alternative video programming service provider shall be responsible for ensuring that the incumbent's wiring is properly capped off in accordance with the Commission's signal leakage requirements. See Subpart K (technical standards) of the Commission's Cable Television Service rules (47 CFR 76.605(a)(13) and 76.610 through 76.617).

(i) Where the subscriber terminates cable service but will not be using the home wiring to receive another alternative video programming service, the cable operator shall properly cap off its own line in accordance with the Commission's signal leakage requirements. See Subpart K (technical standards) of the Commission's Cable Television Service rules (47 CFR 76.605(a)(13) and 76.610 through 76.617).

(j) Cable operators are prohibited from using any ownership interests they may have in property located on the subscriber's side of the demarcation point, such as molding or conduit, to prevent, impede, or in any way interfere with, a subscriber's right to use his or her home wiring to receive an alternative service. In addition, incumbent cable operators must take reasonable steps within their control to ensure that an alternative service provider has access to the home wiring at the demarcation point. Cable operators and alternative multichannel video programming delivery service providers are required to minimize the potential for signal leakage in accordance with the guidelines set forth in 47 CFR 76.605(a)(13) and 76.610 through 76.617, theft of service and unnecessary disruption of the consumer's premises.

(k) Definitions—Normal operating conditions—The term ''normal operating conditions'' shall have the same meaning as at 47 CFR 76.309(c)(4)(ii).

[FR Doc. 96–3128 Filed 2–15–96; 8:45 am]

BILLING CODE 6712–01–P

47 CFR Part 90

[PR Docket No. 93–144; PP Docket No. 93–253; FCC 95–501]

The Future Development of SMR Systems in the 800 MHz Frequency Band

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this *First Report* and Order in PR Docket No. 93–144, and *Eighth Report* and Order in PP Docket No. 93–253, the Commission adopts final service and competitive bidding rules for the ''upper 10 MHz block'' of 800 MHz Specialized Mobile Radio (SMR) spectrum and adopts rules which streamline the licensing process for SMR services in the 800 MHz band.

In this *First Report and Order* (''*First R&O*''), the Commission designates a portion of 800 MHz SMR spectrum for wide-area licensing using license areas defined by the Economic Areas (EAs) established by the U.S. Department of Commerce Bureau of Economic Analysis. Under this wide-area licensing plan the Commission has allocated three channel blocks, one 120-channel block, one 60-channel block, and one 20-channel block.

In this *Eighth Report and Order* (''*Eighth R&O*''), the Commission reiterated that competitive bidding is an appropriate licensing tool for the 800 MHz SMR service. The Commission also adopts specific auction rules for the upper 10 MHz block, including rules pertaining to competitive bidding design, license grouping, bidding procedures, and treatment of ''designated entities'' (that is, small businesses, businesses owned by minorities and/or women, and rural telephone companies). The intended effect of this action is to facilitate future deployment of SMR systems in the 800 MHz band through licensing procedures and the use of competitive bidding.

EFFECTIVE DATE: March 18, 1996.

FOR FURTHER INFORMATION CONTACT: David Furth or Lisa Warner at (202) 418–0620.

SUPPLEMENTARY INFORMATION: This *First Report and Order* in PR Docket No. 93–144, and this *Eighth Report and Order* in PP Docket No. 93–253, adopted December 15, 1995, and released December 15, 1995, is available for inspection and copying during normal business hours in the FCC Dockets Branch, Room 230, 1919 M Street N.W., Washington, D.C. The complete text may be purchased from the Commission's copy contractor, International Transcription Service, Inc., 2100 M Street, N.E., Suite 140, Washington, D.C. 20037 (telephone (202) 857–3800).

Synopsis of *First Report and Order* and *Eighth Report and Order:*

I. Background

1. The Commission's current rules for the 800 MHz Specialized Mobile Radio (SMR) service were designed primarily to license dispatch radio systems on a transmitter-by-transmitter basis in local markets. In recent years, however, some SMR licenses have been authorized through waivers and extended implementation rules to expand the geographic scope of their services and aggregate large numbers of channels to provide service more directly comparable to that provided by cellular operators and that envisioned for Personal Communications Services (PCS). While the 800 MHz SMR rules have proven sufficiently flexible to permit such expansion, the licensing process remains cumbersome because of the need to license each SMR transmitter site individually. In May 1993, the Commission adopted a *Notice of Proposed Rule Making* in PR Docket No. 93–144, 58 FR 33062 (June 15, 1993) (''*Notice*''), proposing wide-area licensing of the 800 MHz SMR service. In August of 1993, Congress amended the Communications Act of 1934 to modify the regulatory treatment of mobile services. In the *Second Report and Order* in GN Docket No. 93–252, 59 FR 18493 (April 19, 1994) (''*CMRS Second R&O*''), the Commission reclassified all mobile services into two statutorily-defined categories: commercial mobile radio services (CMRS) and private mobile radio services (PMRS). The Commission concluded that all SMR systems providing or authorized to provide interconnected service would be reclassified as CMRS.

2. In the *Third Report and Order* in GN Docket No. 93–252, 59 FR 59945 (November 21, 1994) (''*CMRS Third R&O*''), the Commission concluded that 800 MHz SMR licensees either compete or have the potential to compete with other CMRS providers. As a result, the Commission determined that the technical and operational requirements for the 800 MHz SMR service should be made comparable, to the extent feasible, to those applicable to other CMRS providers. In this connection, the Commission concluded that: (1) wide-area licensing should be implemented in the 800 MHz SMR service; and (2) licensing of the 800 MHz SMR spectrum should be accomplished through competitive bidding procedures.

3. On October 20, 1994, the Commission adopted a *Further Notice of Proposed Rule Making* in PR Docket No. 93–144, 59 FR 60111 (November 22, 1994) (''*Further Notice*''), proposing a new framework for licensing of 800 MHz SMR systems. Specifically, the Commission proposed to assign 10 MHz of SMR spectrum (consisting of 200 contiguous channels) in defined market-based service areas to facilitate the development of wide-area, multi-channel SMR systems, while the remaining 4 MHz of spectrum (consisting of 80 non-contiguous

channels) would be designated for continued licensing on a local basis to accommodate the needs of smaller SMR systems primarily seeking to provide local, more dispatch-oriented service.

II. First Report and Order

A. Wide-Area SMR Licensing in the 800 MHz Band

1. Spectrum Designated for Wide-Area Licensing

4. In the *CMRS Third R&O,* the Commission determined that assigning contiguous spectrum, where feasible, is likely to enhance the competitive potential of wide-area SMR providers. The Commission indicated its belief that contiguous spectrum is essential to the competitive viability of a wide-area SMR system, because it permits use of spread spectrum and other broadband technologies that are available to other CMRS providers but unavailable to systems operating on non-contiguous spectrum. In the *Further Notice*, the Commission proposed to designate the upper 10 MHz block of 800 MHz SMR spectrum for wide-area SMR licensing.

5. In the *First R&O,* the Commission concludes that the 800 MHz SMR spectrum most suitable to be designated primarily for wide-area use is the upper 10 MHz block, as it is the only contiguous SMR spectrum in the 800 MHz band. The Commission further concludes that the entire 10 MHz block should be used, rather than a portion thereof, because it is equivalent in size to the smallest amount of spectrum presently authorized for broadband PCS.

2. Service Areas

6. In the *CMRS Third R&O,* the Commission concluded that the use of service areas based on Rand McNally Major Trading Areas (MTAs), identical to those adopted for broadband PCS, would be preferable for wide-area licensing of the 800 MHz SMR service. The Commission noted that allowing licensees to operate over MTAs as opposed to smaller areas, such as Rand McNally Basic Trading Areas (BTAs), would enhance their ability to invest in technology and to re-use channels more effectively.

7. In this *First R&O,* the Commission determines that, despite its previous conclusion in the CMRS proceeding that MTAs appear to be the most suitable building blocks for 800 MHz SMR licensees seeking to construct wide-area systems, a broad range of commenters expressed support for Economic Areas (EAs) established by the U.S. Department of Commerce Bureau of Economic Analysis rather than MTAs. The Commission agrees with the majority of commenters that EAs reflect the actual coverage provided by 800 MHz SMR systems and concludes that use of EAs will further the public interest because it will result in the dissemination of licenses among a variety of applicants as anticipated by Section 309(j) of the Communications Act. The Commission further concludes that use of these smaller geographic areas ultimately will result in a more diverse group of prospective bidders, because small and medium-sized operatives will have incentives to seek EA licenses.

8. Thus, 800 MHz SMR wide-area licenses in the upper 10 MHz block will be based on the 172 EAs covering the continental United States and Alaska, and three additional licensing regions covering the five U.S. possessions, Guam, Northern Marina Islands, Puerto Rico, U.S. Virgin Islands, and American Samoa.

3. EA Spectrum Blocks

9. In the *CMRS Third R&O,* the Commission observed that most commenters agreed that wide-area SMR systems must have the ability to use (and reuse) a large number of channels, preferably on contiguous frequencies, to compete successfully with cellular and broadband PCS. Based on the record established earlier in the 800 MHz SMR proceeding and the comments submitted in the CMRS proceeding, the *Further Notice* proposed to divide the upper 10 MHz block of 800 MHz SMR spectrum into four blocks of 2.5 MHz, corresponding to 50 channels per block, under the Commission's existing frequency allocation rules. In addition, the Commission chose not to propose to issue a single license covering the entire 10 MHz upper block of 800 MHz SMR spectrum because it determined that a single 10 MHz license would preclude licensing of multiple wide-area licensees in each market.

10. In this *First R&O,* the Commission concludes that dividing the upper 10 MHz block into multiple spectrum blocks is both feasible and desirable. The Commission concludes that allocating varying size blocks will accomplish its goal of creating opportunities for wide-area SMR providers with differing spectrum needs. Thus, the Commission adopts a licensing plan which allocates one 120-channel block, one 60-channel block, and one 20-channel block for each EA. The Commission believes that these channel block sizes will provide opportunities for a variety of licensees of different sizes to participate in the provision of wide-area service.

4. 800 MHz SMR Spectrum Aggregation Limit

11. In the *CMRS Third R&O,* the Commission concluded that a 45 MHz limit on aggregation of broadband PCS, cellular, and SMR spectrum, combined with existing service-specific caps for cellular and PCS, was sufficient to maintain a competitive CMRS market. In light of this conclusion, in the *Further Notice,* the Commission concluded that an additional aggregation limit within the 800 MHz SMR service was unnecessary.

12. The Commission concludes in this *First R&O* that allowing unrestricted aggregation of 800 MHz SMR spectrum would not impede CMRS competition. The Commission expresses concern that limiting aggregation of 800 MHz SMR spectrum may result in a competitive disadvantage to SMR licensees as potential competitors to broadband PCS and cellular providers. Thus, the Commission further concludes that SMR licensees will be permitted to seek and (if they are the high bidders for all EA licenses) obtain all three of the EA licenses in a particular license area. The Commission reiterates, however, that even though it has declined to adopt a spectrum aggregation limit specific to the 800 MHz SMR service, such licensees remain subject to the 45 MHz CMRS spectrum aggregation limit and to the competitive component of the public interest standard.

5. Licensing in Mexican and Canadian Border Areas

13. In the *Further Notice,* the Commission tentatively concluded that attempting to create different allocations in border areas would be administratively unworkable, and, thus, proposed to license wide-area spectrum blocks on a uniform basis without distinguishing border from non-border areas. The Commission further proposed to license the channels in border areas not contained in the wide-area spectrum block on a channel-by-channel basis under the same rules it ultimately adopts for the lower 80 channels in non-border areas.

14. The Commission concludes that EA spectrum blocks should be licensed on a uniform basis, without distinguishing border from non-border areas. EA licenses will be entitled to use any available border area channels within their spectrum blocks, subject to international assignment and coordination of such channels. The Commission also concludes that the limited channel availability and other operating restrictions in the border areas are matters to be assessed by EA

applicants in their valuation of EA spectrum blocks for competitive bidding purposes. The Commission, however, defers a decision regarding treatment of 800 MHz SMR channels licensed in border areas, but not included within the EA spectrum blocks, until the resolution of the *Second Further Notice of Proposed Rule Making* in PR Docket No. 93–144.

B. Rights and Obligations of EA Licensees

1. Operational Flexibility

15. In the *Further Notice,* the Commission tentatively concluded that wide-area SMR licensees in the 800 MHz band should be authorized to construct stations at any available site and on any available channel within their respective spectrum blocks. In addition, the Commission proposed to allow wide-area licensees to ''self-coordinate'' system modifications within their service areas—that is, to add, subtract, move, and otherwise modify their base station facilities without prior Commission consent, provided they notify the Commission of the coordinates and certify compliance with its co-channel interference protection and emission requirements.

16. The Commission concludes that grant of EA licenses will provide licensees with: (1) the right to construct at any available site within the EA, and to add, subtract, or move site locations within the EA during the license term, on a ''self-coordinated'' basis; and (2) the right to use any available spectrum within the EA licensee's designated spectrum block on a self-coordinated basis, including full discretion over channelization of available spectrum within the block (provided that emission mask requirements are met, and co-channel interference protection is afforded to incumbent licensees and co-channel EA licensees in neighboring EAs). The Commission further concludes that simplified initial licensing and subsequent system modification substantially will reduce the existing administrative burden on both SMR licensees and the Commission, and will establish greater consistency with its cellular and PCS licensing rules.

2. Spectrum Management Rights—Acquisition and Recovery of Channels Within Spectrum Blocks

17. In the *Further Notice,* the Commission recognized that the operational flexibility afforded to wide-area 800 MHz SMR licensees would be limited by the large number of systems already authorized and operating in the band, particularly in major markets. The Commission noted that even if wide-area licensees do not immediately obtain clear spectrum comparable to its allocations for cellular or broadband PCS, wide-area licensing should confer other valuable rights that would enhance a licensee's ability to establish wide-area service. Thus, the Commission proposed to assist wide-area licensees in consolidating spectrum within their respective blocks by providing that (1) if an incumbent fails to construct, discontinues operations, or otherwise has its license terminated by the Commission, the spectrum covered by the incumbent's authorization automatically reverts to the wide-area licensee; and (2) if a wide-area licensee negotiates to acquire an incumbent system by assignment or transfer, the assignment or transfer presumptively will be considered in the public interest.

18. In this *First R&O,* the Commission concludes that an EA licensee has the right to use any spectrum within the EA block that is recovered by the Commission. In addition, the Commission determines that assignments from incumbents operating in an EA spectrum block to the respective EA licensee generally will be presumed to be in the public interest. The Commission concludes that granting these rights to EA licensees will give them greater flexibility in managing their spectrum, establish greater consistency with its cellular and PCS rules, and reduce regulatory burdens on both licensees and the Commission with respect to future management of the spectrum within the wide-area blocks. The Commission also eliminates all waiting lists for SMR Category channels within the upper 10 MHz block, and dismisses all applications on such waiting lists. The Commission determines that continuing such lists would be inconsistent with the wide-area licensing scheme it has adopted.

19. With respect to the impact of these rights on the finders' preference program, the Commission concludes that successful applicants for a finders' preference program will be considered an ''incumbent'' within the meaning of the rules adopted in the *First R&O.* In addition, the Commission no longer will accept finders' preference requests following the adoption of this *First R&O.* As a result, the EA licensee will have the exclusive right to recover unconstructed or non-operational channels on blocks for which it is licensed.

3. License Term and Renewal Expectancy

20. In the *CMRS Third R&O,* the Commission determined that every Part 90 licensee that is reclassified and treated as a CMRS licensee when its current license term expires thereafter shall have a ten-year license term and be afforded a renewal expectancy, provided it is able to demonstrate that it: (1) has provided ''substantial'' service during the license term; and (2) has complied with applicable Commission rules and policies, and the Communications Act. Furthermore, the Commission determined that ''grandfathered'' Part 90 licensees, because they retain their ''private'' status until August 10, 1996, would not be afforded either the ten-year license term or the renewal expectancy during the statutory transition period.

21. In this *First R&O,* the Commission determines that EA licenses should be granted for a ten-year license term. In addition, EA licensees generally will be afforded a renewal expectancy as determined in the *CMRS Third R&O.*

C. Treatment of Incumbent Systems

1. Mandatory Relocation

22. In the *Further Notice,* the Commission tentatively concluded that incumbent SMR systems should not be subject to mandatory relocation to new frequencies pursuant to Nextel's band-clearing proposal. The Commission also expressed concern that mandatory relocation could impose significant costs and disruption on incumbent licensees.

23. The Commission concludes in this *First R&O* that, based on the record in this proceeding, a smooth and expedient transition to the new licensing framework for 800 MHz SMR service cannot be accomplished without some form of mandatory relocation. Thus, the Commission has created a two-phase mandatory relocation mechanism under which there is a fixed one-year period for voluntary negotiations between EA licensees and incumbents and a two-year period for mandatory negotiations. Under this mechanism, if an EA licensee and an incumbent licensee fail to reach an agreement by the conclusion of the mandatory negotiation period, then the EA licensee may request involuntary relocation of the incumbent's system provided that it: (1) guarantees payment of all costs of relocating the incumbent to a comparable facility; (2) completes all activities necessary for placing the new facilities into operation, including engineering and frequency coordination, if necessary; and (3) builds and tests the

new system. Specifically, any relocation of an incumbent must be conducted in such a fashion that there is a ''seamless'' transition from the incumbent's ''old'' frequency to its ''relocated'' frequency (that is, there is no significant disruption in the incumbent's operations). In connection with this mandatory relocation mechanism, EA licensees will be required to notify incumbents operating on frequencies included in their spectrum block of their intention to relocate such incumbents within 90 days of the release of the Public Notice commencing the voluntary negotiation period. If an applicant does not receive timely notification of relocation, the EA licensee loses the right to require that incumbent to relocate.

24. The Commission also initiates a partial lifting of the freeze on acceptance of new applications for SMR and General Category channels to permit those assignments and transfers of control that involve modifications to licensed facilities, provided such assignments and transfers are designed to accommodate market-driven, voluntary relocation arrangements between incumbents and potential EA applicants, and do not change the 22dBu service contour of the facilities to be relocated. This option is not available for purposes of relocating incumbents from one part of the upper 10 MHz block to another. Moreover, potential EA applicants and relocating incumbents utilizing this option must be completely unaffiliated. Processing of these assignments and transfers will continue until the date the Commission releases the Public Notice announcing the upper 10 MHz auction.

2. Incumbent Operation Flexibility

25. In the *Further Notice*, the Commission tentatively concluded that in those situations in which incumbents are allowed to continue operating on already-licensed facilities, incumbent systems should not be allowed to expand beyond their existing service areas on those channels designated for wide-area licensing, without the consent of the wide-area licensee.

26. The Commission concludes that allowing non-EA licensees to expand their systems at will after wide-area licensing has occurred would diminish substantially the value of the EA license and would create continuing uncertainty for EA applicants and licensees alike. The Commission recognizes, however, that there may be circumstances in which an EA licensee should be required to permit incumbents to make minor alterations to their service areas to preserve the viability of their systems. Thus, the Commission granted operational flexibility to incumbent SMR licensees to add, subtract, or move site locations within their current 22 dBu contours, on a ''self-coordinated'' basis. The incumbent must, however, still comply with the short-spacing criteria in Section 90.621(b) of the Commission's rules, even if its modifications do not extend its 22 dBu interference contour. Incumbent licensees will be required to notify the Commission of any changes in technical parameters or additional stations constructed, including agreements with an EA licensee to expand beyond their signal strength contour, through a minor modification of their license.

D. Co-channel Interference Protection

1. Incumbent SMR Systems

27. In the *CMRS Third R&O*, the Commission concluded that, as a general matter, it would retain its existing co-channel protection rules for CMRS licensees. Under the current rules, a wide-area licensee would be required to afford protection to incumbents, either by locating its stations at least 113 km (70 mi) from the facilities of any incumbent, or by complying with the co-channel separation standards set forth in its ''short-spacing'' rule if it seeks to operate stations located less than 113 km (70 mi) from an incumbent licensee's facilities.

28. In this *First R&O*, the Commission determines to require EA licensees to afford interference protection to incumbent SMR systems, as provided in Section 90.621 of the Commission's rules. As a result, an EA licensee will be able to satisfy its co-channel protection obligations with respect to incumbents in one of three ways: (1) by locating its stations at least 113 km (70 miles) from any incumbent's facilities; (2) by complying with the short-spacing rule if it seeks to operate stations less than 113 km from an incumbent's facilities; or, (3) by negotiating an even shorter distance with the incumbent licensee. The Commission concludes that these requirements will ensure adequate protection of incumbent operations, without hampering the ability of EA licensees to construct stations throughout their authorized service areas. The Commission believes that this rule will afford maximum flexibility to EA licensees, allow incumbents to fill in ''dead spots,'' and protect incumbent licensees from actual interference.

2. Adjacent EA Licensees

29. In the *CMRS Third R&O*, the Commission concluded that the co-channel interference protection obligations of geographic-area licensees with respect to other geographic-area licensees would be similar to those imposed in the cellular and PCS services. In the *Further Notice*, the Commission tentatively concluded, therefore, that wide-area SMR licensees in the 800 MHz band should not be allowed to exceed a signal level of 22 dBuV/m at their service area boundaries (unless they negotiate a different signal strength limit with all potentially affected adjacent licensees).

30. In this *First R&O*, the Commission prohibits EA licensees from exceeding a signal level of 40 dBuV/m at their service area boundaries, unless all bordering EA licensees agree to a higher field strength. The Commission requires coordination of frequency use between co-channel adjacent EA licensees and all other affected parties. This approach provides EA licensees with a signal strength level sufficient to operate their systems up to the borders of their EAs, while also providing protection to adjacent operations. As an exception to this requirement, when a single entity obtains licenses for adjacent EAs on the same spectrum block, it will not be required to coordinate its operations in this manner.

3. Emission Masks

31. To protect against adjacent channel interference, the Commission has emission mask rules in most mobile radio services to restrict transmitter emissions on the spectrum adjacent to the licensee's assigned channel. In the *CMRS Third R&O*, the Commission affirmed its out-of-band emission rules for CMRS services and determined that out-of-band emission rules should apply only where emissions have the potential to affect other licensees' operations. With respect to licensees that have exclusive use of a block of contiguous channels, the Commission concluded that out-of-band emission rules would be applied only to the extent necessary to protect operations outside of the licensee's authorized spectrum.

32. The Commission concludes that out-of-band emission rules should apply only to the ''outer'' channels included in an EA license and to spectrum adjacent to interior channels used by incumbents. The Commission believes that these channels alone have the potential to affect operations outside of the EA licensee's authorized bandwidth. The Commission also believes that this requirement will facilitate dual mode

SMR/cellular operation, similar to that in the PCS/cellular context, which ultimately will add capacity to the systems operated by the EA licensees.

E. Construction Requirements

1. EA Licensees

33. In the *CMRS Third R&O,* the Commission determined that the record in the CMRS proceeding generally supported use of longer construction periods, combined with interim coverage requirements, to ensure that wide-area CMRS licensees provide service to portions of their service area before the construction period expires. In the *Further Notice,* the Commission noted that such an approach has been used for cellular service and recently was adopted for both broadband and narrowband PCS. In the *Further Notice,* the Commission tentatively concluded that wide-area SMR licensees should have five years to construct their systems.

34. In this *First R&O,* the Commission concludes that EA licensees should have a five-year construction period. While this construction period is shorter than that imposed for PCS systems, we agree with the majority of commenters that it is the most appropriate time period for the 800 MHz SMR service. In addition, given the substantial construction of 800 MHz SMR systems (including wide-area systems) to date, the ten-year construction period applicable to PCS appears excessive for the service. Although a five-year construction period may give some EA licensees more time to construct certain facilities than otherwise might have been allowed, the Commission believes that EA licensees should have this flexibility. Furthermore, the Commission believes that use of competitive bidding to select geographic-area licensees provides ample incentives for rapid system construction, since this permits license winners to recover their bidding expenses.

2. Extended Implementation Authority

35. The Commission noted in the *Further Notice* that some existing SMR licensees have been granted extended implementation periods of up to five years to construct their systems, pursuant to either a waiver of its construction and loading rules or Section 90.629 of its Rules. The Commission's rules require SMR licensees with extended implementation authority to submit annual certifications of compliance with their yearly station construction commitments. Moreover, if the Commission concludes, at any time, that the licensee has failed to meet such construction commitments, it may terminate extended implementation authority and give the licensee six months from the termination date to complete construction of the system.

36. Following the Commission's adoption of the *Further Notice,* some SMR licensees filed requests for extended implementation authority, which remain pending. With respect to two such requests filed by Chadmoore and PCC Management Corp., the Wireless Telecommunications Bureau (''Bureau'') released a Public Notice seeking comment on whether the requests should be granted. In its extended implementation authority request, Chadmoore sought three years to construct a non-contiguous ''wide-area'' SMR system that will extend from the southeastern United States through the upper Midwest and use new technology. Chadmoore argued that grant of its extended implementation request was warranted on four grounds: (a) Chadmoore's principals have demonstrated expertise in SMR sales and service; (b) Chadmoore previously has demonstrated its ability to acquire and construct those licenses granted to SMR ''investors;'' (c) Chadmoore's proposal would assist those licensees ''who have, as yet, not constructed'' their stations, and who are in danger of losing their investment once their already extended deadline has expired; and, (d) grant of Chadmoore's proposal would promote competition in the SMR equipment manufacturing market. Similarly, PCC sought a period of three years to construct a regional, and ultimately nationwide, network of SMR systems. PCC's proposed system would include 2,181 channels, 849 conventional channels and 269 trunked channels, encompassing 1,118 licenses. PCC argued that grant of its extended implementation request was warranted for the following reasons: (a) climatic conditions for the region(s) in which the SMR systems are located preclude construction during certain seasons of the year; (b) grant of PCC's proposal would assist licensees who have not yet constructed their authorized facilities; (c) PCC's implementation plan would result in a more cost-effective build-out for the stations included in its proposal; and (d) grant of PCC's proposal would facilitate the implementation of an integrated nationwide network.

37. The Commission initially established extended implementation authority for SMRs to facilitate construction of wide-area systems. In the *First R&O,* the Commission concludes that the availability of extended implementation authority in the 800 MHz SMR service is no longer necessary. In fact, the Commission is concerned that both existing and future grants of extended implementation authority would be contrary to the underlying goals of this proceeding. Specifically, the Commission believes that allowing licensees to retain extended implementation authority of up to five years after adoption of the wide-area licensing approach detailed in this *First R&O* would impinge upon the construction requirements imposed on EA licensees. Thus, the Commission believes that it is necessary not only to cease acceptance of requests for extended implementation authority but also to accelerate the termination date of existing implementation periods so that EA licensees will not be unnecessarily hampered in their efforts to comply with the construction requirements associated with their authorizations.

38. In addition, several licensees and commenters contend that such extended implementation grants have resulted in spectrum warehousing. To address these spectrum warehousing concerns, the Commission will require all incumbent 800 MHz SMR licensees who have received extended implementation authority to demonstrate that allowing them extended time to construct their facilities is warranted and furthers the public interest. Specifically, a licensee seeking to retain extended implementation authority must: (a) indicate the duration of its extended implementation period (including commencement and termination date); (b) provide a copy of its implementation plan, as originally submitted and approved by the Commission, and any Commission-approved modifications thereto; (c) demonstrate its compliance with Section 90.629 of its rules if authority was granted pursuant to that provision, including confirmation that it has filed annual certifications regarding fulfillment of its implementation plan; and (d) certify that all facilities covered by the extended implementation authority proposed to be constructed as of the adoption date of this *First R&O* are fully constructed and that service to subscribers has commenced as defined in the *CMRS Third R&O*. These showings must be submitted within 90 days from the effective date of this *First R&O*. The Commission notes that all of the information to be included in the showing presently is required by Section 90.629 of its Rules. The Commission delegated to the Bureau the authority to review and take appropriate action upon such showings.

39. If a licensee's extended implementation authority showing is approved by the Bureau, such licensee

will be afforded a construction period of two years or the remainder of its current extended implementation period, whichever is shorter. The Commission recognizes that some licensees were initially granted extended implementation periods which exceed this two-year period. In those instances where a licensee demonstrates that it has fully complied with the requirements of Section 90.629 of the Commission's rules and that its system cannot reasonably be completed within the two-year period, the Commission will entertain requests for the minimum period of time necessary to complete implementation of the licensee's proposal provided that the licensee explains why the two-year period is an insufficient amount of time. The Commission anticipates that such explanation would entail the same type of public interest showing associated with a request for waiver of the Commission's rules under Section 1.3 of the rules.

40. Upon the termination of this two-year period, authorizations for facilities that remain unconstructed will cancel automatically. If a licensee either fails to submit the showing described above within the designated time frame or submits an insufficient or incomplete showing, such licensee will have six months from the last day on which it could timely file such a showing or six months from the denial of its request to construct the remaining facilities covered under its implementation plan. After this six-month period, authorizations for facilities still unconstructed will cancel automatically.

41. With respect to pending requests for extended implementation authority, the Commission determines that grant of these requests would conflict with its goal of uniformly implementing wide-area licensing. It also reiterates that parties that remain interested in obtaining extended implementation authority are free to apply for an EA license under the Commission's new rules.

3. Interim Coverage Requirements

42. In the *CMRS Third R&O*, the Commission concluded that 800 MHz wide-area SMR licensees should be subject to interim coverage requirements that are similar to those in the cellular and PCS rules. In the *Further Notice*, the Commission proposed that geographic-area licensees be required to provide coverage to one-third of the population within their license area within three years of initial license grant, and to two-thirds of the population by the end of their five-year construction period.

43. In the *CMRS Third R&O*, the Commission noted that any interim coverage requirements for wide-area SMR systems must account for the fact that geographic-area licensees may be required to provide co-channel protection to incumbent systems within their service area. In the *Further Notice*, the Commission indicated its belief that when a licensee acquires a wide-area license, it assumes the responsibility of obtaining the right to use sufficient spectrum to provide coverage if such spectrum is not already available. The Commission further indicated its expectation that coverage be achieved directly by constructing facilities on available spectrum authorized to the wide-area licensee or acquiring such spectrum through buy-outs of incumbent licensees within its authorized spectrum block. To the extent that the *Further Notice* could be read to propose that coverage could be met through use of resale or similar agreements, the Commission clarifies its intention that the wide-area licensee is free to engage in resale activities, but must satisfy its construction requirements through use of its facilities and not capacity acquired from others through resale.

44. The Commission will require EA licensees to provide coverage to one-third of the population of their respective EAs within three years of initial license grant and to two-thirds by the end of their five-year construction period. This requirement is consistent with the Commission's 900 MHz SMR rules. Unlike its approach in the 900 MHz SMR context, the Commission is not adopting a ''substantial service'' benchmark for the upper 10 MHz block as an alternative to the population coverage criteria. Given the already extensive licensing in the upper 10 MHz block, the Commission believes it is unlikely that an EA licensee could provide substantial service without buying incumbent systems or relocating incumbents. Similarly, the Commission did not adopt a ''substantial service'' standard in the Multipoint Distribution Service (MDS) because of extensive incumbent presence in that spectrum.

4. Channel Use Requirement

45. Given the extensive licensing of the upper 10 MHz block, the Commission shares the concern of several commenters that interim coverage requirements alone may not ensure efficient spectrum use unless a channel use requirement is added. Specifically, the Commission is concerned that an EA licensee potentially could satisfy the interim coverage requirements by constructing only one channel in its spectrum block. This would result in inefficient use of 800 MHz SMR spectrum, for which there is great demand. In addition, unlike the 900 MHz SMR service and other lightly encumbered auctionable services, the substantial incumbent presence in the 800 MHz SMR service presents the potential for a bidder who is incapable of building out a wide-area system to participate in the auction solely to restrict a competing incumbent licensee's ability to expand. Accordingly, the Commission will require EA licensees to construct 50 percent of the total channels included in their spectrum blocks in at least one location in their respective EAs within three years of initial license grant. Although the Commission does not impose an additional channel use requirement at the fifth year, EA licensees nonetheless are required to maintain their compliance with the initial channel usage requirement for the remainder of their construction period.

5. Non-compliance With Interim Coverage Requirements

46. The Commission concluded that an EA licensee's failure to meet either the three-year or five-year coverage requirements or the channel usage requirement will result in forfeiture of the entire EA license. Forfeiture of the EA license, however, will not result in the loss of any constructed facilities authorized to the licensee prior to the auction.

F. EA License Application Issues

1. Initial Eligibility

47. In the *CMRS Third R&O* and the *Further Notice*, the Commission tentatively concluded that the initial application process for wide-area SMR licenses should be open to any qualified applicant. The Commission also sought comment on whether it was necessary to restrict eligibility for EA licenses to incumbent licensees (or to restrict eligibility based on other criteria) if competitive bidding procedures are used in the upper 10 MHz block.

48. In this *First R&O*, the Commission concludes that restrictions on eligibility for EA licenses are not warranted, except that EA applicants will be presumptively classified as CMRS, and therefore will be required to comply with the alien ownership requirements specified in Section 310 of the Act. The Commission has adopted specific provisions in the service rules for the upper 10 MHz block to address these concerns, *e.g.*, imposition of construction periods combined with

interim coverage and channel use requirements. Moreover, the Commission believes that the competitive bidding process itself will deter speculation by those not genuinely interested in providing service to the public. In addition, the Commission believes that open eligibility for the EA licensees will be pro-competitive and potentially will result in a diverse group of entities providing wide-area SMR service in the upper 10 MHz block.

49. With respect to foreign ownership, all applicants will be subject to Section 310(b) of the Communications Act, except to the extent they have received waiver of preexisting ownership interests. In the CMRS docket, the Commission established specific procedures for private mobile services licensees reclassified as CMRS to file waiver petitions to retain existing foreign ownership interests. Thus, any reclassified private mobile services licensees that have levels of alien ownership or control that would be prohibited when these licensees assume CMRS status must already have filed a petition seeking to have such interests grandfathered.

2. Regulatory Classification of EA Licensees

50. In the *CMRS Second R&O*, the Commission determined that SMR licensees would be classified as CMRS if they offered interconnected service and as PMRS if they did not offer such service. In the *Further Notice*, the Commission indicated its view that most, if not all, EA licensees will be classified as CMRS, because they are likely to provide interconnected service as part of their service offering. As a result, the Commission proposed to classify all EA licensees presumptively as CMRS providers. The Commission also proposed that EA applicants or licensees who do not intend to provide CMRS service would be able to overcome this presumption by demonstrating that their service does not fall within the CMRS definition. The Commission further proposed that the statutory grandfathering period also would apply with respect to the operation of this presumption. As a result, entities licensed in the SMR service as of August 10, 1993, would not be subject to CMRS regulation, other than foreign ownership restrictions, until August 10, 1996.

51. The Commission reiterates its conclusion that EA licensees will be classified presumptively as CMRS providers. The Commission also concluded that EA applicants and licensees, like other CMRS providers (such as broadband PCS applicants and licensees), will be able to overcome this presumption if they demonstrate that their service does not fall within the CMRS definition provided in Section 332(d)(1) of the Communications Act.

G. Redesignation of Other 800 MHz Spectrum—General Category Channels and Inter-Category Sharing

52. Currently, 800 MHz SMR systems may be licensed on the General Category channels or licensed under its inter-category sharing rules on 100 channels in the Industrial/Land Transportation and Business Categories (collectively, ''Pool Channels''). In the *Further Notice*, the Commission indicated that although it believes that SMR licensees with existing operations on the General Category or Pool Channels should be allowed to operate on such channels, the Commission also believes that some restriction on future SMR applications for General Category or Pool Channels might be appropriate.

1. General Category Channels

53. In the *Further Notice*, the Commission asked commenters to address whether the entire General Category or some portion thereof should be designated for future licensing exclusively to SMR applicants. The Commission's licensing records indicate that the overwhelming majority of General Category channels are used for SMR as opposed to non-SMR service. As a result, the Commission concludes that the demand for additional spectrum by SMR providers is significantly greater than the demand by non-SMR services. In addition, given the already extensive licensing on the upper 10 MHz block and the mandatory relocation established in this *First R&O*, as part of its wide-area licensing for the 800 MHz SMR service, the Commission expects that demand for additional SMR spectrum will increase, as EA licensees seek frequencies for relocation of incumbents. The Commission believes that by prohibiting SMR eligibility on the Pool Channels it will relieve much of the pressure on such frequencies. The Commission concludes that the most efficient use of the General Category channels is to redesignate them exclusively for SMR use.

2. Inter-Category Sharing

54. In the *Further Notice*, the Commission noted that the Pool Channels are intended for non-commercial internal use by Business and Industrial/Land Transportation licensees, and their availability for SMR licensees was to be on a limited basis only. After the release of the *Further Notice*, the Bureau placed a freeze on inter-category sharing.

55. The Commission is concerned that continuing to allow SMR applications for the Pool Channels could cause a scarcity of frequencies for PMRS uses. Specifically, if these channels remain available to SMR licensees, but are not subject to auctions, demand for the channels by SMR applicants seeking to avoid auctions may render them unavailable to other eligible Part 90 services. Thus, the Commission revises current eligibility rules for inter-category sharing of the Pool Channels to eliminate the risk of SMR encroachment on spectrum allocated for PMRS purposes. SMR licensees no longer will be eligible to apply for Pool Channels on an inter-category sharing basis.

56. In light of its elimination of SMR eligibility for the Pool Channels, the Commission concludes that non-SMR licensees no longer will be eligible for SMR channels, including the General Category channels. With respect to the upper 10 MHz block, the Commission concludes that non-SMR incumbent licensees, like SMR incumbent licensees, will receive the operational rights extended to incumbents and will be subject to the mandatory relocation mechanism.

III. Eighth Report and Order

A. Auctionability of the Upper 10 MHz Block of 800 MHz SMR Spectrum

57. Section 309(j) of the Communications Act, permits auctions only where: (1) mutually exclusive applications for initial licenses or construction permits are accepted for filing by the Commission; (2) the principal use of the spectrum will involve or is reasonably likely to involve the receipt by the licensee of compensation from subscribers in return for enabling those subscribers to receive or transmit communications signals; and, (3) the objectives set forth in Section 309(j)(3) would be promoted.

58. In the *Second Report and Order* in PP Docket No. 93–253, 59 FR 22980 (May 4, 1994) *(Competitive Bidding Second R&O)*, the Commission concluded that SMR as a class of service, including 800 MHz SMR, would satisfy the Section 309(j) criteria for auctionability. The Commission noted that its rules explicitly contemplate and expect that SMR licensees will provide service to eligible subscribers for compensation. The Commission concluded that the use of competitive bidding will speed the development and rapid deployment of SMR service, including service in rural areas, with minimal administrative or judicial

delays, as required by Section 309(j)(3)(A). The Commission also determined that competitive bidding would promote the objectives of Section 309(j)(3)(C) in the SMR service by recovering for the public a portion of the value of SMR spectrum made available for commercial use, and avoiding unjust enrichment.

59. In the *CMRS Third R&O*, the Commission concluded that it generally should use competitive bidding procedures to select among mutually exclusive CMRS applications where it has the authority to do so and where the Commission find such processing to be in the public interest. The Commission specifically concluded that competitive bidding procedures should be used to select between mutually exclusive initial applications in the 800 MHz SMR service. The Commission also concluded that, because the number of mutually exclusive applications in future licensing in the 800 MHz SMR service may be considerable, the use of competitive bidding will ensure that the qualified applicants who place the highest value on the available spectrum will prevail in the selection process.

60. The Commission reiterates its conclusion that competitive bidding is an appropriate licensing tool for the 800 MHz SMR service. The Commission emphasizes that the use of auctions will apply only to issuance of initial licenses in the upper 10 MHz block, the EA licenses. These EA licenses previously have not been issued by the Commission, and include certain rights and obligations that previously were not granted to or required of licensees. Significantly, its granting of these EA licenses does not affect rights afforded to licensees under existing authorizations, because incumbent licensees will be able to continue to operate their systems. Even though incumbents will be subject to mandatory relocation under certain circumstances, their existing operations will be protected. Furthermore, auctions will be used only in the event that there are competing applications for the same EA license.

61. The Commission concludes that use of competitive bidding in the upper 10 MHz block is authorized by Section 309(j) of the Communications Act. The Commission affirmed its previous conclusion that 800 MHz SMR, as a service, satisfies the criteria set forth by Congress for determining when competitive bidding should be used. SMR licenses are used to provide service to subscribers for compensation, so a precondition to competitive bidding under Section 309(j)(2)(A) is met. Moreover, competitive bidding will further the public interest requirements of Section 309(j)(3), by promoting rapid development of service, fostering competition, recovering a portion of the value of the spectrum for the public, and encouraging efficient spectrum use. Where competitive bidding is utilized, a diverse group of entities, including incumbent licensees and potential new entrants, will be able to participate in the auction process, because the Commission has decided not to restrict eligibility for these EA licenses, an outcome which furthers the goals of Section 309(j)(3)(B) of the Communications Act.

62. Additionally, the Commission believes that competitive bidding procedures will minimize administrative or judicial delays in licensing, particularly when compared to other licensing alternatives—comparative hearings, lotteries (which specifically are prohibited since the 800 MHz SMR service is auctionable), or first-come, first-served procedures. The Commission employed first-come, first-served procedures in the 800 MHz SMR service prior to its implementation of the Budget Act. The Commission's experience is that such procedures have resulted in processing delays. By contrast, the Commission expects that use of competitive bidding will allow interested parties to obtain expeditious access to 800 MHz SMR spectrum and to use such spectrum efficiently. The Commission concludes that this result furthers both Section 309(j)(3)(A) and Section 309(j)(3)(D) of the Communications Act.

63. The Commission disagrees with those commenters who argue that the Commission's competitive bidding authority does not extend to existing services. Section 309(j) of the Communications Act does not distinguish between new services (such as PCS) and existing services in terms of whether initial licenses in a given service should be subject to competitive bidding. Accordingly, the Commission concludes that its determination that the 800 MHz SMR service is auctionable is fully consistent with Section 309(j) of the Communications Act.

B. Competitive Bidding Methodology for Upper 10 MHz Block

1. Competitive Bidding Design

64. *Simultaneous Multiple Round Auctions.* Based on the record in this proceeding and the Commission's successful experience conducting simultaneous multiple round auctions for other CMRS services (*e.g.,* narrowband and broadband PCS), the Commission believes a simultaneous multiple round auction is the most appropriate competitive bidding design for the 10 MHz upper block of 800 MHz SMR spectrum. The Commission has developed and successfully conducted auctions with software capable of handling numerous licenses in a simultaneous multiple round auction. Thus, this methodology will afford the Commission administrative convenience and enable it to hold an auction quickly and efficiently. For certain bidders, the value of these licenses will be significantly interdependent because of the desirability of aggregation across geographic regions. Given this high degree of interdependency among licenses, the Commission rejects SBA's suggestion that single round sealed bidding is a more appropriate competitive bidding design for licensing the upper 10 MHz SMR spectrum blocks. The Commission believes that simultaneous multiple round bidding will generate more information about license values during the course of the auction and provide bidders with more flexibility to pursue back-up strategies, than if the licenses were auctioned separately or through sealed bidding. As the Commission decided in the 900 MHz SMR service, the Bidder Information Package for the 10 MHz upper block licenses will provide all the information about incumbent licensees that is available in its licensing records as of 60 days prior to the filing deadline for participation in the auction. In this connection, upon release of the Public Notice announcing the date of the auction for the upper 10 MHz block of 800 MHz SMR spectrum, all pending applications for frequencies within this spectrum will be returned without prejudice to the applicants. These applicants then will be able to seek licenses for these frequencies through the competitive bidding process. In addition, the Commission encourages all potential bidders to examine these records carefully and do their own independent investigation regarding existing licensees' operations in each EA in which they intend to bid in order to maximize their success in the auction. The Commission will hold a seminar for prospective bidders to acquaint them with this competitive bidding design. The Commission will announce the date and location for such seminar by Public Notice. The Commission concludes, therefore, that simultaneous multiple round bidding is most likely to award licenses to the bidders who value them the most highly and to provide bidders with the greatest likelihood of obtaining the license

combinations that best satisfy their service needs.

65. *Stopping Rules.* The Commission will adopt a simultaneous stopping rule for the upper 10 MHz block 800 MHz SMR auction. The simultaneous stopping rule is designed to allow bidders to decide how long the auction will run, based on bidding strategy and demand for each license. Under a simultaneous stopping rule, bidding will remain open on all licenses in an auction until bidding stops on every license. In this *Eighth R&O,* the Commission concludes that the substitutability between licenses within the same EA and the ability to pursue back-up strategies support the use of a simultaneous stopping rule.

66. As a result, the upper 10 MHz block 800 MHz SMR auction will close after one round passes in which no new valid bids or proactive activity rule waivers are submitted. The Commission retains the discretion to keep the auction open even if no new acceptable bids and no proactive waivers are submitted in a single round. In the event that the Commission exercise this discretion, the effect will be the same as if a bidder has submitted a proactive waiver. The Commission also retains the discretion to announce market-by-market closings.

67. The Commission further retains the discretion to declare after 40 rounds that the auction will end after some specified number of additional rounds. Bids will be accepted only on licenses where the high bid has increased in the last three rounds. This will deter bidders from continuing to bid on a few low value licenses solely to delay the closing of the auction. It also will enable the Commission to end the auction when it determines that the benefits of terminating the auction and issuing licenses exceed the likely benefits of continuing to allow bidding. The Commission will announce by Public Notice the number of remaining rounds and other final bidding procedures. In this *Eighth R&O,* the Commission delegates authority to the Bureau to issue such Public Notices.

68. *Activity Rules.* In the *Further Notice,* the Commission proposed that if simultaneous multiple round auctions are used for the upper 10 MHz block, the Commission would use activity rules the same as or similar to those used in simultaneous multiple round bidding for MTA-based PCS licenses. The Commission has used the Milgrom-Wilson activity rule to award broadband and narrowband PCS licenses. In the *Competitive Bidding Fifth R&O,* the Commission permitted broadband PCS bidders one ''automatic'' waiver from the activity rule during each stage of an auction. An automatic waiver is exercised by the Commission if a bidder fails to bid and fails to submit a ''proactive'' waiver, unless the bidder chooses to override the automatic waiver process to intentionally decrease eligibility: a ''proactive'' waiver is one which can be submitted by the bidder when it chooses not to bid in a round and wishes to maintain its current eligibility level. With respect to broadband PCS auctions, the Commission initially determined that only proactive waivers, and not automatic waivers, would keep an auction open. In that context, however, the Commission later modified the rule by retaining the discretion to keep an auction open even if no new acceptable bids and no proactive waivers are submitted in a single round. The Commission will employ the Milgrom-Wilson activity rule in conjunction with the simultaneous stopping rule. Under the Milgrom-Wilson approach, the minimum activity level, measured as a fraction of the bidder's eligibility in the current round, increases during the course of the auction. The three-stage Milgrom-Wilson approach encourages bidders to participate in early rounds by limiting their maximum participation to some multiple of their minimum participation level.

69. Absent waivers, a bidder's eligibility (in terms of activity units) in the current round is determined by the bidder's activity level and eligibility in the previous round. In the first round, however, eligibility is determined by the bidder's upfront payment and is equal to the upfront payment divided by $0.02 per activity unit.

70. In each round of Stage I, a bidder who wishes to maintain its current eligibility must be active on licenses encompassing at least one-half (50 percent) of the activity units for which it currently is eligible. Failure to maintain the requisite activity level will result in a reduction in the amount of activity units upon which a bidder will be eligible to bid in the next round of bidding (unless an activity rule waiver is used). During Stage I, if bidding activity is below the required minimum level, eligibility in the next round will be calculated by multiplying the current round activity by two. Eligibility for each applicant in the first round of the auction is determined by the amount of the upfront payment received and the licenses identified in its auction application. In each round of Stage II, a bidder who wishes to maintain its current eligibility in the next round is required to be active on at least 75 percent of the activity units for which it is eligible in the current round. During Stage II, if activity is below the required minimum level, eligibility in the next round will be calculated by multiplying the current round activity by four-thirds (4⁄3). In each round of Stage III, a bidder who wishes to maintain its current eligibility must be active on licenses encompassing at least 95 percent of the activity units for which it is eligible in the current round. In Stage III, if activity in the current round is below 95 percent of current eligibility, eligibility in the next round will be calculated by multiplying the current round activity by twenty nineteenths (20⁄19). The Commission reserve the discretion to set and, by announcement before or during the auction, vary the requisite minimum activity levels (and associated eligibility calculations) for each auction stage. Retaining this flexibility will improve the Commission's ability to control the pace of the auction and help ensure that the auction is completed within a reasonable period of time.

71. As in prior auctions, the Commission will determine the transition from one stage to the next in the 800 MHz SMR auction by the aggregate level of bidding activity, subject to its discretion. The transition rule also may be defined in terms of the ''auction activity level''—the sum of activity units of those licenses whose high bid increased in the current round, as a percentage of the total activity units of all licenses in that auction. The auction will start in Stage I and move to Stage II when the auction activity level is below ten percent for three consecutive rounds in Stage I. The auction will move from Stage II to Stage III when the auction activity level is below five percent for three consecutive rounds in Stage II. In no case can the auction revert to an earlier stage. The Commission retains the discretion, however, to determine and announce during the course of an auction when, and if, to move from one auction stage to the next. These determinations will be based on a variety of measures of bidder activity including, but not limited to, the auction activity level defined above, the percentage of licenses (measured in terms of activity units) on which there are new bids, the number of new bids, and the percentage increase in revenue.

72. To avoid the consequences of clerical errors and to compensate for unusual circumstances that might delay a bidder's bid preparation or submission on a particular day, the Commission will provide bidders with five activity rule waivers that may be used in any round during the course of the auction.

If a bidder's activity level is below the required activity level a waiver automatically will be applied. That is, if a bidder fails to submit a bid in a round, and its activity level from any ''standing'' high bids (*i.e.,* high bids at the end of the bid withdrawal period in the previous round) falls below its required activity level, a waiver automatically will be applied. A waiver will preserve current eligibility in the next round, but cannot be used to correct an error in the bid amount. An activity rule waiver applies to an entire round of bidding and not to a particular EA service area.

73. Bidders will be afforded an opportunity to override the automatic waiver mechanism when they place a bid, if they wish to reduce their bidding eligibility and do not want to use a waiver to retain their eligibility at its current level. If a bidder overrides the automatic waiver mechanism, its eligibility permanently will be reduced, and it will not be permitted to regain its bidding eligibility from a previous round. An automatic waiver invoked in a round in which there are no valid bids will not keep the auction open. Bidders will have the option to enter a ''proactive'' waiver during the bid submission period. If a bidder submits a proactive waiver in a round in which no other bidding activity occurs, the auction will remain open.

74. The Commission retains the discretion to issue additional waivers during the course of an auction for circumstances beyond a bidder's control. The Commission also retains the flexibility to adjust, by Public Notice prior to an auction, the number of waivers permitted, or to institute a rule that allows one waiver during a specified number of bidding rounds or during specified stages of the auction. In this *Eighth Report and Order,* the Commission delegated to the Bureau the discretion to issue additional waivers or restrict the use of such waivers.

2. License Grouping

75. In the *Further Notice,* the Commission tentatively concluded that if simultaneous multiple round auctions were used for the 800 MHz SMR wide-area spectrum blocks, the wide-area licenses covering these spectrum blocks should be auctioned simultaneously, because of the relatively high value and significant interdependence of the licenses.

76. The Commission believes that the licenses for the upper 10 MHz band are significantly interdependent. The Commission believes that grouping interdependent licenses and putting them up for bid at the same time will facilitate awarding licenses to bidders who value them most highly by providing bidders with information about the prices of complementary and substitutable licenses during the course of an auction. Because potential bidders may be interested in aggregating spectrum across geographic areas as well as across spectrum blocks, the Commission disagrees with Cellcall's suggestion to auction each geographic area individually. As a result, the Commission concludes that all EA licenses for the upper 10 MHz block should be auctioned simultaneously. The Commission further concludes that holding a single auction for all 176 EAs in the 800 MHz SMR band will be the fairest, fastest, and most efficient means of distributing these licenses.

3. Bidding Issues for Upper 10 MHz Block of 800 MHz SMR Spectrum

77. *Bidding Procedures.* In the *Further Notice,* the Commission proposed that if simultaneous multiple round auctions are used for wide-area SMR licenses, the Commission would use the same or similar bidding procedures to those used in simultaneous multiple round bidding for broadband PCS licenses. The Commission adopts the same bidding procedures used for MTA-based PCS licenses. Under these procedures, bidders will be able to submit bids via remote bidding, using special bidding software, or via telephone. The Commission has established a schedule of fees that participants in the competitive bidding process will be assessed for certain on-line computer services, bidding software, and for Bidder Information Packages. In addition, bidders will be permitted to bid electronically only if they have filed a short-form application electronically. Bidders who file their short-form manually may bid only telephonically. When submitting bids telephonically, bidders may utilize the Internet to learn the round-by-round results of the auction. Online services such as CompuServe, Prodigy, and America Online provide Internet access at a reasonable cost. Bidders also may, at negligible cost, use a computerized bulletin board service, accessible by telephone lines, from which auction results can be downloaded to a personal computer. The Commission intends to hold a seminar for prospective bidders to acquaint them with these bidding procedures.

78. *Bid Increments.* In the *Further Notice,* the Commission proposed that if simultaneous multiple round auctions are used for the upper 10 MHz block, the Commission would use the same or similar procedures for bid increments as those used in simultaneous multiple round bidding for MTA-based PCS licenses.

79. The Commission will announce, by Public Notice prior to the auction, the general guidelines for bid increments. The Commission retains the discretion to set and, by announcement before or during the auction, vary the minimum bid increments for individual licenses or groups of licenses over the course of the auction.

80. *Duration of Bidding Rounds.* In simultaneous multiple round auctions, the Commission recognize that bidders may need a significant amount of time to evaluate back-up strategies and develop their bidding plans. The Commission delegated to the Bureau the discretion to vary the duration of the bidding rounds or the interval at which bids are accepted (*e.g.,* to run more than one round per day) in order to move the auction to closure more quickly. The Bureau will announce any changes to the duration of and intervals between bidding rounds, either by Public Notice prior to the auction or by announcement during the auction.

4. Procedural and Payment Issues

81. *Pre-Auction Application Procedures.* In the *Competitive Bidding Second R&O,* the Commission determined that it should require only a short-form application (FCC Form 175) prior to auction, and that only winning bidders should be required to submit a long-form license application (FCC Form 600) after the auction. In this connection, the Commission determined that such a procedure would fulfill the statutory requirements and objectives and adequately protect the public interest. In the *Further Notice,* the Commission proposed to treat all wide-area applicants as initial applicants for public notice, application processing, and competitive bidding purposes, regardless of whether they already are incumbent licensees in the 800 MHz band. In addition in the *Further Notice,* the Commission proposed to require applicants for wide-area SMR licenses to file an initial ''short-form'' application in order to qualify for competitive bidding.

82. The Commission will extend the pre-auction application procedures established in the *Competitive Bidding Second R&O* to the competitive bidding process for the upper 10 MHz block. With respect to the definition of ''initial'' application in the upper 10 MHz block of 800 MHz SMR spectrum, the Commission believes that the most appropriate basis for this determination is an evaluation of the nature of the EA license. As EA licensees will gain use of

a large geographic area and the freedom to locate base stations anywhere within that larger geographic region, they differ from the existing 800 MHz SMR licensees that essentially are confined to smaller geographic areas, are site-specific, and do not encompass a large number of frequencies. Accordingly, the Commission will treat all EA applicants as initial applicants for public notice, application processing, and auction purposes, regardless of whether they already are incumbent operators.

83. Prior to the start of the 800 MHz SMR auction, the Commission will release an initial Public Notice announcing the auction. The initial Public Notice will specify the licenses to be auctioned and the time and place of the auction in the event that mutually exclusive applications are filed. The Public Notice will specify the method of competitive bidding to be used, applicable bid submission procedures, stopping rules, activity rules, the deadline by which short-form applications must be filed, and the amounts and deadlines for submitting upfront payments. The Commission will not accept applications filed before or after the dates specified in the Public Notice. Applications submitted before the release of the Public Notice will be returned as premature. Likewise, applications submitted after the deadline specified by the Public Notice will be dismissed, with prejudice, as untimely.

84. Soon after the release of the initial Public Notice, a Bidder Information Package will be made available to prospective bidders. The Bidder Information Package for the 800 MHz SMR service will contain information on the incumbents occupying blocks on which bidding will be available.

85. Section 309(j)(5) provides that no party may participate in an auction ''unless such bidder submits such information and assurances as the Commission may require to demonstrate that such bidder's application is acceptable for filing.'' Moreover, ''[n]o license shall be granted to an applicant selected pursuant to this subsection unless the Commission determines that the applicant is qualified pursuant to Section 309(a), Section 308(b), and Section 310'' of the Communications Act. As the legislative history of Section 309(j) makes clear, the Commission may require that bidders' applications contain all information and documentation sufficient to demonstrate that the application is not in violation of the Commission's rules, and the Commission will dismiss applications not meeting those requirements prior to the auction.

86. Thus, all bidders will be required to submit short-form applications on FCC Form 175 (and FCC Form 175–S, if applicable), by the date specified in the initial Public Notice. Applicants are encouraged to file FCC Form 175 electronically. Detailed instructions regarding electronic filing will be contained in the Bidder Information Package. Those applicants filing manually will be required to submit one paper original and one diskette original of their application, as well as two diskette copies. In addition, applicants filing manually will not be permitted to bid electronically. The short-form applications will require applicants to provide the information required by Section 1.2105(a)(2) of the Commission's rules. Specifically, each applicant will be required to specify on its FCC Form 175 application certain identifying information, including its status as a designated entity, its classification (*i.e.*, individual, corporation, partnership, trust, or other), the EAs and spectrum blocks for which it is applying, and, assuming that the licenses will be auctioned, the names of persons authorized to place or withdraw a bid on its behalf. The Commission requests applicants indicate their designated entity status in order to assist us in analyzing the applicant pool and the auction results to determine whether the Commission has accomplished substantial participation by minorities, women, small businesses, and rural telephone companies. In this connection, the Commission notes that Section 309(j) of the Communications Act requires us to prepare a report on the participation of designated entities in the auction and in the provision of spectrum-based services.

87. As the Commission indicated in the *Competitive Bidding Second R&O,* if it receives only one application that is acceptable for filing for a particular license, and thus there is no mutual exclusivity, the Commission will issue a Public Notice cancelling the auction for this license and establishing a date for the filing of a long-form application, the acceptance of which will trigger the procedures permitting petitions to deny. If no petitions to deny are filed, the application will be grantable after 30 days. By ensuring that bidders and license winners are serious, qualified applicants, these rules will minimize the need to re-auction licenses and will prevent delays in the provision of 800 MHz SMR service to the public. In response to those commenters concerned about the ability of unsuccessful bidders to participate in geographic-area licensing, the Commission reiterated its decision in the *First R&O* that incumbents, post-auction, will be able to trade-in their multiple licenses for a single authorization in a particular area, provided certain conditions are satisfied.

88. *Amendments and Modifications.* The Commission will adopt the following procedures for amendments to and modifications of short-form applications in the 800 MHz SMR service. Upon reviewing the short-form applications, the Commission will issue a Public Notice listing all defective applications, and applicants with minor defects will be given an opportunity to cure them and resubmit a corrected version. By the resubmission date, all applicants will be required to submit an upfront payment to the Commission, as discussed below, to the Commission's lock-box by the date specified in the Public Notice, which should be no later than 14 days before the scheduled auction. After the Commission receives from its lock-box bank the names of all applicants who have submitted timely upfront payments, the Commission will issue a second Public Notice announcing the names of all applicants that have been determined to be qualified to bid. An applicant who fails to submit a sufficient upfront payment to qualify it to bid on any license being auctioned will not be identified on this Public Notice as a qualified bidder. Each applicant listed on this Public Notice will be issued a bidder identification number and further information and instructions regarding auction procedures.

89. On the date set for submission of corrected applications, applicants that on their own have discovered minor errors in their applications (*e.g.*, typographical errors, incorrect license designations, *etc.*) will be permitted to file corrected applications. The Commission also will waive the *ex parte* rules as they apply to the submission of amended short-form applications for the 800 MHz SMR auctions, to maximize applicants' opportunities to seek Commission staff advice on making such amendments. Applicants will not be permitted to make any major modifications to their applications, including, but not limited to, changes in license areas and changes in control of the applicant, or additions of other bidders into the bidding consortia, until after the auction. Applicants also 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 will not result in a change in *de jure* or *de facto* 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, *i.e.*, EAs. In addition, applications that are not signed will be dismissed as unacceptable for filing, as will applications in which no market designations are made.

90. In addition, a single member of a bidding consortium may withdraw from a consortium only in a particular EA(s), but otherwise remain in the consortium for purposes of bidding on all other markets specified on the short-form application. However, such arrangements to assign the member's interests in particular licenses to other consortium members after the auction must be disclosed on an original or amended short-form application, and a request to transfer or assign the license also must be filed in conjunction with the long-form application.

5. Upfront Payments

91. In the *Competitive Bidding Second R&O*, the Commission established a minimum upfront payment of $2,500 and stated that this amount could be modified on a service-specific basis. In the *Further Notice*, the Commission proposed to require 800 MHz SMR auction participants to tender in advance to the Commission a substantial upfront payment, $0.02 per activity unit for the largest combination of activity units on which a bidder anticipates bidding in any round, as a condition of bidding in order to ensure that only serious, qualified bidders participate in auctions, and to ensure payment of the monetary assessment in the event of bid withdrawal or default. The Commission also sought comment on the upfront payment formula and minimum upfront payment most appropriate for the 800 MHz SMR service.

92. The Commission adopts the standard $0.02 per activity unit formula to calculate the upfront payment. The Commission also adopts a minimum upfront payment of $2,500 for the 800 MHz SMR service. In the initial Public Notice issued prior to the auction, the Commission will announce population information corresponding to each license and the upfront payment amount for each EA license. In general, population coverage for each channel block in each EA will be based on a formula that takes into account the presence of incumbent licensees.

93. Upfront payments will be due by a date specified by Public Notice, but generally no later than 14 days before a scheduled auction. Each qualified bidder will be issued a bidder identification number and further information and instructions regarding the auction procedures. During the auction, bidders will be required to provide their bidding identification numbers when submitting bids.

6. Down Payments and Full Payments

94. *Down Payments.* In the *Competitive Bidding Second R&O*, the Commission generally required successful bidders to tender a 20 percent down payment on their bids to discourage default between the auction and licensing, and to ensure payment of the monetary assessment if such default occurs. In the *Further Notice*, the Commission proposed to require the winning bidders for 800 MHz SMR licenses to supplement their upfront payments with a down payment sufficient to bring their total deposits up to 20 percent of their winning bid(s).

95. The Commission concludes that winning bidders must supplement their upfront payments with a down payment sufficient to bring their total deposits up to 20 percent of their winning bid(s). If the upfront payment already tendered by a winning bidder, after deducting any bid withdrawal and default payments due, amounts to 20 percent or more of its winning bids, no additional deposit will be required. If the upfront payment amount on deposit is greater than 20 percent of the winning bid amount after deducting any bid withdrawal and default payments due, the additional monies will be refunded. If a bidder has withdrawn a bid or defaulted, but the amount of the payment cannot yet be determined, the bidder will be required to make a deposit of 20 percent of the amount bid on such licenses. When it becomes possible to calculate and assess the payment, any excess deposit will be refunded. Upfront payments will be applied to such deposits, and to bid withdrawal and default assessments due, before being applied toward the bidder's down payment on licenses the bidder has won and seeks to acquire.

96. The Commission also will require winning bidders to submit the required down payment by cashier's check or wire transfer to its lock-box bank by a date and time to be specified by Public Notice, generally within five business days following the close of bidding. The Commission will hold the down payment until the high bidder is awarded the license and has paid the remaining balance due on such license, or until the winning bidder is found unqualified to be a licensee or has defaulted, in which case it will be returned, less applicable monetary assessments. All auction winners generally will be required to make full payment of the balance of their winning bids within five business days following Public Notice that the Commission is prepared to award the license. The Commission generally will grant uncontested licenses within ten business days after receiving full payment. During the period that deposits are held pending the ultimate award of the license, the interest that accrues, if any, will be retained by the U.S. Treasury.

97. *Long-Form Applications.* The Commission will follow these procedures if the winning bidder makes the down payment in a timely manner: A long-form application filed on FCC Form 600 must be filed by a date specified by Public Notice, generally within ten business days after the close of bidding. After the Commission receives the winning bidder's down payment and long-form application, the Commission will review the long-form application to determine if it is acceptable for filing. Upon acceptance for filing of the long-form application, the Commission will issue a Public Notice announcing this fact, triggering the filing window for petitions to deny. If the Commission denies all petitions to deny, and otherwise is satisfied that the applicant is qualified, the license(s) will be granted to the auction winner.

98. *Petitions to Deny and Limitations on Settlements.* A party filing a petition to deny against an 800 MHz SMR application will be required to demonstrate standing and meet all other applicable filing requirements. The restrictions in Section 90.162 were established to prevent the filing of speculative applications and pleadings (or threats of the same) designed to extract money from 800 MHz SMR applicants. Thus, the Commission will limit the consideration that an applicant or petitioner is permitted to receive for agreeing to withdraw an application or petition to deny to the legitimate and prudent expenses of the withdrawing applicant or petitioner.

99. With respect to petitions to deny, the Commission need not conduct a hearing before denying an application if it determines that an applicant is not qualified and no substantial and material issue of fact exists concerning that determination. In the event the Commission identifies substantial and material issues of fact, Section 309(i)(2) of the Communications Act permits the submission of all or part of evidence in written form in any hearing and allows employees other than administrative law judges to preside over the taking of written evidence.

100. *Bid Withdrawal, Default, and Disqualification.* In the *Further Notice,* the Commission proposed to adopt bid withdrawal, default, and disqualification rules for the 800 MHz SMR service, based on the procedures established in its general competitive bidding rules.

101. The Commission believes that forfeiture of the entire upfront payment is too extreme for the bidder who withdraws only one bid. Since commenters have not stated why the 800 MHz SMR service differs in this respect from the narrowband and broadband PCS services, there is no justification for departing from the already tested narrowband and broadband PCS withdrawal, default, and disqualification assessments. Therefore, the Commission believes applying Section 1.2104(g)(1) of its Rules to the 800 MHz SMR auction is more equitable and is consistent with its practice in prior auctions. Section 1.2104(g)(1) provides that any bidder that withdraws a high bid during an auction before the Commission declares bidding closed will be required to reimburse the Commission in the amount of the difference between its high bid and the amount of the winning bid the next time the license is offered by the Commission, if this subsequent winning bid is lower than the withdrawn bid.

102. If a license is re-offered by auction, the ''winning bid'' refers to the high bid in the auction in which the license is re-offered. If a license is re-offered in the same auction, the winning bid refers to the high bid amount, made subsequent to the withdrawal, in that auction. If the subsequent high bidder also withdraws its bid, that bidder will be required to pay an assessment equal to the difference between its withdrawn bid and the amount of the subsequent winning bid the next time the license is offered by the Commission. If a license which is the subject of withdrawal or default is not re-auctioned, but instead is offered to the highest losing bidders in the initial auction, the ''winning bid'' refers to the bid of the highest bidder who accepts the offer. Losing bidders will not be required to accept the offer, *i.e.,* they may decline without penalty. The Commission wish to encourage losing bidders in simultaneous multiple round auctions to bid on other licenses, and therefore the Commission will not hold them to their losing bids on a license for which a bidder has withdrawn a bid or on which a bidder has defaulted.

103. After bidding closes, the Commission will apply Section 1.2104(g)(2) of its Rules to assess a defaulting auction winner an additional payment of three percent of the subsequent winning bid or three percent of the amount of the defaulting bid, whichever is less. The additional three percent payment is designed to encourage bidders who wish to withdraw their bids to do so before bidding ceases. The Commission will hold deposits made by defaulting or disqualified auction winners until full payment is made. In the unlikely event that there is more than one bid withdrawal on the same license, the Commission will hold each withdrawing bidder responsible for the difference between its withdrawn bid and the amount of the winning bid the next time the licenses are offered for auction by the Commission.

104. These payment requirements will discourage default and ensure that bidders meet all eligibility and qualification requirements. If a default or disqualification involves gross misconduct, misrepresentation or bad faith by an applicant, the Commission may declare the applicant and its principals ineligible to bid in future auctions, and may take any other action that it deems necessary, including institution of proceedings to revoke any existing licenses held by the applicant.

105. If the EA license winner defaults, is otherwise disqualified after having made the required down payment, or the license is terminated or revoked, then the Commission will re-auction the license. 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, or if that bidder declines the offer, to offer the license to other bidders (in descending order of their bid amounts) at the final bid levels. If only a short time has passed since the initial auction, the Commission may choose to offer the license to the highest losing bidders if the cost of running another auction exceeds the benefits.

7. Regulatory Safeguards

106. *Rules Prohibiting Collusion.* The Commission's rules prevent parties from agreeing in advance to bidding strategies that divide the market according to their strategic interests and/or disadvantage other bidders. Bidders will be required to (i) disclose all parties with whom they have entered into any agreement that relates to the competitive bidding process, and (ii) certify they have not entered into any explicit or implicit agreements, arrangements, or understandings with any parties, other than those identified, regarding the amount of their bid, bidding strategies, particular properties on which they will or will not bid or any similar agreement.

107. The Commission will subject 800 MHz SMR licensees to the reporting requirements and rules prohibiting collusion embodied in Sections 1.2105 and 1.2107 of the Commission's rules. Bidders will be required by Section 1.2105(a)(2) to identify on their FCC Form 175 applications all parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements or understandings which relate to the competitive bidding process. If parties agree in principle on all material terms, those parties must be identified on the short-form application, even if the agreement has not been reduced to writing. Only at such level of agreement can it be fairly stated that the parties have entered into a bidding consortium or other joint bidding arrangement. If the parties have not agreed in principle by the short-form filing deadline, an applicant would not include the names of those parties on its application, and may not continue negotiations with those parties. Bidders will be required to certify that they have not entered and will not enter into any explicit or implicit agreements, arrangements or understandings with any parties, other than those identified, regarding the amount of their bid, bidding strategies or the particular properties on which they will or will not bid. In this connection, any communications between EA bidders and incumbent licensees should take place prior to the deadline for filing FCC Form 175 applications.

108. After the FCC Form 175 filing deadline, applicants may not discuss the substance of their bids or bidding strategies with bidders, other than those identified on their FCC Form 175 application, that are bidding in the same license areas, *i.e.*, EAs. This prohibition on discussions extends to providing indirect information that affects bids or bidding strategy. For example two applicants not listed on each other's FCC Form 175 applications for the 800 MHz SMR auctions may not discuss bids or bidding strategies with each other if they are bidding for licenses in any of the same EAs, even if they are not bidding for the same spectrum blocks.

109. Section 1.2105(c) of the Commission's rules, however, provides certain exceptions to the rule prohibiting discussions with other applicants after the filing of the short-form application. First, applicants may make agreements to bid jointly for licenses, so long as the applicants have not applied for licenses in any of the same license areas. Second, an applicant

may modify its short-form application to reflect formation of bidding agreements or changes in ownership at any time before or during the auction, as long as the changes do not result in change of *de jure* or *de facto* control of the applicant, and the parties forming the bidding agreement have not applied for licenses in any of the same license areas. Finally, a holder of a non-controlling attributable interest in an applicant may acquire an ownership interest in, or enter into a bidding agreement with other applicants in the same license area, if (1) the owner of the attributable interest certifies that it has not communicated and will not communicate bids or bidding strategies of more than one of the applicants in which it holds an attributable interest or with which it has a bidding agreement; and (2) the arrangements do not result in any change of control of the applicant. However, once the short-form application has been filed, a party with an attributable interest in once bidder may not acquire a controlling interest in another bidder bidding for licenses in any of the same license areas.

110. Where the applicant does not meet one of these exceptions, it may not discuss matters relating to bidding with other applicants. Even when an applicant has withdrawn its application after the short-form filing deadline, the applicant may not enter into a bidding agreement with another applicant bidding on authorizations in the license areas from which the first applicant withdrew.

111. If an applicant has the high bid for a license, Section 1.2107(d) of the Commission's rules requires the applicant to include with its long-form application a detailed explanation of the terms and conditions and parties involved in any bidding consortia, joint venture, partnership or other agreement or arrangement it had entered into relating to the competitive bidding process prior to the time bidding was completed. Under the Commission's rules prohibiting collusion, the term ''applicant'' includes the entity submitting the application, owners of 5 percent or more of the entity, and all officers and directors of such entity.

112. The Commission noted that even where the applicant discloses parties with whom it has reached on agreement on the short-form application, thereby permitting discussions with those parties, the applicant nevertheless is subject to existing antitrust laws. As discussed in the *Competitive Bidding Fourth Memorandum Opinion & Order* in PP Docket No. 93–253, 59 FR 53364 (October 24, 1994) (*''Competitive Bidding MO&O''*), under the antitrust laws, the parties to an agreement may not discuss bid prices if they have applied for licenses in the same license area. In addition, agreements between actual or potential competitors to submit collusive, non-competitive or rigged bids are *per se* violations of Section One of the Sherman Antitrust Act. Further, actual or potential competitors may not agree to divide territories horizontally in order to minimize competition, regardless of whether they split a license area in which they both do business, or whether they merely reserve one license area for one and another for the other.

113. The Commission noted that where specific instances of collusion in the competitive bidding process are alleged during the petition to deny process, the Commission may conduct an investigation or refer such complaints to the United States Department of Justice for investigation. Bidders who are found to have violated the antitrust laws, in addition to any penalties they incur under the antitrust laws, or who are found to have violated the Commission's rules in connection with their participation in the auction process may be subject to a variety of sanctions, including forfeiture of their down payment or their full bid amount, revocation of their license(s), and may be prohibited from participating in future auctions.

114. *Transfer Disclosure Requirements.* In Section 309(j)(4)(E) of the Communications Act, Congress directed the Commission to ''require such transfer disclosures and anti-trafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits.'' In the *Competitive Bidding Second R&O*, the Commission adopted safeguards designed to ensure that the requirements of Section 309(j)(4)(E) are satisfied. The Commission decided that it was important to monitor transfers of licenses awarded by competitive bidding to accumulate the necessary data to evaluate its auction designs and to judge whether ''licenses [have been] issued for bids that fall short of the true market value of the license.'' Therefore, the Commission imposed a transfer disclosure requirement on licenses obtained through the competitive bidding process, whether such licenses were held by a designated entity or not. The Commission proposed in the *Further Notice* to adopt the transfer disclosure requirements of Section 1.2111(a) of its Rules to all 800 MHz SMR licenses obtained through the competitive bidding process.

115. The Commission believes that a three-year holding period is unnecessary. In other auctionable services, the Commission has required holding periods only in limited circumstances. For example, the Commission's broadband PCS rules require those successful bidders benefitting from special provisions for designated entities to hold their licenses for a certain period of time and restrict the type of transfers and assignments of such licenses during that time. The Commission is not adopting special provisions for designated entities on the upper 10 MHz block of 800 MHz SMR spectrum. When the Commission has not established special provisions for designated entities in other auctionable services, the Commission generally has required only disclosure of certain information regarding transfers or assignments within the first three years after initial license grant. The Commission concludes that this is the most appropriate course of action here. Thus, the Commission will apply Section 1.2111(a) to all 800 MHz SMR licenses obtained through the competitive bidding process. Generally, licensees transferring their licenses within three years after the initial license grant will be required to file, together with their transfer applications, the associated contracts for sale, option agreements, management agreements, and all other documents disclosing the total consideration received in return for the transfer of their licenses. The Commission will give particular scrutiny to auction winners who have not yet begun commercial service and who seek approval for a transfer of control or assignment of their licenses within three years after the initial license grant, so that the Commission may determine if any unforeseen problems relating to unjust enrichment have arisen.

116. *Performance Requirements.* The Communications Act requires the Commission to ''include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services.'' In the *Competitive Bidding Second R&O*, the Commission decided it was unnecessary and undesirable to impose additional performance requirements, beyond those already provided in the service rules, for all auctionable services. In the *Further Notice*, the Commission did not propose

to adopt any additional performance requirements for competitive bidding purposes.

117. The service rules for the upper 10 MHz block contain specific performance requirements, such as the requirement to construct within a specific period of time, channel construction requirements, and interim coverage requirements. Because the failure to meet these requirements will result in automatic cancellation of the EA license, the Commission believes this is a sufficient incentive to promote prompt service and prevent spectrum warehousing. Thus, the Commission will not adopt any performance requirements for the 800 MHz SMR service beyond those required by Section 90.685 of the Rules.

8. Treatment of Designated Entities

118. *Overview, Objectives, and the Impact of Adarand Constructors* v. *Peña.* The Communications Act provides that, in developing competitive bidding procedures, the Commission shall consider various statutory objectives and consider several alternative methods for achieving them. Specifically, the statute provides that in establishing eligibility criteria and bidding methodologies the Commission shall ''promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.'' Small businesses, rural telephone companies and businesses owned by minorities and/or women are collectively referred to as ''designated entities.'' Section 309(j)(4)(A) provides that in order to promote the Communications Act's objectives, the Commission shall ''consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods * * * and combinations of such schedules and methods.'' The Communications Act also requires the Commission to ''ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services.''

119. To meet the statutory objectives of providing opportunities for designated entities, the Commission has employed a wide range of special provisions and eligibility criteria in other spectrum-based services. The measures adopted thus far for each service were established after closely examining the specific characteristics of the service and determining whether any particular barriers to accessing capital impeded opportunities for designated entities. After examining the record in the Competitive Bidding proceeding in PP Docket 93–253, the Commission established provisions to enable designated entities to overcome the barriers to accessing capital in each particular service. Moreover, these provisions were designed to increase the likelihood that designated entities who win licenses in the auctions become strong competitors in the provision of wireless services.

120. *Impact of Adarand Constructors, Inc.* v. *Peña.* In the broadband PCS docket, the Commission determined that, on separate entrepreneurs' blocks, the bidding credits would vary according to the type of designated entity that applied (*i.e.*, a small business would receive a 10 percent bidding credit, a business owned by minorities or women would receive a 15 percent bidding credit, and a small business owned by women or minorities would receive an aggregated bidding credit of 25 percent), and all entrepreneurs' block licensees would be eligible for varying degrees of installment payments. The Commission adopted special provisions for businesses owned by members of minority groups or women and analyzed their constitutionality using the ''intermediate scrutiny'' standard of review articulated in *Metro Broadcasting* v. *FCC*, because, as in *Metro Broadcasting*, the proposed provisions involved Congressionally-mandated benign race- and gender-conscious measures.

121. After the release of the *Further Notice*, the Supreme Court decided *Adarand Constructors, Inc.* v. *Peña*, which overruled *Metro Broadcasting* ''to the extent that *Metro Broadcasting* is inconsistent with'' the holding in *Adarand* that ''all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny.'' As a result of the *Adarand* decision, the constitutionality of any federal program that makes distinctions on the basis of race must serve a compelling governmental interest and must be narrowly tailored to serve that interest. In this connection, the Bureau issued a Public Notice requesting further comment on the effect of the decision in *Adarand* on the proposals made in the *Further Notice* in order to supplement the record in the 800 MHz SMR proceeding.

122. *Special Provisions for Designated Entities.* In instructing the Commission to ensure the opportunity for designated entities to participate in auctions and provision of spectrum-based services, Congress was well aware of the problems that designated entities would have in competing against large, well-capitalized companies in auctions and the difficulties these bidders encounter in accessing capital. For example, the legislative history accompanying Congress's grant of auction authority states generally that the Commission's regulations ''must promote economic opportunity and competition,'' and ''[t]he Commission will realize these goals by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses and businesses owned by members of minority groups and women.'' The House Report states that the House Committee was concerned that, ''unless the Commission is sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications industries.'' More specifically, the House Committee was concerned that adoption of competitive bidding should not have the effect of ''excluding'' small businesses from the Commission's licensing procedures, and anticipated that the Commission would adopt regulations to ensure that small businesses would ''continue to have opportunities to become licensees.''

123. Consistent with Congress's concern that auctions not operate to exclude small businesses, the provisions relating to installment payments clearly were intended to assist small businesses. The House Report states that these related provisions were drafted to ''ensure that all small businesses will be covered by the Commission's regulations, including those owned by members of minority groups and women.'' It also states that the provisions in Section 309(j)(4)(A) relating to installment payments were intended to promote economic opportunity by ensuring that competitive bidding does not inadvertently favor incumbents with deep pockets ''over new companies or start-ups.''

124. In addition, with regard to access to capital, Congress previously made specific findings in the Small Business Credit and Business Opportunity Enhancement Act of 1992, that ''small business concerns, which represent higher degrees of risk in financial markets than do large businesses, are

experiencing increased difficulties in obtaining credit.'' As a result of these difficulties, Congress resolved to consider carefully legislation and regulations ''to ensure that small business concerns are not negatively impacted'' and to give priority to passage of ''legislation and regulations that enhance the viability of small business concerns.''

125. In the 800 MHz SMR service, as in other auctionable services, the Commission is 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. Accordingly, in balancing the objectives set forth in the Communications Act, the *Further Notice* proposed bidding credits and a tax certificate program for businesses owned by women and minorities and installment payments for small businesses on all 800 MHz SMR channel blocks in each MTA.

126. The Commission concludes that special provisions for small businesses are appropriate for the 800 MHz SMR service because build-out of an EA license may require a significant amount of capital. Although the Commission believes that the 800 MHz SMR service is less capital intensive than PCS, the Commission also believes that it is more capital-intensive than the 900 MHz SMR service. The Commission further believes that small entities may be disadvantaged in their efforts of acquiring 800 MHz SMR licenses if required to bid against existing large companies. For instance, if one or more of these big firms targets a market for strategic reasons, there is almost no likelihood that it could be outbid by a small business. The Commission will address this potential outcome in two ways. First, for the upper 10 MHz block, the Commission will adopt the same ''tiered'' installment payments approach adopted in the 900 MHz SMR service. Specifically, licensees who qualify for installment payments will be entitled to pay their winning bid amount in quarterly 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. Small businesses with gross revenues less than $15 million will be required to pay interest only for the first two years of the license term at the same interest rate as set forth above. Interest will accrue at the Treasury note rate plus 2.5 percent. Small businesses with gross revenues less that $3 million will be able to make interest-only payments for five years. Interest will accrue at the Treasury note rate without the additional 2.5 percent. Timely payment of all quarterly installments will be a condition of the license grant, and failure to make such timely payment will be grounds for revocation of the license. As the Commission have noted previously, allowing installment payments reduces the amount of private financing needed by prospective small business licensees and therefore mitigates the effect of limited access to capital by small businesses. In determining eligibility for these installment payment plans, the Commission will not attribute gross revenues of investors that hold less than a 20 percent interest in the applicant, but the Commission will include the gross revenues of the applicant's affiliates and investors with ownership interests of 20 percent or more in the applicant. As has been the case in prior auctions where special provisions for small businesses have been made, it also is the Commission's expectation that a qualifying small business or principals of a qualifying small business will retain *de facto* and *de jure* control of the applicant. In determining attribution when 800 MHz SMR licensees are held indirectly through intervening corporate entities, the Commission will use the same multiplier employed for the 900 MHz SMR service.

127. Second, the Commission has proposed additional special provisions for small businesses seeking licenses for the lower 80 and General Category channels in the *Second Further Notice of Proposed Rule Making* in PR Docket No. 93–144, because the Commission believes that most, if not all, of the incumbent licensees relocated will qualify as small businesses under its proposed definition, and the lower 80 and General Category channels will be the spectrum to which they most likely will be relocated. This approach is consistent with the Commission's approach in the broadband PCS context in which the Commission designated certain frequency blocks as ''entrepreneurs' blocks'' and restricted eligibility based on size limitations. The Commission also believes that the service areas and spectrum blocks for the upper 10 MHz block the Commission adopted in the *First R&O* will permit operators of smaller SMR systems to participate in the upper 10 MHz block auction.

128. At this time the Commission concludes that there is an insufficient record to support the adoption of special provisions solely benefitting minority- and women-owned businesses (regardless of size) for the upper 10 MHz block auction. The Commission notes, however, that in the *Second Further Notice of Proposed Rule Making,* the Commission is seeking comment on this issue with respect to the lower 80 and General Category channels. Moreover, the Commission believes that most minority- and women-owned businesses will be able to take advantage of the installment plan described above. The Commission expects that the vast majority of minority- and women-owned businesses will be able to qualify as small businesses under any definition the Commission adopts.

129. *Partitioning.* In the *Further Notice,* the Commission did not propose any special provisions for rural telephone companies, on the basis that: (1) they, like other wireline carriers, then were ineligible to hold SMR licenses; (2) even if wireline entry into SMR was permitted, the Commission questioned whether special bidding provisions would be necessary to ensure the participation of rural telephone companies in the provision of SMR service given the relatively modest build-out costs involved to serve rural areas; and (3) in view of the fact that rural telephone companies may use their existing infrastructure to support integrated 800 MHz SMR service in their rural service areas, the Commission anticipated that they would have ample opportunity to participate in 800 MHz SMR.

130. Since adoption of the *Further Notice,* rural telephone companies have gained eligibility to hold SMR licenses. Thus, the Commission concludes that rural telephone companies will be permitted to acquire partitioned EA 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 800 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 geo-political boundaries (such as county lines), and each area must include all portions of the wireline service area of the rural telephone company applicant that lie within the EA service area. The Commission also will use the definition for rural telephone companies used in its

broadband PCS and 900 MHz SMR rules. Thus, rural telephone companies will be defined as ''local exchange carriers having 100,000 or fewer access lines, including all affiliates.'' In the *Second Further Notice of Proposed Rule Making,* the Commission seeks comment on its proposal to extend the partitioning option to SMR licensees generally.

131. *Set-Aside Spectrum.* In the *Further Notice,* the Commission expressed its concern, based on its experience with PCS, that designated entities may have difficulties competing for 800 MHz SMR licenses against large firms with significant financial resources. The Commission tentatively concluded, however, that it would not be feasible to designate a wide-area spectrum block as an entrepreneurs' block because the large number of incumbents already licensed throughout the spectrum designated for wide-area licensing make it virtually impossible to identify a suitable block.

132. The Commission does not adopt an entrepreneurs' block in the upper 10 MHz block of 800 MHz SMR spectrum. The Commission concluded that an entrepreneur's block in this portion of 800 MHz SMR spectrum is not feasible, given the substantial number of licensees already licensed on such spectrum. However, the Commission is interested in ensuring that small businesses have a meaningful opportunity to continue to participate in the provision of 800 MHz SMR service. Thus, in the *Second Further Notice of Proposed Rule Making* the Commission seeks additional comment on whether designation of an entrepreneurs' block for other 800 MHz spectrum would be feasible.

IV. Procedural Matters and Ordering Clauses

A. Final Regulatory Flexibility Analysis

133. With respect to this *First Report and Order* and *Eighth Report and Order,* pursuant to the Regulatory Flexibility Act of 1980, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Further Notice of Proposed Rule Making* in PR Docket No. 93–144. Written comments on the IRFA were requested. The Commission's final analysis is as follows:

Need for and purpose of the action. The rule making proceeding has implemented Sections 332 and 3(n), respectively, of the Communications Act of 1934, as amended. The rules adopted herein will carry out Congress's intent to establish a consistent framework for all commercial mobile radio services (CMRS).

Issues raised in response to the IRFA. No comments were submitted in response to the IRFA.

Significant alternatives considered and rejected. All significant alternatives have been addressed in the *First Report and Order* in PR Docket No. 93–144, the *Third Report and Order* in GN Docket No. 93–252, and the *Eighth Report and Order* in PP Docket No. 93–253.

B. Paperwork Reduction Act

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden, invites the general public and other Federal agencies to take this opportunity to comment on the following proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written comments should be submitted on or before April 16, 1996. If you anticipate that you will be submitting comments but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all comments to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M St., NW., Washington, DC 20554, or via Internet to dconway@fcc.gov; and Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 17th St., NW., Washington, DC 20503, or via Internet to fain__t@al.eop.gov.

FOR FURTHER INFORMATION CONTACT: Dorothy Conway, (202) 418–0217, or via Internet at dconway@fcc.gov.

SUPPLEMENTARY INFORMATION:

Title: Amendment to the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band.

Type of Review: Revised collection.

Respondents: Individuals or households; Business or other for-profit; Not-for-profit institutions; State, Local or Tribal Government.

Number of Respondents: 9,570.

Estimated Time Per Response: Approximately 2 hours.

Total Annual Burden: Approximately 17,254 hours.

Total Annual Cost: $6,468,260 this includes the costs for filing the information electronically or mailing submissions and hiring consultants that may be necessary to respond the requests.

Needs and Uses: The information will be used by the Commission for the following purposes: (a) To determine if the grant or retention of an extended implementation schedule is warranted; (b) to update the Commission's licensing database and thereby facilitate the successful coexistence of EA licensees and incumbents in the upper 10 MHz block of 800 MHz SMR spectrum; (c) to ensure that incumbents are timely notified of possible relocation thus allowing relocation to occur in an orderly, efficient, and expedient manner; and (d) to determine whether an applicant is eligible for special provisions for small businesses provided for applicants in the 800 MHz SMR service.

C. Ex Parte Rules—Non-Restricted Proceeding

This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules, 47 CFR §§ 1.1202, 1.1203, 1.1206(a).

D. Authority

The legal authority for this proposed information collection includes 47 U.S.C. Sections 154(i), 303(c), 303(f), 303(g), 303(r), 309(j) and 332 47 U.S.C. §§ 154(i), 303(c), 303(f), 303(g), 303(r), 309(j), 332, as amended. The information collection would not affect any FCC forms. The proposed collection would increase minimally the burden on 800 MHz SMR service applicants.

E. Ordering Clauses

It is ordered that the rule changes made herein will become effective March 18, 1996. This action is taken pursuant to Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309(j).

It is further ordered that all requests for extended implementation authority for the 800 MHz SMR service filed pursuant to Section 90.629 of the Commission's rules and currently pending before the Commission are denied.

It is further ordered that the Secretary shall send a copy of this *First Report*

and Order and *Eighth Report and Order* to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 90

Common carriers, Radio, Reporting and recordkeeping requirements.

Federal Communications Commission.
William F. Caton,
Acting Secretary.

Rule Changes

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

The authority citation for Part 90 is revised to read as follows:

Authority: 47 U.S.C. §§ 154, 303, and 332, unless otherwise noted.

Section 90.7 is amended by adding the definitions for ''EA-based or EA license'' and ''Economic Areas (EAs)'' in alphabetical order to read as follows:

§ 90.7 Definitions.

* * * * *

EA-based or EA license. A license authorizing the right to use a specified block of SMR spectrum within one of the 175 Economic Areas (EAs) as defined by the Department of Commerce Bureau of Economic Analysis. The EA Listings and the EA Map are available for public inspection at the Wireless Telecommunications Bureau's public reference room, Room 5608, 2025 M St. NW, Washington, DC 20554 and Office of Operations—Gettysburg, 1270 Fairfield Road, Gettysburg, PA 17325.

Economic Areas (EAs). A total of 175 licensing regions based on the United States Department of Commerce Bureau of Economic Analysis Economic Areas available from the Bureau of Economic Analysis at (202–606–3700) defined as of February 1995, with the following exceptions:

(1) Guam and Northern Mariana Islands are licensed as a single EA-like area

(2) Puerto Rico and the U.S. Virgin Islands are licensed as a single EA-like area

(3) American Samoa is licensed as a single EA-like area

* * * * *

3. Section 90.155 is amended by revising paragraph (a) to read as follows:

§ 90.155 Time in which station must be placed in operation.

(a) All stations authorized under this part, except as provided in paragraphs (b) and (d) of this section and in §§ 90.629, 90.631(f), 90.665, and 90.685, must be placed in operation within eight (8) months from the date of grant or the authorization cancels automatically and must be returned to the Commission.

* * * * *

4. Section 90.173 is amended by revising paragraph (k) and adding a new paragraph (n) 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 800/900 MHz (except on frequencies designated exclusively for SMR service) 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.

* * * * *

(n) Any recovered channels in the 800 MHz SMR service will revert automatically to the holder of the EA license within which such channels are included. If there is no EA licensee for recovered channels, such channels will be retained by the Commission for future licensing.

Section 90.210 is amended by adding a new footnote 3 to the entry for ''806–821/851–866'' in the introductory paragraph table to read as follows:

§ 90.210 Emission masks.

* * * * *

APPLICABLE EMISSION MASKS

Frequency Band MHz.	Mask for equipment with audio low path filter.	Mask for equipment without audio low path filter.
* * * * *		
806–821/851–866 [3].	B	G.
* * * * *		

[3] Equipment used in this band licensed to EA systems shall comply with the emission mask provisions of § 90.691.

* * * * *

6. Section 90.609 is amended by revising paragraphs (c) and (d) introductory text to read as follows:

§ 90.609 Special limitations on amendment of applications for assignment or transfer of authorizations for radio systems above 800 MHz.

* * * * *

(c) Licensees of constructed systems in any category other than Spectrum Block D frequencies in the 800 MHz SMR service (formerly General Category) are permitted to make partial assignments of an authorized grant to an applicant proposing to create a new system or to an existing licensee that has loaded its system to 70 mobiles per channel and is expanding that system. An applicant authorized to expand an existing system or to create a new system with frequencies from any category other than Spectrum Block D frequencies in the 800 MHz SMR service obtained through partial assignment will receive the assignor's existing license expiration date and loading deadline for the frequencies that are assigned. A licensee that makes a partial assignment of a station's frequencies will not be authorized to obtain additional frequencies for that station for a period of one year from the date of the partial assignment.

(d) A constructed system originally licensed in the General Category that is authorized to operate in the conventional mode may be combined with an existing SMR system above 800 MHz authorized to operate in the trunked mode by assignment of an authorized grant of the General Category station to the SMR station.

* * * * *

7. Section 90.611 is amended by revising paragraphs (a) and (c) and by removing and reserving paragraph (d) to read as follows:

§ 90.611 Processing of applications.

* * * * *

(a) All applications will first be considered to determine whether they are substantially complete and acceptable for filing. If so, except as otherwise specifically provided for in this subpart, they will be assigned a file number and put in pending status. If not, they will be returned to the applicant.

* * * * *

(c) Each application will be reviewed to determine whether it can be granted. Applicants must specify the intended frequency (or frequencies) of operation.

* * * * *

8. Section 90.615 is revised to read as follows:

§ 90.615 Frequencies available in Spectrum Block D in the 800 MHz SMR service (formerly General Category).

(a) Except as indicated in § 90.619, as of March 18, 1996, frequencies in the 800 MHz Spectrum Block D (Channels 1–150) previously designated as General Category channels are re-allocated for use exclusively by the SMR service for either trunked or conventional operations. The frequencies are available to SMR licensees in areas farther than 110 km (68.4 miles) from the U.S./Mexico border and farther than 140 km (87 miles) from the U.S./Canada border.

(b) Non-SMR stations that were authorized to transmit on these frequencies prior to March 18, 1996 and have remained so authorized continuously since that time may continue to operate in accordance with their current authorizations. Such authorizations may be renewed unchanged or with minor modifications as described in § 90.693.

9. Section 90.617 is amended by revising introductory paragraphs (b) and (c) (the Tables remain unchanged), paragraph (d) and Table 4A of paragraph (d) 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.

* * * * *

(b) The channels listed in Table 2A are available to eligible applicants in the Industrial/Land Transportation Category (consisting of the Power, Petroleum, Forest Products, Film and Video Production, Relay Press, Special Industrial, Manufacturers, Telephone Maintenance, Motor Carrier, Railroad, Taxicab and Automobile Emergency Radio Services). These frequencies are available in areas farther than 110 km (68.4 miles) from the U.S./Mexico border and farther than 140 km (87.0 miles) from the U.S./Canada border. Specialized Mobile Radio (SMR) systems will not be authorized on these frequencies. These channels are available for inter-category sharing as indicated in § 90.621(g).

* * * * *

(c) The channels listed in Table 3A are available to eligible applicants in the Business Radio Category. This category does not include Specialized Mobile Radio Systems as defined in § 90.7. These frequencies are available in areas farther than 110 km (68.4 miles) from the U.S./Mexico border and farther than 140 km (87.0 miles) from the U.S./Canada border. Specialized Mobile Radio Systems will not be authorized on these frequencies. These channels are available for inter-category sharing as indicated in § 90.621(g).

* * * * *

(d) The channels listed in Tables 4A and 4B are available only to eligibles in the SMR category which consists of Specialized Mobile Radio (SMR) stations and eligible end users. The frequencies listed in Table 4A are available to SMR eligibles desiring to be authorized for EA-based service areas in accordance with § 90.681. SMR licensees licensed on Channels 401–600 on or before March 18, 1996 may continue to utilize these frequencies within their existing service areas, subject to the mandatory relocation provisions of § 90.699. Systems licensed on the channels listed in Table 4A as Spectrum Block D or E Channels will be licensed on a site-specific basis. This paragraph deals with the assignment of frequencies only in areas farther than 110 km (68.4 miles) from the U.S./Mexico border and farther than 140 km (87) miles from the U.S./Canada border. See § 90.619 for the assignment of SMR frequencies in these border areas. For stations located within 113 km (70 miles) of Chicago, channels 401–600 will be assigned in blocks as outlined in Table 4C.

TABLE 4A.—SMR CATEGORY 806–821/851–866 MHZ BAND CHANNELS

Spectrum block	Channel No.
EA-Based SMR Category Systems (200 channels):	
A	401–420.
B	421–480.
C	481–600.
SMR Category (230 channels):	
D	1–150.
E	201–208, 221–228, 241–248, 261–268, 281–288, 301–308, 321–328, 341–348, 361–368, 381–388.

* * * * *

10. Section 90.619 is amended by revising introductory paragraph (a)(3), the introductory text of paragraph (a)(5) and Table 4A of paragraph (a)(5), Table 12 in paragraph (b)(8), Table 16 in paragraph (b)(9), Table 20 in paragraph (b)(10), and Table 24 in paragraph (b)(11) to read as follows:

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

(a) * * *

(3) Tables 2A and 2B list the channels that are available for assignment to eligible applicants in the Industrial/Land Transportation Category (consisting of the Power, Petroleum, Forest Products, Video Production, Relay Press, Special Industrial, Manufacturers, Telephone Maintenance, Motor Carrier, Railroad, Taxicab and Automobile Emergency Radio Services). New applications for Specialized Mobile Radio systems will not be accepted for these channels after March 18, 1996.

* * * * *

(5) Tables 4A and 4B list the channels that are available for assignment for the SMR Category (consisting of Specialized Mobile Radio systems as defined in § 90.7). These channels are not available for inter-category sharing.

TABLE 4A.—UNITED STATES-MEXICO BORDER AREA, SMR CATEGORY 806–821/851–866 MHZ BAND (95 CHANNELS)

Spectrum block	Offset channel No.
EA-Based SMR Category (30 Channels):	
A	None.
B	429, 431, 433, 435, 437,439, 469, 471, 473, 475, 477, 479.
C	509, 511, 513, 515, 517, 519, 549, 551, 553, 555, 557, 559, 589, 591, 593, 595, 597, 599.
SMR Category (65 Channels):	
D	None.
E	None.
Other	228–240, 268–280, 308–320, 348–360, 388–400.

* * * * *

(b) * * *

(8) * * *

TABLE 12.—SMR CATEGORY—95 CHANNELS

[Regions 1, 4, 5, 6]

Spectrum block	Channel No.
EA-Based SMR Category (90 Channels):	
A	None.
B	463–480.
C	493–510, 523–540, 553–570, 583–600.
SMR Category (5 Channels):	

TABLE 12.—SMR CATEGORY—95 CHANNELS—Continued

[Regions 1, 4, 5, 6]

Spectrum block	Channel No.
D	30, 60, 90, 120, 150.
E	None.

(9) * * *

TABLE 16.—SMR CATEGORY—60 CHANNELS

[Region 2]

Spectrum block	Channel No.
EA-Based SMR Category (55 Channels):	
A	None.
B	None.
C	518–528, 536–546, 554–564, 572–582, 590–600.
SMR Category (5 Channels):	
D	18, 36, 54, 72, 90.
E	None.

(10) * * *

TABLE 20.—SMR CATEGORY—135 CHANNELS

[Region 3]

Spectrum block	Channel No.
EA-Based SMR Category (120 Channels):	
A	417–420.
B	421–440, 457–480.
C	497–520, 537–560, 577–600.
SMR Category (15 Channels):	
D	38, 39, 40, 78, 79, 80, 118, 119, 120.
E	None.
Other	158, 159, 160, 198, 199, 200.

(11) * * *

TABLE 24.—(REGIONS 7, 8) SMR CATEGORY—190 CHANNELS

Spectrum block	Channel No.
EA-Based SMR Category (80 Channels):	
A	None.
B	425–440, 465–480.
C	505–520, 545–560, 585–600.
SMR Category (110 Channels):	
D	35–40, 75–80, 115–120.
E	225–228, 265–268, 305–308, 345–348, 385–388.
Other	155–160, 195–200, 229–240, 269–280, 309–320, 349–360, 389–400.

* * * * *

11. Section 90.621 is amended by revising paragraphs (a) introductory text, (a)(1)(iii), (b) introductory text, (c), and (e) introductory text, removing paragraph (a)(1)(iv), and removing and reserving paragraphs (e)(2), (e)(3), and (e)(4) to read as follows:

§ 90.621 Selection and assignment of frequencies.

(a) Applicants for frequencies in the Public Safety, Industrial/Land Transportation, and Business Categories must specify on the application the frequencies on which the proposed system will operate pursuant to a recommendation by the applicable frequency coordinator. Applicants for frequencies in the SMR Category must request specific frequencies by including in their applications the frequencies requested.

(1) * * *

(iii) There are no limitations on the number of frequencies that may be trunked. Authorizations for non-SMR stations may be granted for up to 20 trunked frequency pairs at a time in accordance with the frequencies listed in §§ 90.615, 90.617, and 90.619.

* * * * *

(b) Stations authorized on frequencies listed in this subpart, except for those stations authorized pursuant to paragraph (g) of this section and EA-based and MTA-based SMR systems, will be afforded protection solely on the basis of fixed distance separation criteria. The separation between co-channel systems will be a minimum of 113 km (70 mi) with the following exceptions:

* * * * *

(c) Conventional systems authorized on frequencies in the Public Safety (except for those systems that have participated in a formal regional planning process as described in § 90.16), Industrial/Land Transportation, Business, and Spectrum Block D frequencies in the 800 MHz SMR service (formerly General) Categories which have not met the loading levels necessary for channel exclusivity will not be afforded co-channel protection.

* * * * *

(e) Frequencies in the 806–821/851–866 MHz bands listed as available for eligibles in the Public Safety, Industrial/Land Transportation, and Business Categories are available for inter-category sharing under the following conditions:

* * * * *

12. Section 90.629 is amended by adding a new paragraph (e) to read as follows:

§ 90.629 Extended implementation period.

* * * * *

(e) As of March 18, 1996, Specialized Mobile Radio systems are not eligible for extended implementation periods under this section. Additionally, all 800 MHz SMR licensees that are operating under extended implementation authority as of March 18, 1996 must, by May 16, 1996, demonstrate that continuing to allow them to have an extended period of time to construct their facilities is warranted and furthers the public interest. If a licensee's extended implementation authority showing is approved by the Bureau, such licensee will be afforded an extended implementation of two years or the remainder of its current extended implementation period, whichever is shorter. Upon the termination of this period, the authorizations for those facilities that remain unconstructed will terminate automatically. If a licensee with a current extended implementation period fails to submit the showing mentioned above within the designated timeframe or submits an insufficient or incomplete showing, such licensee will have six months from the last day on which it could timely file such a showing or from the disapproval of its request to construct the remaining facilities covered under its implementation plan to construct any unconstructed facilities for which it is authorized. The authorizations for those facilities remaining unconstructed after this six-month period will terminate automatically.

13. Section 90.631(b) is amended by removing the words ''General Category'' and adding in their place ''Spectrum Block D frequencies in the 800 MHz SMR service (formerly General Category)''.

14. Subpart S is amended by adding a new centered heading following Section 90.671 to read as follows:

Policies Governing the Licensing and Use of EA-Based SMR Systems in the 816–821/861–866 Band

15. A new § 90.681 is added to Subpart S to read as follows:

§ 90.681 EA-based SMR service areas.

EA licenses for SMR spectrum blocks in the 816–821/861–866 band listed in Table 4A of § 90.617(d) are available in 175 Economic Areas (EAs) as defined in § 90.7.

16. A new § 90.683 is added to Subpart S to read as follows:

§ 90.683 EA-Based SMR system operations.

(a) EA-based licensees authorized in the 816–821/861–866 MHz band pursuant to § 90.681 may construct and operate base stations using any of the base station frequencies identified in their spectrum block anywhere within their authorized EA, provided that:

(1) The EA licensee affords protection, in accordance with § 90.621(b), to all previously authorized co-channel stations that are not associated with another EA license;

(2) The EA licensee complies with any rules and international agreements that restrict use of frequencies identified in their spectrum block, including the provisions of § 90.619 relating to U.S./Canadian and U.S./Mexican border areas;

(3) The EA licensee limits the field strength of its base stations at any location on the border of the EA service area in accordance with § 90.689;

(4) The EA licensee notifies the Commission within 30 days of the completion of the addition, removal, relocation or modification of any of its facilities within the EA. Such notification must be made by submitting an FCC Form 600 and must include the appropriate filing fee, if any; and

(5) For any construction or alteration that would exceed the requirements of § 17.7 of this chapter, licensees must notify the appropriate Regional Office of the Federal Aviation Administration (FAA Form 7460–1) and file a request for antenna height clearance and obstruction marking and lighting specifications (FCC Form 854) with the FCC, WTB, Support Services Branch, Gettysburg, PA 17325.

(6) Any additional transmitters placed in operation must not have a significant environmental effect as defined by §§ 1.1301 through 1.1319 of this chapter.

(b) In the event that the authorization for a previously authorized co-channel station within the EA licensee's spectrum block is terminated or revoked, the EA licensee's co-channel obligations to such station will cease upon deletion of the facility from the Commission's official licensing records, and the EA licensee then will be able to construct and operate without regard to that previous authorization.

17. A new § 90.685 is added to Subpart S to read as follows:

§ 90.685 Authorization, construction and implementation of EA licenses.

(a) EA licenses in the 816–821/861–866 MHz band will be issued for a term not to exceed ten years. Additionally, EA licensees generally will be afforded a renewal expectancy only for those stations put into service after August 10, 1996.

(b) EA licensees in the 816–821/861–866 band will be permitted five years to construct their stations. This five-year period will commence with the issuance of the EA-based license and will apply to all of the licensee's stations within the EA spectrum block, including any stations that may have been subject to an earlier construction deadline arising from a pre-existing authorization.

(c) EA licensees in the 816–821/861–866 MHz band must, within three years, construct and place into operation a sufficient number of base stations to provide coverage to at least one-third of the population of its EA-based service area. Further, each EA licensee must provide coverage to at least two-thirds of the population of the EA-based service area within five years.

(d) *Channel use requirement.* In addition to the population coverage requirements described in this section, we will require EA licensees to construct 50 percent of the total channels included in their spectrum block in at least one location in their respective EA-based service area within three years of initial license grant and to retain such channel usage for the remainder of the construction period.

(e) An EA licensee's failure to meet the population coverage requirements of paragraphs (c) and (d) of this section, will result in forfeiture of the entire EA license. Forfeiture of the EA license, however, would not result in the loss of any constructed facilities authorized to the licensee prior to the date of the commencement of the auction for the EA licenses.

18. A new § 90.687 is added to Subpart S to read as follows:

§ 90.687 Special provisions regarding assignments and transfers of authorizations for incumbent SMR licensees in the 816–821/861–866 MHz band.

An SMR licensee initially authorized on any of the channels listed in Table 4A of § 90.617 may transfer or assign its channel(s) to another entity subject to the provisions of §§ 90.153 and 90.609(b). If the proposed transferee or assignee is the EA licensee for the spectrum block to which the channel is allocated, such transfer or assignment presumptively will be deemed to be in the public interest. However, such presumption will be rebuttable.

19. A new § 90.689 is added to Subpart S to read as follows:

§ 90.689 Field strength limits.

(a) For purposes of implementing §§ 90.689 through 90.699, predicted 40 dBuV/m contours shall be calculated using Figure 10 of § 73.699 of this chapter with a correction factor of −9 dB, and predicted 22 dBuV/m contours shall be calculated using Figure 10a of § 73.699 of this chapter with a correction factor of −9 dB.

(b) The predicted or measured field strength at any location on the border of the EA-based service area for EA licensees must not exceed 40 dBuV/m unless all bordering EA licensees agree to a higher field strength. In the event that this standard conflicts with the EA licensee's obligation to provide co-channel protection to incumbent licensees pursuant to § 90.621(b), the requirements of § 90.621(b) shall prevail.

20. A new § 90.691 is added to Subpart S to read as follows:

§ 90.691 Emission mask requirements for EA-based systems.

(a) Out-of-band emission requirement shall apply only to the ''outer'' channels included in an EA license and to spectrum adjacent to interior channels used by incumbent licensees. The emission limits are as follows:

(1) For any frequency removed from the EA licensee's frequency block by up to and including 37.5 kHz, the power of any emission shall be attenuated below the transmitter power (P) in watts by at least $116\ \mathrm{Log}_{10}(f/6.1)$ decibels or $50 + 10\ \mathrm{Log}_{10}(P)$ decibels or 80 decibels, whichever is the lesser attenuation, where f is the frequency removed from the center of the outer channel in the block in kilohertz and where f is greater than 12.5 kHz.

(2) For any frequency removed from the EA licensee's frequency block greater than 37.5 kHz, the power of any emission shall be attenuated below the transmitter power (P) in watts by at least $43 + 10\mathrm{Log}_{10}(P)$ decibels or 80 decibels, whichever is the lesser attenuation, where f is the frequency removed from the center of the outer channel in the block in kilohertz and where f is greater than 37.5 kHz.

(b) When an emission outside of the authorized bandwidth causes harmful interference, the Commission may, at its discretion, require greater attenuation than specified in this section.

21. A new § 90.693 is added to Subpart S to read as follows:

§ 90.693 Grandfathering provisions for incumbent licensees in spectrum blocks A, B, and C.

(a) These provisions apply to ''incumbent licensees'', all 800 MHz SMR licensees who obtained licenses or filed applications on or before December 15, 1995. An incumbent licensee's service area shall be defined by its originally-licensed 40 dBu field strength contour and its interference contour shall be defined as its originally-licensed 22 dBu field strength contour. Incumbent licensees are permitted to add, remove or modify transmitter sites within this existing service area without prior notification to the Commission so long as their original 22 dBu field strength contour is not expanded and the station complies with the Commission's short-spacing criteria in §§ 90.621(b)(4) through 90.621(b)(6). The incumbent licensee must, however, notify the Commission within 30 days of the completion of any changes in technical parameters or additional stations constructed through a minor modification of their license. Such notification must be made by submitting an FCC Form 600 and must include the appropriate filing fee, if any. These minor modification applications are not subject to public notice and petition to deny requirements or mutually exclusive applications.

(b) Incumbent licensees operating at multiple sites may, after grant of EA 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 800 MHz SMR auction.

22. A new § 90.699 is added to Subpart S to read as follows:

§ 90.699 Transition of the upper 200 channels in the 800 MHz band to EA licensing.

In order to facilitate provision of service throughout an EA, an EA licensee may relocate incumbent licensees in its EA by providing ''comparable facilities'' on other frequencies in the 800 MHz band. Such relocation is subject to the following provisions:

(a) EA licensees may negotiate with incumbent licensees as defined in § 90.693 operating on frequencies in Spectrum Blocks A, B, and C for the purpose of agreeing to terms under which the incumbents would relocate their operations to other channels in the 800 MHz band, or alternatively, would accept a sharing arrangement with the EA licensee that may result in an otherwise impermissible level of interference to the incumbent licensee's operations. EA licensees may also negotiate agreements for relocation of the incumbents' facilities within Spectrum Blocks A, B or C in which all interested parties agree to the relocation of the incumbent's facilities elsewhere within these bands. ''All interested parties'' includes the incumbent licensee, the EA licensee requesting and paying for the relocation, and any EA licensee of the spectrum to which the incumbent's facilities are to be relocated.

(b) The relocation mechanism consists of two phases that must be completed before an EA licensee may proceed to request the involuntary relocation of an incumbent licensee.

(1) *Voluntary period.* There is a one year voluntary period during which an EA licensee and an incumbent may negotiate any mutually agreeable relocation agreement. The Commission will announce the commencement of the first phase voluntary period by Public Notice. EA licensees must notify incumbents operating on frequencies included in their spectrum block of their intention to relocate such incumbents within 90 days of the release of the Public Notice that commences the voluntary negotiation period. Failure on the part of the EA licensee to notify the incumbent licensee during this 90 period of its intention to relocate the incumbent will result in the forfeiture of the EA licensee's right to request involuntary relocation of the incumbent at any time in the future.

(2) *Mandatory period.* If no agreement is reached by the end of the voluntary period, a two-year mandatory period will begin during which both the EA licensee and the incumbent must negotiate in ''good faith''. Failure on the part of the EA licensee to negotiate in good faith during this mandatory period will result in the forfeiture of the EA licensee's right to request involuntary relocation of the incumbent at any time in the future.

(c) If no agreement is reached during either the voluntary or mandatory negotiating periods, the EA licensee may request involuntary relocation of the incumbent's system. In such a situation, the EA licensee must:

(1) Guarantee payment of all costs of relocating the incumbent to a comparable facility;

(2) Complete all activities necessary for placing the new facilities into operation; and

(3) Build and test the new system.

(d) If an EA licensee cannot provide comparable facilities to an incumbent licensee as defined in this section, the incumbent licensee may continue to operate its system on a primary basis in accordance with the provisions of this part.

23. A new Subpart V, Sections 90.901 through 90.913, is added to read as follows:

Subpart V—Competitive Bidding Procedures for 800 MHz Specialized Mobile Radio Service

§ 90.901. 800 MHz SMR spectrum subject to competitive bidding.

Mutually exclusive initial applications for Spectrum Blocks A, B, and C in the 800 MHz band are subject to competitive bidding procedures. The general competitive bidding procedures provided in part 1, subpart Q of this chapter will apply unless otherwise indicated in this subpart.

§ 90.902 Competitive bidding design for 800 MHz SMR licensing.

The Commission will employ a simultaneous multiple round auction design when selecting from among mutually exclusive initial applications for EA licenses for Spectrum Blocks A, B, and C in the 800 MHz band, unless otherwise specified by the Wireless Telecommunications Bureau before the auction.

§ 90.903 Competitive bidding mechanisms.

(a) *Sequencing.* The Wireless Telecommunications Bureau will establish and may vary the sequence in which 800 MHz SMR licenses for Spectrum Blocks A, B, and C will be auctioned.

(b) *Grouping.* All EA licenses for Spectrum Blocks A, B, and C will be auctioned simultaneously, unless the Wireless Telecommunications Bureau announces, by Public Notice prior to the auction, an alternative competitive bidding design.

(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 the 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.

§ 90.904 Aggregation of EA licenses for spectrum blocks A, B, and C.

The Commission will license each Spectrum Block A, B, and C in the 800 MHz band separately. Applicants may aggregate across spectrum blocks within the limitations specified in § 20.6 of this chapter.

§ 90.905 Withdrawal, default and disqualification payments.

(a) During the course of an auction conducted pursuant to § 90.902, the Commission 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 monetary asssessment 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 (5) 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, or if that bidder declines the offer, to offer the license to other bidders (in descending order of their bid amounts) at the final bid levels.

§ 90.906 Bidding application (FCC Form 175 and 175–S Short-form).

All applicants to participate in competitive bidding for 800 MHz SMR licenses in Spectrum Blocks A, B, and C 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 these 800 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 800 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 and/or a women-owned entity, as defined in § 90.912(e).

§ 90.907 Submission of upfront payments and down payments.

(a) Bidders in the 800 MHz SMR auction for Spectrum Blocks A, B, and C will be required to submit an upfront payment of $0.02 per activity unit, in accordance with § 1.2106 of this chapter.

(b) Winning bidders in a 800 MHz SMR auction for Spectrum Blocks A, B, and C must submit a down payment to the Commission in an amount sufficient to bring their total deposits up to 20 percent of their winning bids within five (5) business days after the auction closes, and the remaining balance due on the license shall be paid within five (5) business days after Public Notice announcing that the Commission is prepared to award the license.

§ 90.908 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 of this part and any associated Public Notices. Only auction winners (and rural telephone companies seeking partitioned licenses pursuant to agreements with auction winners under § 90.911) will be eligible to file applications on FCC Form 600 for initial 800 MHz SMR licenses in the event of mutual exclusivity between applicants filing FCC Form 175.

§ 90.909 License grant, denial, default, and disqualification for spectrum blocks A, B, and C.

(a) Except with respect to entities eligible for installment payments (*see* § 90.912) each winning bidder will be required to pay the balance of its winning bid in a lump sum payment within five (5) business days following Public Notice that the license is ready for grant. The Commission will grant the license within ten (10) business days after receipt of full and timely payment of the winning bid amount.

(b) 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 § 90.905 or § 1.2109 of this chapter, as applicable.

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

§ 90.910 Installment payments for licenses for spectrum blocks A, B, and C.

(a) Each licensee for Spectrum Blocks A, B, and C 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 EA 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 § 90.912(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 § 90.912(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.

§ 90.911 Procedures for partitioned licenses in spectrum blocks A, B, and C.

(a) Notwithstanding § 90.661, a rural telephone company, as defined in § 90.912, may be granted a 800 MHz SMR license that is geographically partitioned from a separately licensed EA, so long as the EA applicant or licensee has voluntarily agreed (in writing) to partition a portion of the license to the rural telephone company.

(b) If partitioned licenses are being applied for in conjunction with a license(s) to be awarded through competitive bidding 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 § 1.2105(a)(2)(viii) of this chapter);

(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 EA filed by the auction winner.

(c) If the partitioned license is being applied for as a partial assignment of the EA 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)(3): 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 set forth in § 90.685.

§ 90.912 Definitions for spectrum blocks A, B, and C.

(a) *Scope.* The definitions in this section apply to §§ 90.910 and 90.911, unless otherwise specified in those sections.

(b) *Small business: Consortium of small businesses.*

(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 three preceding 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 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 § 90.912(h).

(3) A small business consortium is conglomerate organization formed as a joint venture between or among mutually-independent business firms, each of which individually satisfies the 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 is one 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.

Note to paragraph (g): 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 percentages for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest.

(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;

(ii) Is directly or indirectly controlled by the applicant;

(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 of stock 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. 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 of interest) are treated as though they are one person and Corporation Y would be deemed an affiliate of the applicant.

Example 2. 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 of 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 effect 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.

§ 90.913 Eligibility for small business status for spectrum blocks A, B, and C.

(a) *Short-form applications: Certifications and disclosure.* Each applicant for an EA license for Spectrum Blocks A, B, or C which qualifies as a small business or consortium of small businesses shall append the following information as an exhibit to its short-form application (FCC 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 of the joint venture; and

(2) The applicant's gross revenues, computed in accordance with § 90.912.

(b) *Long-form applications: Certifications and disclosure.* In addition to the requirements in this subpart, each applicant submitting a long-form application for license(s) for Spectrum Blocks A, B, or C 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 § 90.912, 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 §§ 90.910 and 90.911, 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 document necessary to establish eligibility as a small business and/or consortium of small businesses under § 90.912. 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 and/or consortium of small businesses under §§ 90.910 and 90.911 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 (FCC 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 800 MHz SMR service and shall also include consent to the interview of principals, employees, customers and suppliers of the applicant or licensee.

(3) Definitions. The terms affiliate, attributable interests, consortium of small businesses, gross revenues, small business used in this section are defined in § 90.912.

[FR Doc. 96–3509 Filed 2–13–96; 5:06 pm]

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GENERAL SERVICES ADMINISTRATION

48 CFR Parts 501, 504, 507, 510, 511, 512, 514, 515, 538, 539, 543, 546, 552 and 570

[APD 2800.12A, CHGE 70]

RIN 3090–AF86

General Services Administration Acquisition Regulation; Acquisition of Commercial Items

AGENCY: Office of Acquisition Policy, GSA.

ACTION: Interim rule with request for comments.

SUMMARY: The General Services Administration Acquisition Regulation (GSAR) is amended to implement Items I and III of Federal Acquisition Circular 90–32 which amended the Federal Acquisition Regulation (FAR) to implement the portions of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103–355) dealing with the Truth in Negotiations Act and with the acquisition of commercial items. The GSAR is revised to conform to the FAR as revised by FAC 90–32 and to implement portions of the FAR where necessary to provide agency procedures. The Multiple Award Schedule (MAS) Policy Statement of October 1, 1982 (47 FR 50242, November 5, 1982) is canceled.

DATES: *Effective Date:* March 4, 1996. (See **SUPPLEMENTARY INFORMATION** for further guidance.)

Comment Date: Comments should be submitted in writing to the address shown below on or before April 16, 1996 to be considered in formulating the final rule.

ADDRESSES: Interested parties should submit written comments to the Office of Acquisition Policy (MV), General Services Administration, Room 4010, 18th & F Streets, NW, Washington, DC 20405.

FOR FURTHER INFORMATION CONTACT: Les Davison, Office of GSA Acquisition Policy, (202) 501–1224.

SUPPLEMENTARY INFORMATION: All new solicitations for commercial items and open season solicitations issued under the multiple award schedule program issued after March 4, 1996 shall conform to this interim rule. To the maximum extent practical, solicitations for commercial items and open season solicitations, that have been issued but where no contract has been awarded shall be amended to conform to this interim rule. However, offerors shall not be required to resubmit information on commercial sales practices and any requests for additional information shall be limited to the minimum needed. Existing MAS contracts may be modified, at the discretion of contracting officers, to conform to all or part of this interim rule.

A. Determination To Issue an Interim Rule

A determination has been made under the authority of the Administrator of General Services that urgent and compelling reasons exist to publish an interim rule prior to affording the public an opportunity to comment. Federal Acquisition Circular 90–32 (60 FR 48206, September 18, 1995) revised the Federal Acquisition Regulation (FAR) to implement Title VIII of Public Law 103–355. Title VIII of Public Law 103–355 contained requirements for the acquisition of commercial items and required publication of implementing FAR revisions by October 1, 1995. The FAR rule became available for use on October 1, 1995, and is mandatory for use by all Federal agencies in commercial items solicitations issued after December 1, 1995. This GSAR rule implements GSA unique requirements and revises the GSAR to bring it into conformance with the FAR. Immediate GSAR coverage is needed to permit GSA contracting activities to comply with Pub. L. 103–355 and the implementing FAR requirements pertaining to the acquisition of commercial items and Truth in Negotiations Act.

B. Executive Order 12866

This rule was not submitted to the Office of Management and Budget (OMB) because it is not a significant rule as defined in Executive Order 12866, Regulatory Planning and Review.

C. Regulatory Flexibility Act

This interim rule is expected to have a positive economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., because the rule simplifies procedures for GSA acquisition of commercial items. An Initial Regulatory Flexibility Analysis (IRFA) has been prepared and may be obtained from the address stated above. A copy of the IRFA has been submitted to the Chief Counsel for Advocacy of the Small Business Administration. Comments from small entities will be considered in accordance with Section 610 of the Act.

D. Paperwork Reduction Act

The Paperwork Reduction Act applies to this interim rule. The information collection requirements in 515.804–8 and related provisions and clauses have been approved by the Office of Management and Budget (OMB) under OMB Control Number 9000–0013. The information collection requirements in 552.212–70, Preparation of Offer (Multiple Award Schedule), represent customary commercial practice and are approved under OMB Control Number 3090–0250.

List of Subjects in 48 CFR Parts 501, 504, 507, 510, 511, 512, 514, 515, 538, 539, 543, 546, 552, and 570

Government procurement.

Accordingly, 48 CFR Parts 501, 504, 507, 510, 511, 512, 514, 515, 538, 539, 543, 546, and 552 and 570 are amended as follows:

PART 501—GENERAL SERVICES ADMINISTRATION ACQUISITION REGULATION SYSTEM

1. The authority citation for 48 CFR Parts 501, 504, 507, 510, 511, 512, 514, 515, 538, 539, 543, 546, 552 and 570 continues to read as follows:

Authority: 40 U.S.C. 486(c).

501.105 [Amended]

2. Section 501.105 is amended by removing the following GSAR references and corresponding OMB control numbers: 510.004–70–3090–0203, 510.011(i)–3090–0246,