR service. As provided by the rules, any stations licensed to incumbents that are not constructed or placed in operation will revert automatically to the MTA licensee for that channel block.

#### Loading Requirements

The Commission denies further reconsideration of its decisions in the CMRS Third Report & Order and the Second R&O & Second Further Notice with respect to loading requirements in the 900 MHz service, as petitioners have raised no new arguments that would merit reconsideration. Consequently, incumbent 900 MHz SMR licensees will continue to be subject to loading requirements, although they are

eliminated for MTA licensees. However, temporary relief of the loading rules may be available if the incumbent's unique circumstances warrant a waiver of the rules.

#### Discontinuance of Operation

The Commission clarifies that the amended rule regarding discontinuance of operation (Section 90.631(f)), which provides that stations taken out of service for 90 consecutive days are considered permanently discontinued, applies only to stations that were taken out of service after June 5, 1995 (the effective date of the rule). The former rule provided that stations taken out of service for 12 months were considered permanently discontinued. Consequently, stations that were taken out of service prior to June 5, 1995, are entitled to stay out of service for the remainder of the original 12 months provided in the former rule, before they will be considered permanently discontinued. Those stations taken out of service on or after June 5, 1995, will be considered permanently discontinued after 90 days. With regard to wide-area SMR licensees that are replacing high power analog sites with low power digital sites, however, the Commission will deem all the base stations "in operation" if the system meets the standards and conditions set out in Fleet Call, Inc., *Memorandum Opinion and Order*, 6 FCC Rcd 1533 (1991), *recon. dismissed*, 6 FCC Rcd 6989 (1991). In Fleet Call, the Commission found that conversion from Fleet Call's existing base stations with aggregate loading from single high-power sites to multiple low-power sites on an integrated basis in six major markets would increase spectrum efficiency without posing a risk of spectrum warehousing.

#### Foreign Ownership Waivers

In Section 332(c)(6) of the Communications Act, Congress reclassified certain categories of private land mobile radio providers (PLMRS) as commercial mobile radio service (CMRS) providers, and provided for their treatment as common carriers. As a result, reclassified providers are subject to the Section 310(b) foreign ownership restrictions. Congress provided for limited grandfathering of existing foreign interests in such licensees through a waiver petition process whereby any reclassified PLMRS licensee could petition the Commission by February 10, 1994 for waiver of the application of Section 310(b) to any foreign ownership that lawfully existed as of May 24, 1993. In the Second R&O & Second Further

Notice, the Commission decided to grandfather any timely-filed petitions for waiver of the foreign ownership restrictions filed by an incumbent in the event the incumbent wins the MTA license. In the Foreign Ownership Order, GN Docket 93-252, 60 FR 40177 (Aug. 7, 1995), the Wireless Telecommunications Bureau noted that the waivers apply to additional licenses granted to petitioners in the same service after May 24, 1993 and prior to August 10, 1996, provided the same ownership structure is maintained. Thus, such entities may acquire other SMR licenses, including MTA licenses in which it is not the incumbent.

### III. Seventh Report and Order

#### A. Auction Rules

A total of 1,020 MTA licenses (51 MTAs times 20 licenses in each MTA) will be awarded in the 900 MHz SMR service. The Commission will use a single simultaneous multiple round auction to award these licenses, because the licenses are interdependent, and licensees likely will aggregate and/or substitute across spectrum blocks and geographic areas. Both incumbents and new entrants are eligible to bid for all MTA licenses, but winning bidders will be subject to the CMRS spectrum cap in 47 CFR 20.6. All applicants for MTA licenses are treated as initial applicants for Public Notice, application processing, and auction purposes. The Wireless Telecommunications Bureau will announce the time and place of the auction and provide additional information to bidders by future Public Notice.

Applicants will apply for the 900 MHz SMR auction by filing a short-form application (FCC Form 175 and paying an upfront payment. The Commission adopts the standard upfront payment formula of \$0.02 per pop-MHz, based on the number of 10-channel blocks in each MTA identified on the applicant's Form 175 and the total MTA population. The Wireless Telecommunications Bureau will announce, by Public Notice, the population calculation of each MTA, using a formula that takes into account incumbents within the MTA, and the upfront payment amount of each MTA. The Commission also adopts the Milgrom-Wilson activity rule used in previous multiple-round simultaneous auctions, which requires bidders to declare their maximum eligibility in terms of MHz-pops and limits them to bidding on licenses encompassing no more than the MHz-pops covered by their upfront payment. Failure to maintain the requisite activity level will result in a reduction in the amount of

MHz-pops upon which a bidder will be eligible to bid in the next round of bidding, unless an activity rule waiver is used. The Commission will provide bidders with five activity rule waivers which may be used in any round, but retains the discretion to issue additional waivers during the course of the auction.

Each applicant will be required to specify on its Form 175 its classification, status as a designated entity (if applicable), markets and frequency blocks applied for, and persons authorized to place or withdraw bids. In the Order, the Commission modified the tables in 47 CFR 90.617 and 90.619 to assign block letters to the former frequency block numbers. Applicants must identify any arrangements or agreements with other parties relating to the licenses that are being auctioned, and certify that there are no arrangements other than those specified. Applicants may correct minor defects in their short-form applications, prior to the auction, but may not make any major modifications to their applications, including license area changes, cognizable ownership changes or changes in the identification of parties to bidding consortia, until after the auction. Applicants may modify their short-form applications to reflect formation of consortia or changes in ownership at any time before or during an auction, provided such changes do not result in a change in control of the applicant, and provided that the parties forming consortia or entering into ownership agreements have not applied for licenses in any of the same geographic license areas. In instances where only a single applicant has applied for a particular MTA channel block, the Commission will cancel the auction for that block and establish a deadline for filing of the applicant's long-form application. In all instances where mutually exclusive applications are filed, the MTA channel block will be included in the auction.

#### Bidding Issues

Bidders will be able to submit bids on site, via personal computers using remote bidding software, or via telephone, but the Commission reserves the right to have only remote bidding—by personal computers and by telephone—for the 900 MHz SMR auction. The timing and duration of auction rounds would be determined by the Wireless Telecommunications Bureau and announced by Public Notice. As in prior auctions, the Commission expects to start the auction with relatively large bid increments and reduce increments as bidding activity

falls. The Commission will use a simultaneous stopping rule for this auction to afford bidders flexibility to pursue back-up strategies to ensure that bidders will not hold back bids until the final round. During the auction, the Commission retains the discretion to declare that the auction will end after a specified number of additional rounds.

The Commission will specify bid increments, i.e., the amount or percentage by which the bid must be raised above the previous round's high bid in order to be accepted as a valid bid in the current bidding round. The application of a minimum bid increment helps to ensure that the auction closes within a reasonable period of time and is expressed in both a percentage and fixed dollar amount. The Commission may impose a minimum bid increment of five percent or \$0.02 per pop-MHz, whichever is greater, but also retains the discretion to set, and by announcement before or during the auction, vary the minimum bid increments for licenses over the course of an auction. Where a tie bid occurs, the Commission will determine the high bidder by the order in which the Commission receives the bids.

#### Withdrawal and Default

The Commission will use the bid withdrawal and default rules for this auction similar to those used in prior auctions. Under these rules, any bidder that withdraws a high bid during an auction before the Commission declares bidding closed must reimburse the Commission for the difference between the amount of the ultimate winning bid and the withdrawn bid if the winning bid is lower than the withdrawn bid. An auction winner defaulting after the close of the auction will also have to pay the lesser of three percent of the subsequent winning bid or three percent of the amount of the defaulting bid. In the event that an auction winner defaults, is disqualified, or if the license is revoked or terminated, the Commission will re-auction the license, except that the Commission may offer the license to the second highest bidder if the default occurs within five days after the auction closes.

#### Down Payment and Final Payment

At the conclusion of the auction, winning bidders must supplement their upfront payments and file their long-form applications (FCC Form 600). The upfront payment must be supplemented in an amount sufficient to bring the winning bidder's deposit up to 20 percent of its winning bid within five days after the close of the auction. Small businesses eligible for installment

payments, however, must bring their deposits up to five percent of the winning bid within five days after the close of the auction. Once each applicant has filed its long form and submitted its down payment, the Wireless Telecommunications Bureau will issue a Public Notice announcing the application's acceptance for filing and open a 30-day window for filing petitions to deny. Excluding designated entities eligible for installment payments, payment of the remaining balance due on the license must be paid within five business days following a Public Notice announcing that the Commission is prepared to award the license.

#### Rules Prohibiting Collusion and Transfer Requirements

The 900 MHz SMR auction will be subject to the same regulatory safeguards as prior auctions to prevent applicants from colluding during the auction or obtaining unjust enrichment from subsequent transfer of the license. To prevent collusion, bidders who have applied for licenses in the same MTA on their short-form applications may not cooperate, collaborate, discuss, or disclose the substance of their bids or strategies with other bidders during the auction except pursuant to a consortium or arrangement identified in the short-form application. Bidders must also attach an exhibit to the Form 600 explaining the terms, conditions, and parties involved in any bidding arrangement. With respect to transfers, licensees transferring their licenses within three years of the initial license grant must disclose to the Commission all contracts and other documentation associated with the transfer.

#### B. Designated Entities

##### Background

Section 309(j)(3)(B) of the Communications Act 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," collectively referred to as "designated entities." For broadband PCS, the Commission adopted special provisions for businesses owned by members of minority groups or women—bidding credits, installment

payments and a separate entrepreneur's block—and analyzed their constitutionality using the "intermediate scrutiny" standard of review articulated in *Metro Broadcasting v. FCC*, 497 U.S. 547, 564–65 (1990), because, as in *Metro*, the proposed provisions involved Congressionally-mandated benign race- and gender-conscious measures.

After the release of the broadband PCS rules, the Supreme Court decided *Adarand Constructors v. Peña*, 115 S. Ct. 2097 (1995), which overruled *Metro Broadcasting* "to the extent that *Metro Broadcasting* is inconsistent with the holding in *Adarand* that all racial classifications must be analyzed under strict scrutiny. In the *Competitive Bidding Further Notice of Proposed Rulemaking*, PP Docket No. 93–253, 60 FR 37786 (July 21, 1995), the Commission modified the designated entities provisions in the entrepreneur's block auction so as to render them race- and gender-neutral, because of the substantial delay that would be incurred in supplementing the record to meet a "strict scrutiny" standard, and to avoid the substantial likelihood that the auction would be stayed based on the holding in *Adarand*.

#### Eligibility

In the 900 MHz SMR service, as in other auctionable services, the Commission remains committed to meeting the statutory objectives of promoting economic opportunity and competition, of avoiding excessive concentration of licenses, and of ensuring access to new and innovative technologies 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. Because of the large number of available licenses and the presence of incumbents throughout the 900 MHz SMR band, the Commission will not create an entrepreneur's block in this service. Nevertheless, the Commission adopts several provisions for bidding in the 900 MHz auction by small businesses which will foster the Commission's statutory goals. Taking commenters' suggestions into account, the Commission defines two categories of small businesses: (1) An entity that, together with affiliates, has average gross revenues for the three preceding years of \$3 million or less; and (2) an entity that, together with affiliates, has average gross revenues for the three preceding years of \$15 million or less. The Commission will define any investor in the applicant with a 20 percent or greater interest to be

attributable for purposes of determining small business status. The 20 percent attribution threshold is derived from the measure of SMR attribution for purposes of applying the CMRS spectrum cap. The Commission also adopts the multiplier governing the CMRS spectrum cap, set out in 47 CFR 20.6(d)(6).

#### Bidding Credits, Installment Payments and Reduced Down Payments

Under this "tiered" approach, small businesses falling under the \$3 million benchmark are eligible for a 15 percent bidding credit on any MTA license; those falling under the \$15 million benchmark are eligible for a 10 percent bidding credit. Bidding credits for small businesses are not cumulative. Thus a \$3 million small business will be eligible for only a 15 percent bidding credit, not a 25 percent credit. All small businesses may make a reduced down payment (five percent of the winning bid following the close of the auction, with the balance of the down payment paid five days after a Public Notice announcing that the Commission is prepared to grant the license), and are entitled to pay the bid balance in quarterly installments over the remaining license term. Small businesses falling under the \$3 million benchmark will be able to make interest-only payments (U.S. Treasury note rate) for the first five years of the license term; small businesses falling under the \$15 million benchmark will be able to make interest-only payments (U.S. Treasury note rate plus 2.5 percent) for the first two years of the license term. The Commission believes that broadening the scope of opportunities for small businesses, particularly on a tiered basis, will result in substantial participation by women and minorities, and that the expected capital outlay for the 900 MHz service will not present the same type of obstacles for those entities as a more costly spectrum-based service like PCS. For this reason, the Commission does not adopt reduced upfront payments for small businesses in the 900 MHz service.

#### Transfer Restrictions and Unjust Enrichment Provisions

Small businesses entitled to special provisions in the 900 MHz SMR service seeking to transfer their licenses, as a condition to approval of the transfer, must remit to the government a payment equal to a portion of the total value of the benefit conferred by the government. Thus, a small business that received bidding credits seeking transfer or assignment of a license to an entity that is not a small business or does not

qualify as a smaller business under the definitions in 47 CFR § 90.814(b)(1), will be required to reimburse the government for the amount of the bidding credit, plus interest at the rate imposed for installment financing at the time the license was awarded, before transfer will be permitted. The amount of this payment will be reduced over time as follows: a transfer in the first two years of the license term will result in a reimbursement of 100 percent of the value of the bidding credit; in year three of the license term the payment will be 75 percent; in year four the payment will be 50 percent and in year five the payment will be 25 percent, after which there will be no payment. If a small business under the \$3 million definition seeks to transfer or assign a license to a small business under the \$15 million definition, for the purposes of determining the amount of payment, the value of the bidding credit is five percent, the difference between the 10 and 15 percent bidding credits. The five percent difference will be subject to the same percentage reductions over time as specified above. These payments will have to be paid to the U.S. Treasury as a condition of approval of the assignment or transfer.

If a licensee that was awarded installment payments seeks to assign or transfer control of its license to an entity that does not meet either of the definitions set forth in Section 90.814(b)(1) during the term of the license, the Commission will require payment of the remaining principal and any interest accrued through the date of assignment as a condition of the license assignment or transfer. Moreover, if a small business under the \$3 million definition seeks to assign or transfer control of a license to a small business under the \$15 million definition (that does not qualify for as favorable an installment payment plan), the installment payment plan for which the acquiring entity qualifies will become effective immediately upon transfer. A licensee may not switch to a more favorable payment plan. If an investor subsequently purchases an "attributable" interest in the business during the first five years of the license term and, as a result, the gross revenues or total assets of the business exceed the applicable financial cap, thereby requiring the applicant to forfeit eligibility for an installment payment scheme, unjust enrichment provisions also will apply.

#### Partitioning for Rural Telcos

Rural telephone companies (rural telcos) are permitted to acquire partitioned 900 MHz SMR licenses in

either of two ways: (1) They may form bidding consortia to participate in auctions, and then partition the licenses won among consortia participants; and (2) they may acquire partitioned 900 MHz SMR licenses from other licensees through private negotiation and agreement either before or after the auction. Each member of a consortium will be required to file a long-form application, following the auction, for its respective mutually agreed-upon geographic area. Partitioned areas must conform to established geopolitical boundaries (such as county lines). With respect to rural telcos, each area must include all portions of the wireline service area of the rural telco applicant that lies within the MTA service area. Rural telcos are defined as local exchange carriers having 100,000 or fewer access lines, including all affiliates. If a rural telco receives a partitioned license post-auction from another MTA licensee, the partitioned area must be reasonably related to the rural telco's wireline service area that lies within the MTA service area. The Commission will presume as "reasonably related" a partitioned area that contains no more than twice the population of that portion of a rural telco's wireline service area that lies within the MTA service area.

#### C. Other Matters

Although the Commission did not request comment on this issue, the National Paging and Personal Communications Association (NPPCA) suggests that the Commission establish a Telecommunications Development Fund (TDF) to assist small businesses in accessing capital for build-out purposes. While the Commission fully supports the goal of ensuring the participation of small businesses in the provision of SMR services, the proposal raised by NPPCA is beyond the scope of this proceeding. As such, it is not addressed in this proceeding.

#### IV. Procedural Matters and Ordering Clauses

##### Final Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. § 603, the Commission incorporated an Initial Regulatory Flexibility Analysis (IRFA) into the Further Notice of Proposed Rule Making. Written public comments on the IRFA were requested. The Commission's final regulatory flexibility analysis for this Seventh Report and Order in PP Docket No. 93-253 is as follows:

A. *Need for and purpose of the action.* This rule making proceeding was

initiated to secure comment on proposals for establishing a flexible regulatory scheme for the 900 MHz Specialized Mobile Radio (SMR) service that would promote efficient licensing and enhance the service's competitive potential in the commercial mobile radio marketplace. The proposals adopted herein are also designed to implement Congress's goal of giving small businesses, rural telephone companies, and businesses owned by members of minority groups and women the opportunity to participate in the provision of spectrum-based services in accordance with 47 U.S.C. 309(j)(4)(D).

B. *Issues raised in by the public in response to the initial analysis.* No comments were submitted specifically in response to the Initial Regulatory Flexibility Analysis.

C. *Significant alternatives considered.* The Second Further Notice of Proposed Rule Making in this proceeding offered numerous proposals. All significant alternatives have been addressed in the Seventh Report and Order. The majority of commenters supported the major tenets of the proposed rules and some commenters suggested changes to some of the Commission's proposals. Any regulatory burdens we have adopted for applicants (for example, small businesses) in the 900 MHz SMR applicants are necessary to carry out the Commission's duties under the Communications Act of 1934, as amended, and the Omnibus Budget Reconciliation Act of 1993. The Final Regulatory Flexibility Analysis, as required by Section 604 of the Regulatory Flexibility Act is set forth in Appendix B.

##### Ordering Clauses

Accordingly, *it is ordered* That, pursuant to the authority of Sections 4(i) 303(r), 309(j), and 332 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), 309(j), and 332, this Second Order on Reconsideration and Seventh Report and Order is adopted and Part 90 of the Commission's Rules is amended as set forth below.

*It is further ordered* that the rule amendments set forth below will become effective October 23, 1995.

*It is further ordered*, that the Petitions for Reconsideration filed by Advanced Mobilecomm, Inc., American Mobile Telecommunications Association, Celsmer, DW Communications, Inc., Geotek Communications, Inc., Nextel, Personal Communications Industry Association, RAM Mobile Data Limited Partnership, and Southern California Edison Company are granted to the

extent discussed herein, and denied in all other respects.

##### List of Subjects in 47 CFR Part 90 Radio.

Federal Communications Commission.

William F. Caton,

*Acting Secretary.*

##### Amendatory Text

Part 90 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

#### PART 90—PRIVATE LAND MOBILE RADIO SERVICES

1. The authority citation for Part 90 is revised as follows:

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

2. Section 90.7 is amended by adding a definition for "900 MHz SMR MTA-based license or MTA license" in alphabetical order to read as follows:

##### § 90.7 Definitions.

\* \* \* \* \*  
 900 MHz SMR MTA-based license or MTA license. A license authorizing the right to use a specified block of 900 MHz SMR spectrum within one of the 47 Major Trading Areas ("MTAs"), as embodied in Rand McNally's Trading Areas System MTA Diskette and geographically represented in the map contained in Rand McNally's Commercial Atlas & Marketing Guide (the "MTA Map"), with the following exceptions and additions:

- (1) Alaska is separated from the Seattle MTA and is licensed separately.
- (2) Guam and the Northern Mariana Islands are licensed as a single MTA-like area.
- (3) Puerto Rico and the United States Virgin Islands are licensed as a single MTA-like area.
- (4) American Samoa is licensed as a single MTA-like area.

The MTA map is available for public inspection in the Office of Engineering and Technology's Technical Information Center, room 7317, 2025 M Street NW., Washington, DC.

\* \* \* \* \*

2. Section 90.173 is amended by revising paragraph (k) to read as follows:

##### § 90.173 Policies governing the assignment of frequencies.

\* \* \* \* \*

(k) Notwithstanding any other provisions of this part, any eligible person may seek a dispositive preference for a channel assignment on an exclusive basis in the 220-222 MHz,

470-512 MHz, and 800 MHz bands by submitting information that leads to the recovery of channels in these bands. Recovery of such channels must result from information provided regarding the failure of existing licensees to comply with the provisions of §§ 90.155, 90.157, 90.629, 90.631 (e) or (f), or 90.633 (c) or (d). Any recovered channels in the 900 MHz SMR service will revert automatically to the MTA licensee.

\* \* \* \* \*

3. Section 90.617(d) is amended by revising Table 4B to read as follows:

**§ 90.617 Frequencies in the 809.750-824/854.750-869 MHz, and 896-901/935-940 MHz bands available for trunked or conventional system use in non-border areas.**

\* \* \* \* \*

(d) \* \* \*

**TABLE 4B—SMR CATEGORY 896-901/935-940 MHz Band-Channels (200 CHANNELS)**

Block	Channel Nos.
A .....	1-2-3-4-5-6-7-8-9-10
B .....	21-22-23-24-25-26-27-28-29-30
C .....	41-42-43-44-45-46-47-48-49-50
D .....	61-62-63-64-65-66-67-68-69-70
E .....	81-82-83-84-85-86-87-88-89-90
F .....	101-102-103-104-105-106-107-108-109-110
G .....	121-122-123-124-125-126-127-128-129-130
H .....	141-142-143-144-145-146-147-148-149-150
I .....	161-162-163-164-165-166-167-168-169-170
J .....	181-182-183-184-185-186-187-188-189-190
K .....	201-202-203-204-205-206-207-208-209-210
L .....	221-222-223-224-225-226-227-228-229-230
M .....	241-242-243-244-245-246-247-248-249-250
N .....	261-262-263-264-265-266-267-268-269-270
O .....	281-282-283-284-285-286-287-288-289-290
P .....	301-302-303-304-305-306-307-308-309-310
Q .....	321-322-323-324-325-326-327-328-329-330
R .....	341-342-343-344-345-346-347-348-349-350
S .....	361-362-363-364-365-366-367-368-369-370
T .....	381-382-383-384-385-386-387-388-389-390

\* \* \* \* \*

4. Section 90.619(a)(5) is amended by revising Table 4B to read as follows:

**§ 90.619 Frequencies available for use in the U.S./Mexico and U.S./Canada border areas.**

(a) \* \* \*  
(5) \* \* \*

**TABLE 4B—UNITED STATES-MEXICO BORDER AREA, SMR CATEGORY 896-901/935-940 MHz BAND (200 CHANNELS)**

Block	Channel Nos.
A .....	1-2-3-4-5-6-7-8-9-10
B .....	21-22-23-24-25-26-27-28-29-30
C .....	41-42-43-44-45-46-47-48-49-50
D .....	61-62-63-64-65-66-67-68-69-70
E .....	81-82-83-84-85-86-87-88-89-90
F .....	101-102-103-014-105-106-107-108-109-110
G .....	121-122-123-124-125-126-127-128-129-130
H .....	141-142-143-144-145-146-147-148-149-150
I .....	161-162-163-164-165-166-167-168-169-170
J .....	181-182-183-184-185-186-187-188-189-190
K .....	201-202-203-204-205-206-207-208-209-210
L .....	221-222-223-224-225-226-227-228-229-230
M .....	241-242-243-244-245-246-247-248-249-250
N .....	261-262-263-264-265-266-267-268-269-270
O .....	281-282-283-284-285-286-287-288-289-290
P .....	301-302-303-304-305-306-307-308-309-310
Q .....	321-322-323-324-325-326-327-328-329-330
R .....	341-342-343-344-345-346-347-348-349-350
S .....	361-362-363-364-635-366-367-368-369-370
T .....	381-382-383-384-385-386-387-388-389-390

\* \* \* \* \*

5. Section 90.631 is amended by revising paragraph (f) to read as follows:

**§ 90.631 Trunked systems loading, construction and authorization requirements.**

\* \* \* \* \*

(f) If a station is not placed in permanent operation, in accordance with the technical parameters of the station authorization, within one year, except as provided in § 90.629, its license cancels automatically and must be returned to the Commission. For purposes of this section, a base station

is not considered to be placed in operation unless at least two associated mobile stations, or one control station and one mobile station, are also placed in operation. An SMR licensee with facilities that have discontinued operations for 90 continuous days after the effective date of this rule is presumed to have permanently discontinued operations, unless the licensee notifies the FCC otherwise prior to the end of the 90 day period and provides a date on which operation will resume, which date must not be in excess of 30 additional days.

\* \* \* \* \*

6. Section 90.665 (c) and (d) are revised to read as follows:

**§ 90.665 Authorization, construction and implementation of MTA licenses.**

\* \* \* \* \*

(c) Each MTA licensee in the 896-901/935-940 MHz band must, three years from the date of license grant, construct and place into operation a sufficient number of base stations to provide coverage to at least one-third of the population of the MTA. Further, each MTA licensee must provide coverage to at least two-thirds of the population of the MTA five years from the date of license grant or, alternatively, demonstrate through a showing to the Commission that it is providing substantial service. The MTA licensee must meet the population coverage benchmarks regardless of the extent to which incumbent licensees are present within the MTA block.

(d) MTA licensees who fail to meet the coverage requirements imposed at either the third or fifth years of their license term, or to make a convincing showing of substantial service, will forfeit the portion of the MTA license that exceeds licensed facilities constructed and operating on the date of the MTA license grant.

7. Section 90.667 is revised to read as follows:

**§ 90.667 Grandfathering provisions for incumbent licensees.**

(a) These provisions apply to all 900 MHz SMR licensees who obtained licenses or filed applications for secondary sites on or before August 9, 1994 ("incumbent licensees"), as well as to all 900 MHz SMR licensees who obtained authorizations pursuant to § 90.173(k). An incumbent licensee's service area shall be defined by its originally-licensed 40 dBu field strength contour. Incumbent licensees are permitted to add new or modify transmit sites in this existing service area without prior notification to the Commission so long as their original 40

dBu field strength contour is not expanded.

(b) Incumbent licensees operating at multiple sites may, after grant of MTA licenses has been completed, exchange multiple site licenses for a single license, authorizing operations throughout the contiguous and overlapping 40 dBu field strength contours of the multiple sites. Incumbents exercising this license exchange option must submit specific information for each of their external base sites after the close of the 900 MHz SMR auction.

(c) Applications in the 900 MHz SMR service for secondary sites filed after August 9, 1994 shall be authorized on a secondary, non-interference basis to MTA licensee operations. No secondary sites shall be granted on this basis in an MTA once the MTA licensee has been selected.

6. A new subpart U consisting of §§ 90.801 through 90.815 is added to Part 90 to read as follows:

**Subpart U—Competitive Bidding Procedures for 900 MHz Specialized Mobile Radio Service**

Sec.

- 90.801 900 MHz SMR subject to competitive bidding.
- 90.802 Competitive bidding design for 900 MHz SMR licensing.
- 90.803 Competitive bidding mechanisms.
- 90.804 Aggregation of 900 MHz SMR licenses.
- 90.805 Withdrawal, default and disqualification payments.
- 90.806 Bidding application (FCC Form 175 and 175-S Short-form).
- 90.807 Submission of upfront payments and down payments.
- 90.808 Long-form applications.
- 90.809 License grant, denial, default, and disqualification.
- 90.810 Bidding credits for small businesses.
- 90.811 Reduced down payment for licenses won by small businesses.
- 90.812 Installment payments for licenses won by small businesses.
- 90.813 Procedures for partitioned licenses.
- 90.814 Definitions.
- 90.815 Eligibility for small business status.

**§ 90.801 900 MHz SMR subject to competitive bidding.**

Mutually exclusive initial applications to provide 900 MHz SMR service are subject to competitive bidding procedures. The general competitive bidding procedures found in Part 1, Subpart Q of this chapter will apply unless otherwise provided in this part.

**§ 90.802 Competitive bidding design for 900 MHz SMR licensing.**

The Commission will employ a simultaneous multiple round auction

design when choosing from among mutually exclusive initial applications to provide 900 MHz SMR service, unless otherwise specified by the Wireless Telecommunications Bureau before the auction.

**§ 90.803 Competitive bidding mechanisms.**

(a) *Sequencing.* The Wireless Telecommunications Bureau will establish and may vary the sequence in which 900 MHz SMR licenses will be auctioned.

(b) *Grouping.* All 900 MHz SMR licenses for each of the MTAs will be auctioned simultaneously, unless the Wireless Telecommunications Bureau announces, by Public Notice prior to the auction, an alternative auction scheme.

(c) *Minimum bid increments.* The Wireless Telecommunications Bureau will, by announcement before or during an auction, require minimum bid increments in dollar or percentage terms.

(d) *Stopping rules.* The Wireless Telecommunications Bureau will establish stopping rules before or during multiple round auctions in order to terminate an auction within a reasonable time.

(e) *Activity rules.* The Wireless Telecommunications Bureau will establish activity rules which require a minimum amount of bidding activity. In the event that the Commission establishes an activity rule in connection with a simultaneous multiple round auction, each bidder will be entitled to request and will be automatically granted a certain number of waivers of such rule during the auction.

**§ 90.804 Aggregation of 900 MHz SMR licenses.**

The Commission will license each 10-channel block in the 900 MHz SMR spectrum separately. Applicants may aggregate across spectrum blocks within the limitation specified in § 20.6(b) of this chapter.

**§ 90.805 Withdrawal, default and disqualification payments.**

(a) During the course of an auction conducted pursuant to § 90.802, the Wireless Telecommunications Bureau will impose payments on bidders who withdraw high bids during the course of an auction, who default on payments due after an auction closes, or who are disqualified.

(b) Bid withdrawal prior to close of auction. A bidder who withdraws a high bid during the course of an auction will be subject to a payment equal to the difference between the amount bid and the amount of the winning bid the next

time the license is offered by the Commission. No withdrawal payment would be assessed if the subsequent winning bid exceeds the withdrawn bid. This payment amount will be deducted from any upfront payments or down payments that the withdrawing bidder has deposited with the Commission.

(c) Default or disqualification after close of auction. If a high bidder defaults or is disqualified after the close of such an auction, the defaulting bidder will be subject to the payment in paragraph (b) of this section plus an additional payment equal to three (3) percent of the subsequent winning bid. If the subsequent winning bid exceeds the defaulting bidder's bid amount, the 3 percent payment will be calculated based on the defaulting bidder's bid amount. These amounts will be deducted from any upfront payments or down payments that the defaulting or disqualified bidder has deposited with the Commission. If the default occurs within five business days after the bidding has closed, the Commission retains the discretion to offer the license to the second highest bidder at its final bid level, of it that bidder declines the offer, to offer the license to other bidders (in descending order of their bid amounts) at the final bid levels.

**§ 90.806 Bidding application (FCC Form 175 and 175-S Short-form).**

All applicants to participate in competitive bidding for 900 MHz SMR licenses must submit applications on FCC Forms 175 and 175-S pursuant to the provisions of § 1.2105 of this chapter. The Wireless Telecommunications Bureau will issue a Public Notice announcing the availability of 900 MHz SMR licenses and, in the event that mutually exclusive applications are filed, the date of the auction for those licenses. This Public Notice also will specify the date on or before which applicants intending to participate in a 900 MHz SMR auction must file their applications in order to be eligible for that auction, and it will contain information necessary for completion of the application as well as other important information such as the materials which must accompany the Forms, any filing fee that must accompany the application or any upfront payment that will need to be submitted, and the location where the application must be filed. In addition to identifying its status as a small business or rural telephone company, each applicant must indicate whether it is a minority-owned entity, as defined in § 90.814(g) and/or a women-owned entity.



**§ 90.807 Submission of upfront payments and down payments.**

(a) Each bidder in the 900 MHz SMR auction will be required to submit an upfront payment of \$0.02 per MHz per pop, for the maximum number of licenses (in terms of MHz-pops) on which it intends to bid pursuant to § 1.2106 of this chapter and procedures specified by Public Notice.

(b) Each winning bidder in the 900 MHz SMR auction shall make a down payment to the Commission in an amount sufficient to bring its total deposits up to 20 percent of its winning bid within five business days after the auction closes, and the remaining balance due on the license shall be paid within five business days after Public Notice announcing that the Commission is prepared to award the license. The grant of the application required by § 90.808 is conditional upon receipt of full payment, except for small businesses that are winning bidders, which are governed by § 90.811. The Commission generally will grant the license within ten (10) business days after the receipt of the remaining balance due on the license.

**§ 90.808 Long-form applications.**

Each winning bidder will be required to submit a long-form application on FCC Form 600 within ten (10) business days after being notified by Public Notice that it is the winning bidder. Applications on FCC Form 600 shall be submitted pursuant to the procedures set forth in 90.119 and any associated Public Notices. Only auction winners (and rural telephone companies and incumbent 900 MHz SMR licensees seeking partitioned licenses pursuant to agreements with auction winners under § 90.813) will be eligible to file applications on FCC Form 600 for initial 900 MHz SMR licenses in the event of mutual exclusivity between applicants filing Form 175.

**§ 90.809 License grant, denial, default, and disqualification.**

(a) A bidder who withdraws its bid subsequent to the close of bidding, defaults on a payment due, or is disqualified, will be subject to the payments specified in § 90.805 or § 1.2109 of this chapter, as applicable.

(b) MTA licenses pursued through competitive bidding procedures will be granted pursuant to the requirements specified in § 90.166.

**§ 90.810 Bidding credits for small businesses.**

(a) A winning bidder that qualifies as a small business or a consortium of small businesses, (as defined in

§ 90.814(b)(1)(i) may use a bidding credit of 15 percent to lower the cost of its winning bid on any of the blocks identified in § 90.617(d), Table 4B. A winning bidder that qualifies as a small business or a consortium of small businesses, (as defined in § 90.814(b)(1)(ii) may use a bidding credit of 10 percent to lower the cost of its winning bid on any of the blocks identified in § 90.617(d), Table 4B.

(b) Unjust Enrichment. (1) A small business seeking transfer or assignment of a license to an entity that is not a small business under the definitions in § 90.814(b)(1) will be required to reimburse the government for the amount of the bidding credit, plus interest at the rate imposed for installment financing at the time the license was awarded, before transfer will be permitted. The amount of this payment will be reduced over time as follows: a transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit; in year three of the license term the payment will be 75 percent; in year four the payment will be 50 percent and in year five the payment will be 25 percent, after which there will be no assessment. If a small business as defined in § 90.814(b)(1)(i) seeks to transfer or assign a license to a small business as defined in § 90.814(b)(1)(ii), the value of the bidding credit to be repaid is five percent, the difference between the 10 and 15 percent bidding credits. The five percent difference will be subject to the percentage reductions over time specified above. These payments must be paid back to the U.S. Treasury as a condition of approval of the assignment or transfer.

(2) If a small business that utilizes a bidding credit under this section seeks to assign or transfer control of its license to a small business meeting the eligibility standards for lower bidding credits or seeks to make any other change in ownership that would result in the licensee qualifying for a lower bidding credit under this section, the licensee must seek Commission approval and reimburse the government for the difference between the amount of the bidding credit obtained by the licensee and the bidding credit for which the assignee, transferee or licensee is eligible under this section as a condition of the approval of such assignment, transfer or other ownership change.

**§ 90.811 Reduced down payment for licenses won by small businesses.**

Each winning bidder that qualifies as a small business shall make a down

payment equal to ten percent of its winning bid (less applicable bidding credits); a winning bidder shall bring its total amount on deposit with the Commission (including upfront payment) to five percent of its net winning bid within five (5) business days after the auction closes, and the remainder of the down payment (five percent) shall be paid within five (5) business days following Public Notice that the Commission is prepared to award the license. The Commission generally will grant the license within ten (10) business days after receipt of the remainder of the down payment.

**§ 90.812 Installment payments for licenses won by small businesses.**

(a) Each licensee that qualifies as a small business may pay the remaining 90 percent of the net auction price for the license in quarterly installment payments pursuant to § 1.2110(e) of this chapter. Licensees who qualify for installment payments are entitled to pay their winning bid amount in installments over the term of the license, with interest charges to be fixed at the time of licensing at a rate equal to the rate for ten-year U.S. Treasury obligations plus 2.5 percent. Payments shall include both principal and interest amortized over the term of the license. An MTA license issued to an eligible small business that elects installment payments will be conditioned on the full and timely performance of the license holder's quarterly payments. The additional following terms apply:

(1) An eligible licensee qualifying as a small business under § 90.814(b)(1)(i) may make interest-only payments for five years. Interest will accrue at the Treasury note rate. Payments of interest and principal shall be amortized over the remaining five years of the license term.

(2) An eligible licensee qualifying as a small business under § 90.814(b)(1)(ii) may make interest-only payments for the first two years of the license term. Interest will accrue at the Treasury note rate plus an additional 2.5 percent. Payments of interest and principal shall be amortized over the remaining eight years of the license term.

(b) Unjust Enrichment. (1) If a licensee that utilizes installment financing under this section seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for installment payments, the licensee must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of assignment or transfer as a condition of approval.

(2) If a licensee that utilizes installment financing under this section seeks to make any change in ownership structure that would result in the licensee losing eligibility for installment payments, the licensee shall first seek Commission approval and must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of such change as a condition of approval.

(3) If a licensee that utilizes installment financing under this section seeks to assign or transfer control of a license to an entity that does not qualify for as favorable an installment payment plan, the installment payment plan for which the acquiring entity qualifies will become effective immediately upon transfer.

**§ 90.813 Procedures for partitioned licenses.**

(a) Notwithstanding § 90.661, a rural telephone company, as defined in § 90.814, may be granted a 900 MHz SMR license that is geographically partitioned from a separately licensed MTA, so long as the MTA applicant or licensee has voluntarily agreed (in writing) to partition a portion of the license to the entity.

(b) If partitioned licenses are being applied for in conjunction with a license(s) to be awarded through competitive procedures—

(1) The applicable procedures for filing short-form applications and for submitting upfront payments and down payments contained in this part and Part 1 of this chapter shall be followed by the applicant, who must disclose as part of its short-form application all parties to agreement(s) with or among other entities to partition the license pursuant to this section, if won at auction (see 47 CFR 1.2105(a)(2)(viii));

(2) Each rural telephone company that is a party to an agreement to partition the license shall file a long-form application for its respective, mutually agreed-upon geographic area together with the application for the remainder of the MTA filed by the auction winner.

(c) If the partitioned license is being applied for as a partial assignment of the MTA license following grant of the initial license, request for authorization for partial assignment of a license shall be made pursuant to § 90.153.

(d) Each application for a partitioned area (long-form initial application or partial assignment application) shall contain a partitioning plan that must propose to establish a partitioned area to be licensed that meets the following criteria:

(1) Conforms to established geopolitical boundaries (such as county lines);

(2) Includes the wireline service area of the rural telephone company applicant; and

(3) Is reasonably related to the rural telephone company's wireline service area.

Note to paragraph (d): A partitioned service area will be presumed to be reasonably related to the rural telephone company's wireline service area if the partitioned service area contains no more than twice the population overlap between the rural telephone company's wireline service area and the partitioned area.

(e) Each licensee in each partitioned area will be responsible for meeting the construction requirements in its area (see § 90.665).

**§ 90.814 Definitions.**

(a) Scope. The definitions in this section apply to §§ 90.810 through 90.813, unless otherwise specified in those sections.

(b) *Small Business: Consortium of Small Business:*

(1) A small business is an entity that either:

(i) together with its affiliates, persons or entities that hold attributable interests in such entity, and their affiliates, has average gross revenues that are not more than \$3 million for the preceding three years; or

(ii) together with its affiliates, persons or entities that hold attributable interests in such entity, and their affiliates, has average gross revenues that are not more than \$15 million for the preceding three years.

(2) For purposes of determining whether an entity meets either the \$3 million or \$15 million average annual gross revenues size standard set forth in paragraph (b)(1) of this section, the gross revenues of the entity, its affiliates, persons or entities holding interests in the entity and their affiliates shall be considered on a cumulative basis and aggregated, subject to the exceptions set forth in § 90.814(g).

(3) A small business consortium is a conglomerate organization formed as a joint venture between or among mutually-independent business firms, each of which individually satisfies either definition of a small business in paragraphs (b)(1) and (b)(2) of this section. In a consortium of small businesses, each individual member must establish its eligibility as a small business, as defined in this section.

(c) *Rural Telephone Company.* A rural telephone company is a local exchange carrier having 100,000 or fewer access lines, including all *affiliates*.

(d) *Gross Revenues.* For applications filed after December 31, 1994, *gross revenues* shall be evidenced by audited financial statements for the preceding relevant number of calendar or fiscal years. If an entity was not in existence for all or part of the relevant period, gross revenues shall be evidenced by the audited financial statements of the entity's predecessor-in-interest or, if there is no identifiable predecessor-in-interest, unaudited financial statements certified by the applicant as accurate.

(e) *Businesses Owned by Members of Minority Groups and/or Women.* A business owned by members of minority groups and/or women in which minorities and/or women who are U.S. citizens control the applicant, have at least 50.1 percent equity ownership and, in the case of a corporate applicant, a 50.1 percent voting interest. For applicants that are partnerships, every general partner either must be a minority and/or woman (or minorities and/or women) who are U.S. citizens and who individually or together own at least 50.1 percent of the partnership equity, or an entity that is 100 percent owned and controlled by minorities and/or women who are U.S. citizens. The interests of minorities and women are to be calculated on a fully-diluted basis; agreements such as stock options and convertible debentures shall be considered to have a present effect on the power to control an entity and shall be treated as if the rights thereunder already have been fully exercised. However, upon a demonstration that options or conversion rights held by non-controlling principals will not deprive the minority and female principals of a substantial financial stake in the venture or impair their rights to control the designated entity, a designated entity may seek a waiver of the requirement that the equity of the minority and female principals must be calculated on a fully-diluted basis.

(f) *Members of Minority Groups.* *Members of minority groups* includes Blacks, Hispanics, American Indians, Alaskan Natives, Asians, and Pacific Islanders.

(g) *Attributable Interests.* Partnership and other ownership interests and any stock interest amounting to 20 percent or more of the equity, or outstanding stock, or outstanding voting stock of a licensee or applicant will be attributable.

(1) *Multiplier.* Ownership interests that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and

application of the relevant attribution benchmark to the resulting product, except that if the ownership percentage for an interest in any line in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest.

(h) *Affiliate.* (1) *Basis for Affiliation.* An individual or entity is an affiliate of an applicant or of a person holding an attributable interest in an applicant (both referred to herein as "the applicant") if such individual or entity:

- (i) Directly or indirectly controls or has the power to control the applicant, or
- (ii) Is directly or indirectly controlled by the applicant, or
- (iii) Is directly or indirectly controlled by a third party or parties that also controls or has the power to control the applicant, or
- (iv) Has an "identity of interest" with the applicant.

(2) *Nature of control in determining affiliation.* (i) Every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative and it is immaterial whether it is exercised so long as the power to control exists.

*Example for paragraph (h)(2)(i).* An applicant owning 50 percent of the voting stock of another concern would have negative power to control such concern since such party can block any action of the other stockholders. Also, the bylaws of a corporation may permit a stockholder with less than 50 percent of the voting to block any actions taken by the other stockholders in the other entity. Affiliation exists when the applicant has the power to control a concern while at the same time another person, or persons, are in control of the concern at the will of the party or parties with the power of control.

(ii) Control can arise through stock ownership; occupancy of director, officer or key employee positions; contractual or other business relations; or combinations of these and other factors. A key employee is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

(iii) Control can arise through management positions where a concern's voting stock is so widely distributed that no effective control can be established.

*Example for paragraph (h)(2)(iii).* In a corporation where the officers and directors own various size blocks totaling 40 percent of the corporation's voting stock, but no officer or director has a block sufficient to give him or her control or the power to control and the remaining 60 percent is widely distributed with no individual

stockholder having a stock interest greater than 10 percent, management has the power to control. If persons with such management control of the other entity are persons with attributable interests in the applicant, the other entity will be deemed an affiliate of the applicant.

(3) *Identity of interest between and among persons.* Affiliation can arise between or among two or more persons with an identity of interest, such as members of the same family or persons with common investments. In determining if the applicant controls or is controlled by a concern, persons with an identity of interest will be treated as though they were one person.

*Example 1 for paragraph (h)(3) introductory text.* Two shareholders in Corporation Y each have attributable interests in the same SMR application. While neither shareholder has enough shares to individually control Corporation Y, together they have the power to control Corporation Y. The two shareholders with these common investments (or identity or interest) are treated as though they are one person and Corporation Y would be deemed an affiliate of the applicant.

*Example 2 for paragraph (h)(3) introductory text.* One shareholder in Corporation Y, shareholder A, has an attributable interest in a SMR application. Another shareholder in Corporation Y, shareholder B, has a nonattributable interest in the same SMR application. While neither shareholder has enough shares to individually control Corporation Y, together they have the power to control Corporation Y. Through the common investment of shareholders A and B in the SMR application, Corporation Y would still be deemed an affiliate of the applicant.

(i) *Spousal Affiliation.* Both spouses are deemed to own or control or have the power to control interests owned or controlled by either of them, unless they are subject to a legal separation recognized by a court of competent jurisdiction in the United States.

(ii) *Kinship Affiliation.* Immediate family members will be presumed to own or control or have the power to control interests owned or controlled by other immediate family members. In this context "immediate family member" means father, mother, husband, wife, son, daughter, brother, sister, father- or mother-in-law, son- or daughter-in-law, brother- or sister-in-law, step-father, or -mother, step-brother, or -sister, step-son, or -daughter, half brother or sister. This presumption may be rebutted by showing that

- (A) The family members are estranged,
- (B) The family ties are remote, or
- (C) The family members are not closely involved with each other in business matters.

*Example for paragraph (h)(3)(ii).* A owns a controlling interest in Corporation X. A's sister-in-law, B, has an attributable interest in an SMR application. Because A and B have a presumptive kinship affiliation, A's interest in Corporation X is attributable to B, and thus to the applicant, unless B rebuts the presumption with the necessary showing.

(4) *Affiliation through stock ownership.*

(i) An applicant is presumed to control or have the power to control a concern if he or she owns or controls or has the power to control 50 percent or more of its voting stock.

(ii) An applicant is presumed to control or have the power to control a concern even though he or she owns, controls or has the power to control less than 50 percent of the concern's voting stock, if the block of stock he or she owns, controls or has the power to control is large as compared with any other outstanding block of stock.

(iii) If two or more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, the presumption arises that each one of these persons individually controls or has the power to control the concern; however, such presumption may be rebutted by a showing that such control or power to control, in fact, does not exist.

(5) *Affiliation arising under stock options, convertible debentures, and agreements to merge.* Stock options, convertible debentures, and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures, and agreements will generally be treated as though the rights held thereunder had been exercised. However, neither an affiliate nor an applicant can use such options and debentures to appear to terminate its control over another concern before it actually does so.

*Example 1 for paragraph (h)(5).* If company B holds an option to purchase a controlling interest in company A, who holds an attributable interest in an SMR application, the situation is treated as though company B had exercised its rights and had become owner of a controlling interest in company A. The gross revenues of Company B must be taken into account in determining the size of the applicant.

*Example 2 for paragraph (h)(5).* If a large company, BigCo, holds 70% (70 to 100 outstanding shares) of the voting stock of company A, who holds an attributable interest in an SMR application, and gives a

third party, SmallCo, an option to purchase 50 of the 70 shares owned by BigCo, BigCo will be deemed to be an affiliate of company, and thus the applicant, until SmallCo actually exercises its options to purchase such shares. In order to prevent BigCo from circumventing the intent of the rule which requires such options to be considered on a fully diluted basis, the option is not considered to have present in this case.

*Example 3 for paragraph (h)(5).* If company A has entered into an agreement to merge with company B in the future, the situation is treated as though the merger has taken place.

(6) *Affiliation under voting trusts.*

(i) Stock interests held in trust shall be deemed controlled by any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will.

(ii) If a trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the stock interests held in trust will be deemed controlled by the grantor or beneficiary, as appropriate.

(iii) If the primary purpose of a voting trust, or similar agreement, is to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control a concern in order that such concern or another concern may meet the Commission's size standards, such voting trust shall not be considered valid for this purpose regardless of whether it is or is not recognized within the appropriate jurisdiction.

(7) *Affiliation through common management.* Affiliation generally arises where officers, directors, or key employees serve as the majority or otherwise as the controlling element of the board of directors and/or the management of another entity.

(8) *Affiliation through common facilities.* Affiliation generally arises where one concern shares office space and/or employees and/or other facilities with another concern, particularly where such concerns are in the same or related industry or field of operations, or where such concerns were formerly affiliated, and through these sharing arrangements one concern has control, or potential control, of the other concern.

(9) *Affiliation through contractual relationships.* Affiliation generally arises where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control, or potential control, of the other concern.

(10) *Affiliation under joint venture arrangements.*

(i) A joint venture for size determination purposes is an association of concerns and/or individuals, with interests in any degree or proportion, formed by contract, express or implied, to engage in and carry out a single, specific business venture for joint profit for which purpose they combine their efforts, property, money, skill and knowledge, but not on a continuing or permanent basis for conducting business generally. The determination whether an entity is a joint venture is based upon the facts of the business operation, regardless of how the business operation may be designated by the parties involved. An agreement to share profits/losses proportionate to each party's contribution to the business operation is a significant factor in determining whether the business operation is a joint venture.

(ii) The parties to a joint venture are considered to be affiliated with each other.

**§ 90.815 Eligibility for small business status.**

(a) *Short-Form Applications: Certifications and Disclosure.* Each applicant for an MTA license which qualifies as a small business or consortium of small businesses shall append the following information as an exhibit to its short-form application (Form 175):

(1) The identity of the applicant's affiliates, persons or entities that hold attributable interests in such entity, and their affiliates, and, if a consortium of small businesses, the members in the joint venture; and

(2) The applicant's gross revenues, computed in accordance with § 90.814.

(b) *Long Form Applications: Certifications and Disclosure.* In addition to the requirements in subpart U of this part, each applicant submitting a long-form application for license(s) and qualifying as a small business shall, in an exhibit to its long-form application:

(1) Disclose separately and in the aggregate the gross revenues, computed in accordance with § 90.814, for each of the following: the applicant; the applicant's affiliates, the applicant's attributable investors, affiliates of its attributable investors, and, if a consortium of small businesses, the members of the joint venture;

(2) List and summarize all agreements or other instruments (with appropriate references to specific provisions in the text of such agreements and instruments) that support the applicant's eligibility as a small business under §§ 90.810 through

90.812, including the establishment of *de facto* and *de jure* control; such agreements and instruments include articles of incorporation and bylaws, shareholder agreements, voting or other trust agreements, franchise agreements, and any other relevant agreements (including letters of intent), oral or written; and

(3) List and summarize any investor protection agreements, including rights of first refusal, supermajority clauses, options, veto rights, and rights to hire and fire employees and to appoint members to boards of directors or management committees.

(c) *Records Maintenance.* All winning bidders qualifying as small businesses, shall maintain at their principal place of business an updated file of ownership, revenue and asset information, including any documents necessary to establish eligibility as a small business and/or consortium of small businesses under § 90.814. Licensees (and their successors in interest) shall maintain such files for the term of the license.

(d) *Audits.* (1) Applicants and licensees claiming eligibility as a small business or consortium of small businesses under §§ 90.810 through 90.812 shall be subject to audits by the Commission, using in-house and contract resources. Selection for audit may be random, on information, or on the basis of other factors.

(2) Consent to such audits is part of the certification included in the short-form application (Form 175). Such consent shall include consent to the audit of the applicant's or licensee's books, documents and other material (including accounting procedures and practices) regardless of form or type, sufficient to confirm that such applicant's or licensee's representations are, and remain, accurate. Such consent shall include inspection at all reasonable times of the facilities, or parts thereof, engaged in providing and transacting business, or keeping records regarding licensed 900 MHz SMR service and shall also include consent to the interview of principals, employees, customers and suppliers of the applicant or licensee.

(e) *Definitions.* The terms *affiliate*, *business owned by members of minority groups and/or women*, *consortium of small businesses*, *gross revenues*, *members of minority groups*, *nonattributable equity*, *small business* and *total assets* used in this section are defined in § 90.814.

[FR Doc. 95-23407 Filed 9-20-95; 8:45 am]

BILLING CODE 6712-01-M