

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

FCC 95-395

In the Matter of	)	
	)	
Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool	)	PR Docket No. 89-553
	)	
Implementation of Section 309(j) of the Communications Act - Competitive Bidding	)	PP Docket No. 93-253
	)	
Implementation of Sections 3(n) and 322 of the Communications Act	)	GN Docket No. 93-252

**SECOND ORDER ON RECONSIDERATION AND SEVENTH REPORT AND ORDER**

Adopted: September 14, 1995

Released: September 14, 1995

By the Commission: Commissioner Barrett issuing a statement.

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### I. INTRODUCTION

1. In this *Second Order on Reconsideration and Seventh Report and Order*, we adopt final auction rules for the 900 MHz SMR service and address reconsideration petitions concerning the service rules adopted in the *Second Report and Order and Second Further Notice of Proposed Rule Making ("Second R&O and Second Further Notice")*.<sup>1</sup> The rules adopted and the policies set forth herein will permit licensing the 900 MHz SMR service in a fast, fair and efficient manner, and will promote competition. At the same time, they will protect incumbents' current services to the public while providing such incumbents with a more flexible environment in which to expand their systems.

### II. EXECUTIVE SUMMARY

2. The following paragraphs summarize the principal decisions made in this *Second Order on Reconsideration* regarding service rules, and those made in the *Seventh Report and Order* regarding auction rules.

#### A. Second Order on Reconsideration: Service Rules

3. As decided in the *CMRS Third Report & Order*,<sup>2</sup> the 900 MHz SMR band will be divided into 20 ten-channel blocks in each of 51 service areas based on Major Trading Areas ("MTAs"), which match the blocks previously licensed for the Designated Filing Areas ("DFAs"). Each MTA license will authorize the licensee to operate throughout the MTA on the designated channels except where a co-channel incumbent licensee already is operating. MTA licensees also will be allowed to aggregate multiple blocks within an MTA and to aggregate blocks geographically in multiple MTAs.

4. As decided in the *Second R&O and Second Further Notice*, MTA licensees in this service will be required to meet coverage requirements of one-third of the population in the service area within three years of the initial license grant and two-thirds of the population

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<sup>1</sup> Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, *Second Report and Order and Second Further Notice of Proposed Rule Making*, PR Docket No. 89-553, PP Docket No. 93-253, GN Docket No. 93-252, FCC 95-159, released April 17, 1995, 60 FR 21987, 22023 (May 4, 1995).

<sup>2</sup> Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services, *Third Report and Order*, GN Docket No. 93-252, 9 FCC Rcd 7988 (1994) (*CMRS Third Report & Order*).

within five years. Alternatively, a licensee may make a showing at five years that it is providing "substantial service." The Commission denies reconsideration of these benchmarks, and reiterates that MTA licensees must satisfy these requirements regardless of the area or percentage of the MTA population that is served by incumbent licensees. We clarify that MTA licensees may use options such as resale or management agreements<sup>3</sup> to fulfill the coverage requirements.

5. To ensure that incumbent licensees receive protection from interference by MTA licensees, the *Second R&O and Second Further Notice* provides that MTA licensees either must maintain a minimum 113 kilometer (70 mile) geographic separation or comply with our short-spacing rules with respect to all incumbent facilities in their service area or in adjacent MTAs. We affirm our intention to allow MTA licensees to use short-spacing rules to comply with interference protection standards, and do not believe it will result in a plethora of interference disputes at the Commission. We also affirm our adoption of the 40 dBu median field strength contour as the protected service area in which incumbents may modify or add facilities, and reject petitioners' requests to use the 22 dBu contour instead. We will allow, however, incumbents to negotiate with wide area licensees to expand the incumbents' service areas. We also will reissue a single "partitioned" license to incumbents who are not successful bidders for the MTAs in which they are currently operating in exchange for their multiple site licenses.

6. As decided in the *Second R&O & Second Further Notice*, no secondary site licenses will be granted once an MTA licensee has been selected. We believe it is important to provide some degree of reliability to potential MTA bidders that the spectrum upon which they are bidding will not become subsequently encumbered with secondary sites. We clarify that all pending finders' preference requests for 900 MHz SMR licenses will be processed, but we are eliminating future finders' preference for the 900 MHz SMR service. As provided by our rules, any stations licensed to incumbents that are not constructed or placed in operation will revert automatically to the MTA licensee for that channel block.

7. We deny further reconsideration of our decisions in the *CMRS Third Report & Order* and the *Second R&O and Second Further Notice* with respect to loading requirements in the 900 MHz service, as petitioners have raised no new arguments that would merit reconsideration. Consequently, incumbent 900 MHz SMR licensees will continue to be subject to the loading requirements that were in effect when they were licensed.

8. We clarify that our amended rule regarding discontinuance of operation (Section 90.631(f)), which provides that stations taken out of service for 90 consecutive days are considered permanently discontinued, applies only to stations that were taken out of service after June 5, 1995 (the effective date of the rule). The former rule provided that stations

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<sup>3</sup> Management agreements should not result in a *de facto* transfer of control. See In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, *Fourth Report and Order*, 9 FCC Rcd 7123 (1994) at ¶¶ 20-28.

taken out of service for 12 months were considered permanently discontinued. Consequently, stations that were taken out of service prior to June 5, 1995, are entitled to stay out of service for the remainder of the original 12 months provided in the former rule, before they will be considered permanently discontinued. Those stations taken out of service on or after June 5, 1995, will be considered permanently discontinued after 90 days. With regard to wide-area SMR licensees that are replacing high power analog sites with low power digital sites, however, we will deem all the base stations "in operation" if the system meets the standards and conditions set out in *Fleet Call, Inc.*<sup>4</sup>

## **B. Seventh Report and Order**

### **1. Auction Rules**

9. A total of 1,020 MTA licenses<sup>5</sup> will be awarded in the 900 MHz SMR service. We will use a single simultaneous multiple round auction to award these licenses, because the licenses are interdependent, and licensees are likely to aggregate and/or substitute across spectrum blocks and geographic areas. Both incumbents and new entrants are eligible to bid for all MTA licenses subject only to the spectrum cap in Section 20.6 of the Commission's Rules.<sup>6</sup> All applicants for MTA licenses are treated as initial applicants for public notice, application processing, and auction purposes. The Wireless Telecommunications Bureau will announce the time and place of the auction and provide additional information to bidders by future public notice.

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

11. Each applicant will be required to specify on its FCC Form 175 its classification.

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<sup>4</sup> *Fleet Call, Inc., Memorandum Opinion and Order*, 6 FCC Rcd 1533 (1991), *recon. dismissed*, 6 FCC Rcd 6989 (1991).

<sup>5</sup> 51 MTAs times 20 licenses in each MTA.

<sup>6</sup> Broadband PCS, cellular, and SMR licensees may have attributable interests in no more than 45 MHz of licensed broadband PCS, cellular, and SMR spectrum regulated as CMRS with significant overlap in any geographic area. See 47 C.F.R. § 20.6.

status as a designated entity (if applicable), markets and frequency blocks for which it applied,<sup>7</sup> and persons authorized to place or withdraw bids. Applicants must identify any arrangements or agreements with other parties relating to the licenses that are being auctioned and certify that there are no arrangements other than those specified. Applicants may correct minor defects in their short-form applications prior to the auction, but may not make any major modifications to their applications, including geographic license area changes, cognizable ownership changes or changes in the identification of parties to bidding consortia, until after the auction. Applicants may modify their short-form applications to reflect formation of consortia or changes in ownership at any time before or during an auction, provided such changes do not result in a change in control of the applicant, and provided that the parties forming consortia or entering into ownership agreements have not applied for licenses in any of the same geographic license areas. In instances where only a single applicant has applied for a particular MTA channel block, the Commission will cancel the auction for that block and establish a deadline for filing of the applicant's long-form application. In all instances where mutually exclusive applications are filed, the MTA channel block will be included in the auction.

12. The timing and duration of auction rounds will be determined by the Wireless Telecommunications Bureau and announced by public notice. As in prior auctions, we expect to start the auction with relatively large bid increments and reduce increments as bidding activity falls. We will use a simultaneous stopping rule for this auction to afford bidders flexibility to pursue back-up strategies, and to ensure that bidders will not hold back bids until the final round. During the auction, we will retain the discretion to declare that the auction will end after a specified number of additional rounds.

13. We will specify bid increments, *i.e.*, the amount or percentage by which the bid must be raised above the previous round's high bid in order to be accepted as a valid bid in the current bidding round. The application of a minimum bid increment helps to ensure that the auction closes within a reasonable period and is expressed in both a percentage and fixed dollar amount. We may impose a minimum bid increment of five percent or \$0.02 per pop-MHz, whichever is greater,<sup>8</sup> but we also retain the discretion to set, vary and announce, before or during the auction, the minimum bid increments for licenses over the course of an auction.

14. We will use bid withdrawal and default rules for this auction similar to those used in prior auctions. Under these rules, any bidder that withdraws a high bid during an auction before the Commission declares bidding closed must reimburse the Commission for the difference between the amount of the ultimate winning bid and the withdrawn bid if the winning bid is lower than the withdrawn bid. An auction winner defaulting after the close of

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<sup>7</sup> The Commission modifies the tables in 47 C.F.R. §§ 90.617 and 90.619 to assign block letters to frequency block numbers.

<sup>8</sup> See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Fifth Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 5532 (1994) at ¶ 44 (*Competitive Bidding Fifth Report & Order*).

the auction will have to make an additional payment equal to the lesser of three percent of the subsequent winning bid or three percent of the amount of the defaulting bid. In the event that an auction winner defaults or is disqualified, or if its license is revoked or terminated, the Commission will re-auction the license, except that we may offer the license to the second highest bidder if the default occurs within five days after the auction closes.

15. At the conclusion of the auction, winning bidders must supplement their upfront payments and file their long-form applications (FCC Form 600). The upfront payment must be supplemented in an amount sufficient to bring the winning bidder's deposit up to 20 percent of its winning bid within five days after the close of the auction. Designated entities eligible for installment payments, however, must bring their deposits up to five percent of the winning bid within five days after the close of the auction. Once each applicant has filed its long form and submitted its down payment, the Wireless Telecommunications Bureau will issue a public notice announcing the application's acceptance for filing and open a 30-day window for filing petitions to deny.

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

## **2. Designated Entities**

17. Because of the large number of available licenses and the presence of incumbents throughout the 900 MHz SMR band, we will not create an entrepreneurs' block in this service. Nevertheless, we adopt several provisions for bidding in the 900 MHz auction by small businesses. Taking commenters' suggestions into account, we define two categories of small businesses: (1) an entity that, together with affiliates, has average gross revenues for the three preceding years of \$3 million or less; and (2) an entity that, together with affiliates, has average gross revenues for the three preceding years of \$15 million or less. We will define any investor in the applicant with a 20 percent or greater interest to be attributable for purposes of determining small business status. The 20 percent attribution threshold is derived from the measure of SMR attribution for purposes of applying the CMRS spectrum cap. In sum, we will consider the gross revenues of the entity and its affiliates and its attributable investors and affiliates.

18. Under this "tiered" approach, small businesses falling under the \$3 million benchmark are eligible for a 15 percent bidding credit on any MTA license; those falling

under the \$15 million benchmark are eligible for a 10 percent bidding credit. All small businesses may make a reduced down payment (five percent of the winning bid following the close of the auction, with the balance of the down payment paid five days after a Public Notice announcing that the Commission is prepared to grant the license), and are entitled to pay the bid balance in quarterly installments over the remaining license term. Small businesses falling under the \$3 million benchmark will be able to make interest-only payments for the first five years of the license term; small businesses falling under the \$15 million benchmark will be able to make interest-only payments for the first two years of the license term. We believe that broadening the scope of opportunities for small businesses, particularly on a tiered basis, will result in substantial participation by women and minorities, and we believe that the expected capital outlay for the 900 MHz service will not present the same type of obstacles for those entities as a more costly spectrum-based service like PCS.

19. We do not adopt reduced upfront payments for small businesses in the 900 MHz service but will allow partitioning for rural telephone companies, similar to those that we have applied to broadband PCS.

20. Small businesses entitled to special provisions in the 900 MHz SMR service seeking to transfer their licenses, as a condition to approval of the transfer, must remit to the government a payment equal to a portion of the total value of the benefit conferred by the government. Thus, a small business that received bidding credits which seeks transfer or assignment of a license to an entity that is not a small business or does not qualify as a smaller business under Section 90.814(b)(1), will be required to reimburse the government for the amount of the bidding credit, plus interest at the rate imposed for installment financing at the time the license was awarded, before transfer will be permitted. The amount of this reimbursement will be reduced over time as follows: a transfer in the first two years of the license term will result in a reimbursement of 100 percent of the value of the bidding credit; in year three of the license term the payment will be 75 percent; in year four the payment will be 50 percent and in year five the payment will be 25 percent, after which there will be no assessment. If a small business under the \$3 million definition seeks to transfer or assign a license to a small business under the \$15 million definition, for the purposes of determining the amount of payment, the value of the bidding credit is 5 percent, the difference between the 10 and 15 percent bidding credits. The 5 percent difference will be subject to the same percentage reductions over time as specified above. These reimbursements must be paid back to the U.S. Treasury as a condition of approval of the assignment or transfer.<sup>9</sup>

21. If a licensee that was awarded installment payments seeks to assign or transfer control of its license to an entity that is not a small business under Section 90.814(b)(1) during the term of the license, we will require payment of the remaining principal and any interest accrued through the date of assignment as a condition of the license assignment or

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<sup>9</sup> See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Third Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2941 (1994) at ¶ 80. (*Competitive Bidding Third Report and Order*).

transfer. Moreover, if a small business under the \$3 million definition seeks to assign or transfer control of a license to a small business under the \$15 million definition (that does not qualify for as favorable an installment payment plan), the installment payment plan for which the acquiring entity qualifies will become effective immediately upon transfer. However, a licensee may not switch its payment plan to a more favorable plan. If an investor subsequently purchases an "attributable" interest in the businesses during the first five years of the license term and, as a result, the gross revenues or total assets of the business exceed the applicable financial cap, thereby requiring the applicant to forfeit eligibility for an installment payment scheme, unjust enrichment provisions also will apply.

### III. BACKGROUND

22. The 900 MHz SMR service was established in 1986, when the Commission allocated 200 channel pairs in the 896-901 MHz and 935-940 MHz bands for SMRs in order to alleviate congestion in the 800 MHz SMR band.<sup>10</sup> To expedite service in major markets where demand for SMR service was greatest, the Commission used a two-phase licensing process. In Phase I, licenses were assigned in 46 "Designated Filing Areas" ("DFAs") comprised of the top 50 markets. Following Phase I, the Commission envisioned licensing facilities in areas outside these markets in Phase II. In the meantime, however, licensing outside the DFAs was frozen after 1986, when the Commission opened its filing window for the DFAs.<sup>11</sup>

23. In 1989, the Commission adopted a *Notice of Proposed Rule Making* in PR Docket 89-553<sup>12</sup> ("*NPRM*"), proposing to begin Phase II licensing of 900 MHz SMR facilities nationwide. The *NPRM* contained proposals intended to add flexibility to 900 MHz SMR systems. The Commission continued its freeze on licensing outside the DFAs while the rule making was pending, but did license 900 MHz providers on a secondary basis (*i.e.*, facilities that may not cause interference to primary licensees and must accept interference from primary licensees) outside their DFAs to meet growing demand for regional service.

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<sup>10</sup> Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, GEN Docket No. 84-1231, Amendment of Parts 2, 15, and 90 of the Commission's Rules and Regulations To Allocate Frequencies in the 900 MHz Reserve Band for Private Land Mobile Use, GEN Docket No. 84-1233, Amendment of Parts 2, 22, and 25 of the Commission's Rules To Allocate Spectrum for, and To Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services, GEN Docket No. 84-1234, *Report and Order*, 2 FCC Rcd 1825 (1986) (*900 MHz SMR Report & Order*).

<sup>11</sup> Public Notice, Private Land Mobile Application Procedures for Spectrum in the 896-901 MHz and 935-940 MHz Bands, rel. Nov. 4, 1986, 1 FCC Rcd 543 (1986) (Public Notice of Nov. 4, 1986).

<sup>12</sup> Amendment of Parts 2 and 90 of the Commission's rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, *Notice of Proposed Rule Making*, PR Docket No. 89-553, 4 FCC Rcd 8673 (1989).

24. In 1993, the Commission adopted a *First Report & Order and Further Notice of Proposed Rule Making* in PR Docket 89-553,<sup>13</sup> modifying its Phase II proposal and seeking comment on whether to license the 900 MHz SMR band to a combination of nationwide, regional, and local systems. Shortly after the *First Report & Order/Further Notice*, Congress amended the Communications Act to reclassify most SMR licensees as Commercial Mobile Radio Service (CMRS) providers, and to establish the Commission's authority to use competitive bidding to select from among mutually exclusive applicants for certain licensed services.<sup>14</sup> Accordingly, the Commission deferred further consideration of Phase II and incorporated the 900 MHz docket (as well as the companion docket relating to 800 MHz SMR)<sup>15</sup>, into its *CMRS* proceeding to ensure that the regulation of all SMRs would be consistent with the regulation of competing CMRS services, such as cellular and PCS,<sup>16</sup> and to consider the impact of auction authority on the record of the pending 900 MHz proceeding.<sup>17</sup>

25. In the *CMRS Third Report and Order*, the Commission further revised its Phase II proposals and established the broad outlines for the completion of licensing in the 900 MHz SMR band. The Commission concluded that (1) the 900 MHz SMR band will be licensed in 20 ten-channel blocks using MTAs as service areas; (2) licensing of mutually exclusive applicants for this spectrum will be based on competitive bidding; and (3) incumbent licensees in the band will retain the right to operate under their existing authorizations, but will be required to obtain the relevant MTA license (or obtain the consent of the MTA licensee) to be able to expand their systems.<sup>18</sup> The Commission noted that some licensees had been granted secondary authorizations to construct facilities outside of the DFAs, so they could link

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<sup>13</sup> Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, *First Report and Order and Further Notice of Proposed Rule Making*, PR Docket No. 89-553, 8 FCC Rcd 1469 (1993) (*Phase II First Report & Order & Further Notice*).

<sup>14</sup> Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 (Budget Act), § 6002(b), 107 Stat. 312, 392 (1993) (codified at 47 U.S.C. §§ 309(j) and 332).

<sup>15</sup> Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *Further Notice of Proposed Rule Making*, PR Docket No. 83-144, FCC 94-271, rel. Nov. 4, 1994, 59 Fed. Reg. 60,111 (Nov. 22, 1994) (*800 MHz Further Notice*).

<sup>16</sup> See Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services, *Second Report and Order*, 9 FCC Rcd 1411 (1994) (*CMRS Second Report & Order*); Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services, *Third Report and Order*, GN Docket No. 93-252, 9 FCC Rcd 7988 (1994) (*CMRS Third Report & Order*).

<sup>17</sup> Due to the passage of the Budget Act, the issues raised in the 1993 *Phase II First Report & Order*, (e.g., primary status of secondary sites; license terms, eligibility for nationwide or regional licenses; limitation on number of licenses controlled by single licensee), were addressed in the *CMRS Third Report & Order*.

<sup>18</sup> *CMRS Third Report & Order* at ¶ 119.

facilities in different markets. With respect to those unprotected sites (*i.e.*, "secondary sites"),<sup>19</sup> the Commission stated that those that were licensed on or before August 9, 1994, would be entitled to primary site protection.<sup>20</sup> The Commission also eliminated loading requirements for future MTA licensees, but retained them for incumbent 900 MHz SMR licensees that do not obtain MTA licenses.<sup>21</sup>

26. While the *CMRS Third Report & Order* established the framework for 900 MHz licensing, the Commission left the adoption of specific auction and service rules for the Phase II *Order*. In the *Second Report and Order and Second Further Notice of Proposed Rule Making*, we adopted final service rules, and requested comment on proposed auction rules. We established technical and operational rules for the new MTA licensees, and also defined the rights of incumbent SMR licensees already operating in the 900 MHz band. We also addressed issues raised on reconsideration of the *CMRS Third Report & Order* pertaining specifically to the 900 MHz SMR service.<sup>22</sup> The *Further Notice* requested comment on further aspects of the Commission's decision in the *CMRS Third Report & Order* to license the 900 MHz band on an MTA basis, and to use competitive bidding to select from among mutually exclusive applicants. We set forth proposals for new licensing rules and auction procedures for the service, including provisions for designated entities. We later issued a Public Notice requesting further comment on the impact of the Supreme Court's subsequent decision in *Adarand Constructors Inc. v. Peña*<sup>23</sup> on our proposed treatment of designated entities in the *Second R&O and Second Further Notice*.<sup>24</sup>

#### IV. SECOND ORDER ON RECONSIDERATION

##### A. Coverage Requirements

27. Background. In the *Second R&O and Second Further Notice*, the Commission adopted Section 90.665(c), which requires 900 MHz MTA licensees to provide coverage to one-third of the population of their service area within three years of initial license grant and to two-thirds of the population of their service area within five years or, at the five year mark.

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<sup>19</sup> See 47 C.F.R. § 90.7 (defining "secondary operation").

<sup>20</sup> *CMRS Third Report & Order* at ¶ 119.

<sup>21</sup> *Id.* at ¶ 194.

<sup>22</sup> Petitions for Reconsideration of the *CMRS Third Report & Order* that raise general CMRS issues, or specific issues pertaining to other CMRS services, will be addressed in a separate Order.

<sup>23</sup> 115 S.Ct. 2097 (1995).

<sup>24</sup> Request for Comments in 900 MHz SMR Proceeding, *Public Notice*, PR Docket No. 89-553, DA 95-1479, released June 30, 1995.

to submit a showing of substantial service.<sup>25</sup> We stated that this requirement fits squarely between the 10 MHz broadband PCS rules (one-fourth population coverage at five years or substantial service) and the narrowband PCS rules (one-fourth population coverage at five years, three-fourths population coverage at 10 years).<sup>26</sup>

28. Petitions. By and large, petitioners request that we both amend the coverage requirements and clarify certain aspects of the rule. Several petitioners request that the Commission adopt a less stringent coverage requirement than that contained in Section 90.665(c).<sup>27</sup> In particular, Personal Communications Industry Association ("PCIA") and Advanced Mobilecomm, Inc. ("AMI") contend that it will be difficult for an MTA licensee to meet these coverage requirements unless it can establish a relationship with the incumbent licensee which may already cover significantly populated areas of an MTA.<sup>28</sup> Both petitioners point to the Los Angeles-San Diego MTA as an example of an anomaly created by the rule. AMI states that, if a San Diego incumbent wishes to obtain an MTA license to expand its San Diego offering, it would have to reach an agreement with the incumbent Los Angeles licensees in order to meet the MTA coverage requirement, as well as those in Las Vegas. As AMI notes, there is little roaming crossover, as Las Vegas was not one of the DFAs that was licensed in 1987.<sup>29</sup> Conversely, PCIA points out that, if a potential applicant wishes to serve only Las Vegas, it would have to reach agreements with the Los Angeles and San Diego incumbents to meet coverage requirements.<sup>30</sup> AMI elaborates that the problem with establishing such a relationship is that the equipment with which each licensee already has constructed may be totally incompatible with that of the potential MTA licensee.<sup>31</sup>

29. Both RAM and Geotek request that the Commission clarify Section 90.665(b) and (d) to indicate that an incumbent licensee who becomes the MTA licensee, then fails to satisfy the coverage requirements, does not forfeit the entire MTA license but, retains those facilities

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<sup>25</sup> 47 C.F.R. § 90.665(c); *Second R&O and Second Further Notice, supra.* at ¶ 40.

<sup>26</sup> *Second R&O and Second Further Notice* at ¶ 40; 47 C.F.R. §§ 24.203(b) and 24.103(c).

<sup>27</sup> Comments of RAM Mobile Data USA Limited on Petition for Reconsideration & Clarification, filed July 27, 1995 at 4.

<sup>28</sup> Petition for Partial Reconsideration of the Personal Communications Industry Association, filed June 5, 1995, at 6-7; Petition for Partial Reconsideration of the Advanced Mobilecomm, Inc., filed June 5, 1995, at 2-3.

<sup>29</sup> AMI Petition at 3; *See* Public Notice, Private Land Mobile Application Procedures for Spectrum in the 896-901 MHz and 935-940 MHz Bands, rel. Nov. 4, 1986, 1 FCC Rcd 543 (1986) (Public Notice of Nov. 4, 1986).

<sup>30</sup> PCIA Petition at 7.

<sup>31</sup> AMI Petition at 3.

licensed to it prior to the auction.<sup>32</sup> Petitioners contend that, if the Commission intends to subject incumbents to forfeiture of the entire MTA license, including their existing systems, incumbents will be dissuaded from participating in the auction<sup>33</sup> and non-incumbents will be given an unfair competitive advantage.<sup>34</sup> Geotek states that, absent clarification, an incumbent licensee will be risking substantial capital to bid on the MTA license, as well as its prior investment in the license and facilities associated with its existing system.<sup>35</sup>

30. Southern California Edison Company ("SCE") requests a number of clarifications of the Commission's coverage requirements. First, SCE requests that the Commission clarify Section 90.665(c) to indicate precisely how population coverage will be counted.<sup>36</sup> SCE urges the Commission to choose a geographically determined benchmark, such as the U.S. Census Bureau's census tracts, to allow for more precise computation of population coverage.<sup>37</sup> Otherwise, SCE contends, since county population is essential to calculating MTA population, an MTA licensee may provide coverage to one corner of a county and claim credit for the entire county.<sup>38</sup> SCE predicts that the failure to clarify population computation methodology will result in protracted disputes between MTA license holders and the Commission.<sup>39</sup> Second, SCE requests that the Commission indicate precisely which edition and population table of *Rand McNally's Commercial Atlas and Marketing Guide* the Commission will use to determine whether an MTA licensee has complied with Section 90.665(c), a clarification which SCE deems critical in view of the five years that have passed since the last U.S. Census.<sup>40</sup> Third, SCE requests clarification of the coverage rule to indicate that MTA licensees must meet coverage requirements regardless of the percentage of the MTA population already served by incumbent licensees.<sup>41</sup>

31. Discussion. We will retain the coverage requirements outlined in Section

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<sup>32</sup> Petition for Reconsideration of Geotek Communications, Inc., filed June 5, 1995, at 8-9; Petition for Reconsideration and Clarification of RAM Mobile Data USA Limited Partnership, Inc., filed June 5, 1995, at 5.

<sup>33</sup> RAM Petition at 5.

<sup>34</sup> Geotek Petition at 9; RAM Petition at 5.

<sup>35</sup> Geotek Petition at 8.

<sup>36</sup> Petition for Clarification of the Southern California Edison Company, filed June 5, 1995, at 6-7.

<sup>37</sup> *Id.*

<sup>38</sup> SCE Petition at 6.

<sup>39</sup> SCE Petition at 7.

<sup>40</sup> SCE Petition at 7.

<sup>41</sup> SCE Petition at 8.

90.665(c), which require 900 MHz MTA licensees to provide coverage to one-third of the population of their service area within three years of initial license grant and to two-thirds of the population of their service area within five years or, at the five year mark, to submit a showing of substantial service. We are convinced that these benchmarks are not too stringent, particularly in light of the "substantial showing" mechanism designed for specialized users, who may not be able to meet the two-thirds requirement due to individualized circumstances. We will review these showings on a case-by-case basis. We believe that any winning MTA bidder should have the ability to meet these coverage requirements.

32. The percentage of population served by the incumbent in a DFA is a factor that MTA bidders will have to take into account in determining whether and how it will meet the coverage requirements of a particular MTA on which it seeks to bid. We expect bidders to have a realistic plan for meeting coverage requirements, by investigating the possibility of resale, affiliation with other bidders, or buyouts of incumbents. Those with an interest in serving only part of an MTA also are free to enter into private contractual arrangements with the MTA licensee. If a bidder expects that it will not be able to reach an agreement with an incumbent, that factor should be considered in the bidding strategy. Developing separate coverage requirements for the portions of the MTA that currently are unserved by incumbents is tantamount to establishing the 900 MHz SMR auction as an "unserved area" auction. That principle is at odds with the Commission's policy for the 900 MHz SMR service of providing the system user with ubiquitous regional coverage.<sup>42</sup> Therefore, we disagree with PCIA and AMI regarding coverage requirements. We will not condition compliance with Section 90.665(c) on the success (or lack thereof) of the MTA's licensee's ability to reach a satisfactory agreement with the incumbent. Thus, the MTA licensee must meet these coverage requirements regardless of the presence of an incumbent licensee.

33. We do, however, agree with RAM and Geotek and will modify Section 90.665(d) to state that an MTA licensee who also is the incumbent within the MTA will not forfeit the entire MTA for failure to meet coverage requirements. Such licensees will forfeit only the spectrum gained in the MTA license, and not the spectrum to which it originally was licensed as the incumbent in the DFA (including any secondary sites that have achieved primary status). In other words, only the right to use channels any place in the MTA will be forfeited, but any channels for which individual sites were constructed and operating prior to auction will be retained by the MTA licensee.

34. Finally, in response to SCE's request, we will use the 1992 edition of *Rand McNally's Commercial Atlas and Marketing Guide* (which is based on the April 1, 1990 U.S. Census) in determining whether the licensee has met its coverage requirement. Under our standard, a licensee will not be able to claim coverage of an entire county if it covers only a small portion of the county. As discussed at ¶ 112, *infra*, the Commission will provide, by Public Notice, population information corresponding to each MTA, which also will be used to

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<sup>42</sup> See *Competitive Bidding Third Report and Order* at ¶ 13.

calculate the upfront payment.

## **B. Treatment of Incumbents**

### **1. MTA Licensee's Interference Protection Obligations to Incumbents**

35. Background. The Commission stated in the *Second R&O and Second Further Notice*, that MTA licensees will be required to afford interference protection to incumbent SMR systems, as provided in Section 90.621(b), in one of three ways: (1) By locating their stations at least 113 km (70 miles) from any incumbent's facilities; (2) by complying with the co-channel separation standards in the short-spacing rule (§ 90.621(b)(4)), if they seek to operate stations located less than 113 km from an incumbent's facilities; or (3) by negotiating an even shorter distance with the incumbent licensee.<sup>43</sup>

36. Petitions. Geotek requests that the Commission require the MTA licensee to comply with the minimum distance criteria without short spacing in order to avoid having the MTA licensee contain the growth of an incumbent's geographic service area.<sup>44</sup> Geotek notes that this is of particular concern in markets in which an incumbent operates with few or one transmitter(s) and the MTA licensee surrounds the incumbent, thereby preventing the incumbent from making modifications or supplementing its service.<sup>45</sup> Geotek claims that allowing the incumbents more flexibility will reduce the Commission's involvement in co-channel disputes.<sup>46</sup>

37. Discussion. We will retain the rule as adopted. Geotek has not presented a sufficient justification to warrant our elimination of the short-spacing option in defining the MTA licensee's interference obligations. We find no merit to Geotek's claim that short-spaced MTA licensees will "box in" incumbents, as we have considered and rejected similar arguments in the past. When we developed the short-spacing table in the *Report and Order* for PR Docket 93-60,<sup>47</sup> Fleet Call (now Nextel) argued that the short-spacing table would impede the development of wide-area digital SMR systems. We denied this request and decided that the use of the short-spacing table offered a balance between increased spectrum efficiency, adequate co-channel protection and administrative convenience.<sup>48</sup> We continue to

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<sup>43</sup> *Second R&O and Second Further Notice* at ¶ 44.

<sup>44</sup> Geotek Petition at 5-6.

<sup>45</sup> *Id.* at 5.

<sup>46</sup> *Id.* at 6.

<sup>47</sup> Co-Channel Protection Criteria for Part 90, Subpart S Stations Operating above 800 MHz, *Report and Order*, PR Docket No. 93-60, 8 FCC Rcd 7293 (1993) at ¶¶ 11,12 and n. 20.

<sup>48</sup> *Id.* at 13.

believe the use of the short-spacing table will afford maximum flexibility to the MTA licensee, will allow incumbents to fill in "dead spots,"<sup>49</sup> and still will protect the incumbent licensee from actual interference. Considering the likelihood that incumbent licensees will bid on the MTAs that surround their systems, we believe that the short-spacing option will not result in a plethora of interference disputes to be resolved by the Commission.

## 2. Incumbents' Interference Protection Obligations to MTA Licensee

38. Background. In the *Second R&O and Second Further Notice*, the Commission defined the incumbent licensee's existing service area by its originally-licensed 40 dBu median field strength contour.<sup>50</sup> We rejected commenters' suggestions that we use the 22 dBu contour as an incumbent's protected service area, because we have consistently applied the 40 dBu signal strength contour to incumbent operations.<sup>51</sup> We noted that incumbents would be able to add new transmitters in their existing service area as long as they did not expand their original 40 dBu signal strength contour.<sup>52</sup> We also required incumbents to notify the Commission of any changes in technical parameters or the construction of additional stations with a minor modification application.<sup>53</sup> We stated our intention to allow incumbents to continue existing operations without harmful interference and to give them flexibility to modify or augment their system without encroaching on the MTA licensee's operations.<sup>54</sup>

39. Petitions. Several petitioners urge the Commission to reconsider its rejection of the 22 dBu contour as the definition of an incumbents' service area. Geotek contends that the 40 dBu contour is too restrictive, and suggests that the Commission use the 40 dBu contour to define the incumbent's protected contour while allowing modifications within the 22 dBu contour.<sup>55</sup> Geotek states that the proposed modifications would neither offer incumbents any more interference protection than they would receive under the current rules, nor expand incumbents' service area.<sup>56</sup> RAM insists that the 22 dBu contour definition enhances an incumbent's operational flexibility and ability to serve more effectively customers in its

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<sup>49</sup> "Dead spots" are those areas where theoretically there should be enough signal/field strength to provide good service to the area, but due to any of a variety of reasons (e.g., high skyscrapers blocking the signal, mountain ranges shading the signal, etc.), the field strength in that region is insufficient to provide good service.

<sup>50</sup> *Second R&O and Second Further Notice* at ¶ 46.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at ¶ 47.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Geotek Petition at 2-4; RAM Comments on Petition for Reconsideration at 2.

<sup>56</sup> Geotek Petition at 4.

service area without impinging on the adjacent MTA licensee's operations.<sup>57</sup> AMTA suggests that the Commission allow incumbents to implement additional or modified facilities at any site that does not expand the 22 dBu contour of an existing site, which facilities would not have to be protected from interference from subsequently granted MTA licenses.<sup>58</sup> AMTA claims that incumbents could cover what otherwise would be "dead spots" without adversely affecting the MTA licensee.<sup>59</sup> RAM also submits an engineering statement purporting to show many instances in which existing systems have added new sites to intensify coverage of already-served areas or fill in "dead spots," which extends the 40 dBu contour but does not increase the interference contour.<sup>60</sup>

40. RAM also argues that the Commission should grant wide-area licenses to incumbents, rather than site-by-site licensing.<sup>61</sup> RAM contends that, to give existing licensees flexibility to operate within their protected areas, the Commission should allow incumbents to trade in their site-specific licenses for a wide-area license, demarcated by the aggregate of the 40 dBu contours around each of the incumbent's contiguous sites operating in the same ten-channel block.<sup>62</sup> RAM suggests that where the incumbent does not apply for, or does not win, the MTA license, it should be able to trade in its "site-by-site" licenses for a license that accurately reflects the 40 dBu contour to which it is now entitled.

41. Discussion. We are not persuaded to change our determination to use the 40 dBu contour to define an incumbent's service area in which they can make modifications without Commission action, rather than the 22 dBu contour, as petitioners request. As RAM points out, we recognized in the *Second R&O and Second Further Notice* that there would be instances where the 40 dBu contour could be expanded without expanding the 22 dBu contour<sup>63</sup> and that it would occur infrequently. RAM does not dispute this conclusion, nor has it submitted new information or raised new arguments that would persuade us to change our initial determination. We continue to believe that the use of the 40 dBu contour to determine the protected service area strikes the most reasonable balance between the rights of the incumbent to add sites within its protected contour and the interest of prospective MTA licensees in obtaining clear spectrum. However, we will modify incumbent notification

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<sup>57</sup> RAM Petition at 3.

<sup>58</sup> Petition for Partial Reconsideration and Clarification of American Mobile Telecommunications Association, filed June 5, 1995, at 11.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 4.

<sup>61</sup> RAM Petition at 2; RAM Comments on Petition for Reconsideration at 3.

<sup>62</sup> RAM Petition at 2.

<sup>63</sup> *Id.*

requirements. All incumbents are prohibited from expanding their 40 dBu field strength contours. Therefore, we will not require incumbents who are making modifications to their systems within the 40 dBu signal strength contour to notify the Commission of modifications to their facilities. Elimination of the notification requirement in Section 90.667(a) of the Commission's Rules will reduce administrative burdens on incumbents without increasing problems of signal interference.

42. We will grant RAM's request to allow incumbents to have their licenses reissued if they are not the successful bidder for the MTA in which they are currently operating. This procedure, which would be granted post-auction upon the request of the incumbent, would essentially convert their current site licenses to a single "partitioned" license, authorizing operations throughout the contiguous and overlapping 40 dBu signal strength contours of the multiple sites. Incumbents seeking reissued "partitioned" licenses, however, will have to make a one-time filing of specific information for each of their external base sites that will assist the staff in updating the Commission's database after the close of the 900 MHz SMR auction. We believe that facilities added or modified without prior approval or subsequent notification under these new sections will not receive interference because they will be indirectly protected by the presence of surrounding stations of the same licensee on the same channel or channel block. If incumbents seek to gain additional geographic coverage beyond the 40 dBu protected contour, they must apply for the MTA license.

### C. Secondary Site Licensing

43. Background. In the *Order on Reconsideration*<sup>64</sup> in this docket, we stated our intention to continue authorizing secondary sites, because it would allow incumbents, many of whom will seek to become MTA licensees, to continue building out their systems and provide service to consumers.<sup>65</sup> We also reasoned that such continued authorizations in advance of MTA licensing would not contribute to spectrum contamination, because such sites are not entitled to interference protection from MTA licensees, and would have to discontinue operations that interfere with MTA-licensed operations.<sup>66</sup> In the *Second R&O and Second Further Notice*, the Commission decided to afford primary site protection to secondary site applications filed on or before August 9, 1994, but stated that any applications filed after that date would continue to be authorized on a secondary site basis.<sup>67</sup> In adopting Section 90.667(b), the Commission also affirmed its intention not to authorize any secondary sites

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<sup>64</sup> Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services. *Order on Reconsideration*, GN Docket No. 93-252, 10 FCC Rcd 1568 (1995) at ¶ 5.

<sup>65</sup> *Order on Reconsideration* at ¶ 4.

<sup>66</sup> *Id.* at ¶ 5.

<sup>67</sup> *Second R&O and Second Further Notice* at ¶ 53.

once the MTA licensee has been selected.<sup>68</sup>

44. Petitions. AMTA and RAM now request that the Commission continue to grant applications for secondary sites after an MTA license has been granted.<sup>69</sup> RAM argues that the restriction in Section 90.667(b) conflicts with the Commission's objective of affording flexibility to incumbents, and that the continued licensing of such sites will not compromise the MTA licensing process.<sup>70</sup>

45. Advanced Mobilecomm, Inc. ("AMI") and PCIA request that the Commission clarify one aspect of our decision to afford primary site status to secondary site authorizations which were licensed, or for applications that were filed, on or before August 9, 1994. Specifically, Petitioners request that the Commission require that such secondary sites (which have since been granted primary status) nevertheless should be required to take into account the original primary sites of incumbent licensees in adjacent markets.<sup>71</sup> In particular, Advanced Mobilecomm points to the Los Angeles and San Diego co-channel systems, where the distance between sites is minimal.<sup>72</sup> Advanced Mobilecomm also requests that the Commission reaffirm the special requirements for transmitters south of 33° 45' Latitude serving the Los Angeles DFA to protect subsequent grants in San Diego.<sup>73</sup>

46. Discussion. We deny AMTA and RAM's request regarding post-auction secondary site licensing. No secondary site licenses will be granted once an MTA licensee has been selected. Notwithstanding the secondary nature of these sites, we believe it is important to assure potential MTA bidders that the spectrum upon which they are bidding will not become subsequently encumbered with secondary sites. We believe the better approach is to require an incumbent to negotiate with the MTA winner for the right to build additional secondary sites *after* the MTA licenses have been awarded, rather than to subject the MTA winners at the outset to potential disputes with incumbents on issues such as whether a particular secondary site will cause actual interference. Considering the proximity of the 900 MHz auction, we believe this approach provides the proper balance between the interest of the MTA bidders in assessing the value of the MTA, and the interest of the incumbent in building out its system.

47. We reiterate the special requirements for transmitters serving the Los Angeles

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<sup>68</sup> 47 C.F.R. § 90.667(b).

<sup>69</sup> AMTA Petition at 11-12; RAM Petition at 4.

<sup>70</sup> RAM Petition at 4.

<sup>71</sup> Advanced Mobilecomm Petition at 4-5; PCIA Petition at 8.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 5 n.6.

DFA. In a 1986 Public Notice, the Commission stated that licensees serving the Los Angeles DFA that employ base station transmitters located on Santiago Peak and other peaks located south of 33° 45' North Latitude have special conditions attached to their licenses requiring that they protect subsequent grants to licensees that serve the San Diego DFA.<sup>74</sup>

#### **D. Finders' Preference Program**

48. DW Communications, Inc. ("DW") and AMTA request that the Commission modify Section 90.667 to include licenses granted through the finders' preference program as incumbents entitled to co-channel interference protection.<sup>75</sup> Section 90.173(k) of the Commission's rules describes the Commission's "finders' preference program," which provides that an applicant finding unused spectrum will receive a dispositive preference for use of a channel in the 900 MHz band on an exclusive basis.<sup>76</sup> DW, a finders' preference licensee, is particularly concerned that, without such clarification, it would not be considered an incumbent and its primary site authorization would be only secondary in nature.<sup>77</sup> AMTA, going one step further, states that, to the extent the Commission retains the finders' preference program, it should exempt finders' preference licenses from the August 9, 1994 primary status cut-off requirement.<sup>78</sup>

49. We will clarify Section 90.667 to include successful applicants for a finders' preference as "incumbents" within the meaning of the rule. As such, they will be entitled to co-channel protection from an MTA licensee. In response to AMTA's request, the Commission has stated that the function of finders' preference mechanisms with respect to CMRS services will be addressed in a future rule making proceeding.<sup>79</sup> While the broad issue of finders' preferences will be addressed in that proceeding, we are eliminating it immediately for the 900 MHz SMR service. The Commission will no longer accept finders' preference applications following the adoption of this *Order*.<sup>80</sup> The MTA licensee will have the

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<sup>74</sup> Private Land Mobile Application Procedures for Spectrum in the 896-901 MHz and 935-940 MHz Bands, *Public Notice*, released November 4, 1986, at 7-8.

<sup>75</sup> Petition for Reconsideration of DW Communications, Inc., filed May 19, 1995, at 3-5; AMTA Petition at 9-10.

<sup>76</sup> 47 C.F.R. § 90.173(k).

<sup>77</sup> DW Petition at 3-4.

<sup>78</sup> AMTA Petition at 10.

<sup>79</sup> *CMRS Third Report and Order* at ¶ 398.

<sup>80</sup> The imposition of this freeze is procedural in nature and therefore is not subject to the notice and comment and effective date requirements of the Administrative Procedure Act (APA). *See Kessler v. FCC*, 326 F.2d 673 (D.C. 1963). Furthermore, good cause exists for noncompliance with these APA requirements. Adherence to the notice and comment and effective date requirements in this matter would be contrary to the

exclusive right to recover unconstructed or non-operational channels on blocks for which it is licensed.

### **E. Loading Requirements**

50. Background. In the *Third Report & Order* in GN Docket No. 93-252 ("*CMRS Third Report & Order*"), we declined to apply the loading/automatic cancellation requirement for MTA licensees in the 900 MHz band, but decided to retain the loading requirement for 900 MHz SMR incumbent licensees.<sup>81</sup> On reconsideration, we affirmed our decision in the *CMRS Third Report and Order* to retain the loading requirement for incumbent 900 MHz SMR licensees.<sup>82</sup> We stated three reasons why we were retaining loading requirements for incumbents: (1) We already had granted incumbents an additional two year loading extension;<sup>83</sup> (2) incumbents who could not fulfill loading requirements because they were limited to operating in the DFAs now can obtain an MTA license; and (3) the public interest is not served by allowing an incumbent who does not obtain the MTA license to retain spectrum that it has been unable to utilize fully for seven years.<sup>84</sup> However, we did grant temporary relief in the form of a waiver from the loading rules to RAM until 30 days after the completion of the 900 MHz auction, based on the unique circumstances of RAM's substantially-constructed wide area network.<sup>85</sup> Recently, the Wireless Telecommunications Bureau granted the same type of temporary relief to Celsmer, which demonstrated that it had constructed a virtually seamless wide area network in Florida, that already is operating and serving customers.<sup>86</sup>

51. Petitions. Several petitioners once again request that the Commission eliminate the five-year loading rule for all 900 MHz SMR systems. AMTA, PCIA and Celsmer take issue with the Commission's justification that 900 MHz SMR is "less mature" than the 800

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public interest because compliance would undercut the purposes of the freeze.

<sup>81</sup> *CMRS Third Report & Order* at ¶ 194. The loading rule, 47 C.F.R. § 90.631(i), requires that each applicant for a trunked system certify that a minimum of 70 mobiles for each channel authorized will be placed in operation within five years of the initial license grant (with the exception of the two-year renewal provided in subsection (i)); otherwise authorizations cancel automatically.

<sup>82</sup> *Second R&O and Second Further Notice* at ¶ 57.

<sup>83</sup> See Amendment of Section 90.631 of the Commission's Rules and Regulations Concerning Loading Requirements for 900 MHz Trunked SMR Stations, *Report and Order*, PR Docket No. 92-17, 7 FCC Rcd 4914 (1992).

<sup>84</sup> *Second R&O and Second Further Notice* at ¶ 57.

<sup>85</sup> *Second R&O and Second Further Notice* at ¶¶ 58-59.

<sup>86</sup> Celsmer Request for Waiver of 47 C.F.R. § 90.631 Loading Standards for 900 MHz SMR Licensees, *Order*, DA 95-1537, released July 10, 1995.

MHz SMR service, for which no loading requirements were retained,<sup>87</sup> and AMTA points to PCS as an even newer service for which there are no loading requirements.<sup>88</sup> AMTA, PCIA and Advanced Mobilecomm argue that maintaining loading requirements for incumbent 900 MHz SMR systems, while eliminating the requirements for other services, does not promote regulatory symmetry.<sup>89</sup> PCIA and Advanced Mobilecomm argue that the MTA licensee has greater rights than the incumbent, with respect not only to loading but with respect to station cancellation, whereby the incumbent's unused channels revert to the MTA licensee.<sup>90</sup> Celsmer, PCIA and Advanced Mobilecomm contend that not all incumbents, particularly independent operators, have the means to solve their loading problem by obtaining the MTA license.<sup>91</sup> Celsmer, PCIA and Advanced Mobilecomm blame regulatory delay in concluding the 900 MHz "Phase II" licensing proceeding for licensees' inability to build out their systems.<sup>92</sup> As an alternative, AMTA requests that the Commission grant a limited waiver of the loading requirements similar to that granted to RAM.<sup>93</sup>

52. DW contends finders' preference licensees that have received grants in 1995 should be specifically exempt from loading requirements.<sup>94</sup> While DW concedes that loading requirements are justified with respect to 900 MHz SMR licenses granted in 1987, DW also points out that 800 MHz SMR licensees that were granted on or after June 1, 1993, are not subject to loading requirements.<sup>95</sup> Therefore, to achieve regulatory symmetry with the 800 MHz SMR service, DW requests that the Commission amend Section 90.631(i) to exempt licensees of primary 900 MHz SMR stations whose initial licenses were granted after June 1, 1993.

53. Discussion. We have considered this issue fully in both the *CMRS Third Report and Order* and the *Second R&O and Second Further Notice*. Petitioners have raised no arguments that would persuade us to reconsider our determination to retain loading requirements for incumbent 900 MHz SMR licenses. The 900 MHz SMR service has a

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<sup>87</sup> AMTA Petition at 7-8; Celsmer Petition at 2; PCIA Petition at 3.

<sup>88</sup> AMTA Petition at 7-8.

<sup>89</sup> AMTA Petition at 6-7; PCIA Petition at 4; Advanced Mobilecomm at 8.

<sup>90</sup> PCIA Petition at 4; Advanced Mobilecomm Petition at 8-9 (citing *Second R&O and Second Further Notice* at ¶ 57); RAM Comments on Petition for Reconsideration at 3.

<sup>91</sup> Celsmer Petition at 3; PCIA Petition at 5; Advanced Mobilecomm at 6-7.

<sup>92</sup> Celsmer Petition at 2; PCIA Petition at 3, 5; Advanced Mobilecomm Petition at 7-8.

<sup>93</sup> AMTA Petition at 7 n.13 and 8.

<sup>94</sup> DW Petition at 5.

<sup>95</sup> See 47 C.F.R. § 90.631(b).

unique history, in that the Commission has, at the request of the SMR industry, substantially extended the deadline for loading systems.<sup>96</sup> It simply does not serve the public interest to allow licensees, who have had a full seven years to load their system, to retain that spectrum.<sup>97</sup> Although finders' preference licensees may not have had seven years in which to meet the requirements, they will still be subject to loading requirements as incumbent licensees. Such finders' preference licensees will have seven years from their license grant to comply with the loading requirements.<sup>98</sup> We reemphasize that every incumbent, including a finders' preference licensee, has the opportunity to bid for an MTA license, for which it will have no loading requirements. Thus, we are not convinced that incumbents should be entitled to relief from this requirement. Nor are we convinced that every incumbent is entitled to temporary relief, such as that granted to both RAM and Celsmer. However, we will entertain waiver petitions and determine, on a case-by-case basis, whether a licensee, who bears the burden of proof, has made a showing justifying why loading standards should not apply to its unique situation.

### **G. Discontinuance of Operation**

54. Background. Section 90.931(f) provides that if a station is not placed in operation within one year, its license cancels automatically. Prior to the *Second R&O and Second Further Notice*, the rule also provided that SMR licensees which had discontinued operations for more than 60 consecutive days were considered permanently discontinued, unless the Commission received prior notification. If the Commission rejected the licensee's justification, the licensee was required to resume operations within five days. In the *Second R&O and Second Further Notice*, the Commission modified Section 90.631(f) to permit licensees to discontinue operations for 90 continuous days without being considered permanently discontinued, and removed any provision for licensees to request an additional extension of this period.<sup>99</sup>

55. Discussion. AMTA and Nextel request that the Commission specify that the 12-month period continues to govern SMR stations discontinued before the effective date of the rule, and that the 90-day period applies prospectively to stations discontinued after the

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<sup>96</sup> See Amendment of Section 90.631 of the Commission's Rules and Regulations Concerning Loading Requirements for 900 MHz Trunked SMR Stations, *Report and Order*, PR Docket No. 92-17, 7 FCC Rcd 4914 (1992).

<sup>97</sup> Contrary to AMTA's argument, the coverage and construction goals for the PCS service are fairly stringent. See 47 C.F.R. §§ 24.103(c) and 24.203(b).

<sup>98</sup> See 47 C.F.R. §§ 90.173(k) and 90.631(b) and (i).

<sup>99</sup> *Second R&O and Second Further Notice* at ¶ 26; 47 C.F.R. § 90.631(f).

effective date of the rule.<sup>100</sup> We agree that SMR stations that were taken out of service before the effective date of the new rule would not be governed by the 90-day requirement.

56. With regard to wide-area SMR licensees that are replacing high power analog sites with low power digital sites, however, we will deem all the base stations that comprise the system "in operation" if the system meets the standards set out in *Fleet Call, Inc.*<sup>101</sup> In *Fleet Call*, the Commission waived the one-year construction requirement so that Fleet Call (now Nextel) could convert its existing base stations with aggregate loading from single high-power sites to multiple low-power sites on an integrated basis in six major markets.<sup>102</sup> It is established that permitting SMR licensees to undergo conversion to multiple low power sites increases spectrum efficiency, and poses little risk of spectrum warehousing. The conversion process does, however, result in intervals when, for example, high powered base stations are taken out of operation in order to bring low-power digital sites on-line. As a result, we will view the entire wide-area system as "operating" if, consistent with *Fleet Call*, particular base stations of the system have discontinued operation as part of the conversion to low power digital sites.

## H. Foreign Ownership Waivers

57. Background. In Section 332(c)(6) of the Act,<sup>103</sup> Congress reclassified certain categories of private land mobile radio providers ("PLMRS") as commercial mobile radio service ("CMRS") providers, and provided for their treatment as common carriers. As a result, reclassified providers are subject to the Section 310(b) foreign ownership restrictions applicable to common carriers.<sup>104</sup> Congress provided for limited grandfathering of existing foreign interests in such licensees through a waiver petition process, whereby any reclassified PLMRS licensee could petition the Commission by February 10, 1994 for waiver of the application of Section 310(b) to any foreign ownership that lawfully existed as of May 24, 1993. The *CMRS First Report and Order* established the specific waiver petition procedure. In the *Second R&O and Second Further Notice*, pursuant to a request from Geotek, the Commission decided to grandfather any timely-filed petitions for waiver of the foreign

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<sup>100</sup> AMTA Petition at 12-13; Nextel Petition at 2-4. The rule became effective on June 5, 1995. See 60 F.R. 22023 (May 4, 1995).

<sup>101</sup> *Fleet Call, Inc., Memorandum Opinion and Order*, 6 FCC Rcd 1533 (1991), *recon. dismissed*, 6 FCC Rcd 6989 (1991) (*Fleet Call*).

<sup>102</sup> *Id.* at 1536 ¶ 26. See also Letter from Ralph A. Haller, Chief, Private Radio Bureau to David Weisman, DA 92-1734, 8 FCC Rcd 143 (*Weisman Letter*).

<sup>103</sup> 47 U.S.C. § 332(c)(6).

<sup>104</sup> 47 U.S.C. § 332(c)(6); See also Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services, *First Report and Order*, GN Docket No. 93-252, 9 FCC Rcd 1056 (1994) (*CMRS First Report & Order*) at ¶¶ 2-3.

ownership restrictions filed by an incumbent in the event the incumbent wins the MTA license.<sup>105</sup>

58. Petitions. Geotek now requests that the Commission extend that grandfathered status to *any* 900 MHz SMR MTA license that an incumbent may acquire, not just the MTA in which the applicant is also the incumbent.<sup>106</sup> In other words, Geotek requests that the grandfathered status apply to the licensee, not the license.<sup>107</sup> Geotek contends that such an interpretation would be consistent with common carrier precedent regarding waivers, and is a proper reading of Section 332(c)(6).<sup>108</sup> Geotek, however, does not cite to any specific Commission precedent in this area. Geotek also points out that the Commission's interpretation would prohibit reclassified CMRS providers from holding common carrier licenses, including microwave or other such licenses used to link base station facilities in the MTA.<sup>109</sup>

59. Discussion. Geotek asks the Commission not only to apply its waiver to other licenses in the same service, but also to other licenses it may acquire in different services. With respect to Geotek's first request, we note that since Geotek filed its petition for reconsideration in this proceeding, the Wireless Telecommunications Bureau has resolved 33 requests for waiver of Section 310(b), including that filed by Geotek.<sup>110</sup> We do not address Geotek's first request here as it is an issue discussed in petitions for reconsideration filed in the Bureau's proceeding. We note, however, that in light of the Bureau's decision, Geotek may bid in the upcoming auction. In the *Foreign Ownership Order*, the Bureau granted Geotek's petition, among others,<sup>111</sup> noting that the waivers apply to additional licenses granted to petitioners in the same service after May 24, 1993 and prior to August 10, 1996, provided the same ownership structure is maintained.<sup>112</sup> Thus, the Bureau held that such entities may acquire other SMR licenses, including MTA licenses in which it is not the incumbent. The Bureau stated that this decision was consistent with Congressional intent in grandfathering the foreign ownership interests of reclassified licensees and provided greater flexibility for the

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<sup>105</sup> *Second R&O and Second Further Notice* at ¶ 71.

<sup>106</sup> Geotek Petition at 6.

<sup>107</sup> Geotek Petition at 8.

<sup>108</sup> Geotek Petition at 6-7.

<sup>109</sup> Geotek Petition at 7.

<sup>110</sup> Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services -- Foreign Ownership Waiver Petitions, *Order*, GN Docket No. 93-252, DA 95-1303, released June 12, 1995 (*Foreign Ownership Order*) (petition(s) for recon. pending).

<sup>111</sup> *Id.* at ¶ 9.

<sup>112</sup> *Id.* at ¶ 10.

transition to CMRS reclassification. We note that in filing a short form application (FCC Form 175), an applicant must certify that it is qualified for the license and that it is in compliance with the foreign ownership provisions of Section 310 of the Act.<sup>113</sup> However, regarding its second request, we do not believe the foreign ownership waiver provision in Section 332(c)(6) extends as far as Geotek argues. Section 332(c)(6) provides an opportunity for a limited waiver of Section 310(b) for private land mobile radio service providers ("PLMRS") that now are reclassified as common carriers. Common carrier licenses, including microwave licenses used to link base station facilities, always have been subject to Section 310(b)<sup>114</sup> and could not be considered grandfathered simply because the licenses are used in conjunction with an SMR operation. In essence, Geotek's request to expand its waiver to apply to common carrier services in which it did not hold a license prior to May 24, 1993, does not comport with the statute. However, we note that Geotek may file for a declaratory ruling under Section 310(b)(4).<sup>115</sup> While Geotek argues that existing precedent supports its request to extend the Section 332(c)(6) waiver to common carrier licenses, it does not cite any specific Commission precedent, and we believe that this is not the appropriate proceeding in which to assess its request under Section 310(b)(4).

## V. SEVENTH REPORT AND ORDER

### A. Competitive Bidding Issues

#### 1. Competitive Bidding Design

60. Background. We tentatively concluded in the *Second R&O and Second Further Notice* that we would use simultaneous multiple round auctions for the 900 MHz SMR service.<sup>116</sup> We based our proposal on the factors established in the *Competitive Bidding Second Report & Order*,<sup>117</sup> for selecting from among auction methodologies to use for each

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<sup>113</sup> See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Second Memorandum Opinion & Order*, PP Docket No. 93-253, 9 FCC Rcd 7345 (1994) (*Competitive Bidding Second Memorandum Opinion & Order*) at ¶ 47. 47 C.F.R. 1.2105(a)(2)(v) and (vi).

<sup>114</sup> See, e.g., Catherine L. Waddill, *Memorandum Opinion and Order and Notice of Apparent Liability*, 8 FCC Rcd 2169 (1993).

<sup>115</sup> Section 310(b)(4) of the Communications Act authorizes the Commission to refuse to grant a license to any corporation directly or indirectly controlled by any other corporation which is foreign owned or controlled, if it is in the public interest. The Commission may act if an officer or more than 25% of the directors are aliens, if more than 25% of the capital stock is owned or voted by aliens, or if the corporation is organized under foreign law.

<sup>116</sup> *Second R&O and Second Further Notice* at ¶ 74.

<sup>117</sup> Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Second Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2348 (1994) (*Competitive Bidding Second Report & Order*).

particular auctionable service.<sup>118</sup> In that Order, we concluded that awarding licenses to those parties who value them most highly would foster Congress's policy objectives. We noted there that since a bidder's ability to introduce valuable new services and to deploy them quickly, intensively, and efficiently increases the value of a license to that bidder, an auction design that awards licenses to those bidders with the highest willingness to pay tends to promote the development and rapid deployment of new services and the efficient and intensive use of the spectrum. We also stated that: (1) licenses with strong value interdependencies should be auctioned simultaneously, and (2) multiple round auctions generally will yield more efficient allocations of licenses and higher revenues by providing bidders with information regarding other bidders' valuations of licenses, especially where there is substantial uncertainty as to value.<sup>119</sup> Thus, where the licenses to be auctioned are interdependent and their value is expected to be high, simultaneous multiple round auctions would best achieve the Commission's goals for competitive bidding.<sup>120</sup>

61. We noted that, like PCS,<sup>121</sup> the 900 MHz SMR licenses are interdependent, and licensees are likely to aggregate and substitute across spectrum blocks and geographic regions. Therefore, simultaneous multiple round bidding is likely to generate the most information about license values during the course of the auction and facilitate efficient aggregation of licenses across spectrum bands.<sup>122</sup>

62. Comments. Most commenters agree with the Commission's proposal to use simultaneous multiple round auctions for selecting among mutually exclusive 900 MHz SMR applicants. According to AMTA, such a design is a means to facilitate spectrum aggregation in a single geographic area, as well as to consolidate other regions.<sup>123</sup> Nextel reasons that the opportunity to purchase a block of channels in all 51 MTAs, or a combination thereof, is essential to the ability of wide-area SMR operators to compete with other CMRS providers.<sup>124</sup> SCE agrees with the Commission's proposal, but suggests that the Commission provide the broadest possible information to potential bidders about the incumbents occupying each

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<sup>118</sup> *Second R&O and Second Further Notice* at ¶ 73.

<sup>119</sup> *Id.* at ¶ 69.

<sup>120</sup> *Id.* at ¶¶ 109-111.

<sup>121</sup> We adopted simultaneous multiple round auctions as the auction methodology for both broadband and narrowband PCS licenses. See *Competitive Bidding Fifth Report & Order* at ¶¶ 27-32 (broadband PCS); *Competitive Bidding Third Report & Order* at ¶¶ 17-21 (narrowband PCS).

<sup>122</sup> *Second R&O and Second Further Notice* at ¶ 74.

<sup>123</sup> AMTA Comments at 2-3.

<sup>124</sup> Nextel Comments at 3.

block.<sup>125</sup> SCE, AMTA, and The Council of Independent Communications Suppliers ("CICS") suggest that the Bidder Information Package provide the incumbent licensee's name, frequencies, block numbers, geographic coordinates for each site, and a narrative site description including its address, city, county, and state.<sup>126</sup> Both SCE and AMTA maintain that, without such information, the Commission may be inclined to award a license to overly enthusiastic bidders who win a block without taking into consideration the location and number of incumbent licensees, only to find that construction requirements cannot be met.<sup>127</sup> According to CICS, a small business will have an uphill battle to develop an incumbent block even if it does obtain bidding credits.<sup>128</sup> RAM, however, reiterates its opposition to auctioning of 900 MHz frequency blocks on which there are existing operations, and contends that auctioning of licenses for those areas is contrary to legislative intent, because RAM believes that Congress intended to allow incumbent licensees to expand their systems without subjecting them to mutually exclusive applications.<sup>129</sup> Contrary to RAM's assertion, the Commission did not base its decision to auction encumbered licenses solely or predominantly on the possibility of deriving auction revenues. Prior to receiving auction authority, the Commission noted that its goal was to encourage the growth of wide-area SMR service.<sup>130</sup>

63. Discussion. Based on the record in this proceeding and our successful experience conducting simultaneous multiple round auctions for narrowband and broadband PCS, we believe a simultaneous multiple round auction design is the most appropriate for the 900 MHz SMR service. First, for certain bidders, the value of these licenses will be significantly interdependent because of the desirability of aggregation across geographic regions. Under these circumstances, 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. Simultaneous multiple round bidding therefore 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. Finally, we expect the value of these licenses to be sufficiently high to warrant simultaneous multiple round bidding.

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<sup>125</sup> SCE Comments at 6.

<sup>126</sup> *Id.* at 8; AMTA Reply Comments at 3; CICS Reply Comments at 7.

<sup>127</sup> SCE Comments at 6; AMTA Comments at 4.

<sup>128</sup> CICS Comments at 6.

<sup>129</sup> RAM Comments at n.1.

<sup>130</sup> Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-553, *First Report and Order and Further Notice of Proposed Rule Making*, 8 FCC Rcd 1469 (1993) at ¶ 13, 19.

64. The Bidder Information Package will provide all the information about incumbent licensees that is available in our licensing records.

65. RAM's argument that incumbent blocks should not be auctioned has been addressed fully in the *CMRS Third Report and Order*<sup>131</sup> and the *Second R&O and Second Further Notice*,<sup>132</sup> and RAM has not raised new arguments which would warrant reconsideration of our decision. Since there are no alternative channels suitable for relocation, the Commission will require MTA licensees to afford protection to incumbent SMR systems. These protections will protect incumbent operators adequately without interfering with MTA licensees' operations.

## **2. License Grouping**

66. Discussion. In the *Second R&O and Second Further Notice*, we tentatively concluded that all 51 MTAs in the 900 MHz SMR band should be auctioned simultaneously.<sup>133</sup> We noted that, even if holding a single auction proves to be more costly than breaking the licenses into groups, the added cost would be outweighed by the informational and bidding flexibility advantages afforded by a single auction.<sup>134</sup> We received no comments on this issue. As the 1,020 licenses to be auctioned in this service all are for the same amount of spectrum and will use a single service definition, we have determined that holding a single auction for all 51 MTAs in the 900 MHz SMR band will be the fairest, fastest, and most efficient means of distributing these licenses.

## **B. Bidding Issues**

### **1. Bidding Procedures**

67. Bidders will be able to submit bids on-site, via personal computers using remote bidding software, or via telephone. Given the space limitations for on-site bidding and the uncertainty as to the exact number of prospective bidders, however, the Commission reserves the right to have only remote bidding -- by personal computers and by telephone -- for the 900 MHz SMR auction.<sup>135</sup> The Commission will hold a seminar for prospective bidders to

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<sup>131</sup> *CMRS Third Report and Order* at ¶ 118-119.

<sup>132</sup> *Second R&O and Second Further Notice* at ¶ 44-47.

<sup>133</sup> *Second R&O and Second Further Notice* at ¶ 78.

<sup>134</sup> *Id.*

<sup>135</sup> The Commission recently adopted a fee schedule for obtaining access to the Commission's database and remote bidding software packages. The remote access bidding software package is available for \$175. The charge for on-line remote access via a 900 number is \$2.30 per minute. See *Assessment and Collection of Charges for FCC Proprietary Remote Software Packages, On-Line Communications Service Charges, and*

acquaint them with this bidding design and all alternative bid submission methods.

68. Telephonic bidding, for example, is a simple and inexpensive method for bidders to submit bids. When submitting bids by telephone, bidders may utilize the Internet to learn of 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.<sup>136</sup>

## 2. Bid Increments and Tie Bids

69. Background. In the *Second R&O and Second Further Notice*, we proposed to establish minimum bid increments for bidding in each round of the auction,<sup>137</sup> as we have done in previous multiple round auctions.<sup>138</sup> The bid increment is the amount or percentage by which a bid must be raised above the previous round's high bid in order to be accepted as valid in the current bidding round. The application of a minimum bid increment speeds the auction process and, along with activity and stopping rules, helps to ensure that the auction closes within a reasonable period of time. Establishing an appropriate minimum bid increment is important in a simultaneous auction with a simultaneous closing rule, because all markets remain open until there is no bidding on any license and a delay in closing one market will delay the closing of all markets.

70. Specifically, we proposed to start the 900 MHz auction with relatively large bid increments, and to adjust the increments as bidding activity indicates.<sup>139</sup> The minimum bid increment in Stage I of the auction generally would be five percent of the high bid in the previous round or \$.02 per MHz-pop whichever is greater. In Stage II, we proposed to reduce the minimum bid increment to the greater of five percent or \$.01 per MHz-pop, and in Stage III, the bid increment would remain at the greater of five percent or \$.01 per MHz-pop. We proposed to retain the discretion to vary the minimum bid increments for individual license or groups of licenses at any time before or during the course of the auction, based on

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Bidder's Information Packages in Connection With Connection With Auctionable Services, WT Docket No. 95-69, *Report and Order*, FCC 95-308, released July 21, 1995. Bidders may also bid via telephone for no additional charge.

<sup>136</sup> See Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, MM Docket No. 94-131, PP Docket No. 93-253, *Report and Order*, FCC 95-230, released June 30, 1995 at ¶ 107 and n.77.

<sup>137</sup> *Second R&O and Second Further Notice* at ¶ 79.

<sup>138</sup> See, e.g., *Competitive Bidding Third Report & Order* at ¶¶ 30-32.

<sup>139</sup> *Id.* at ¶ 80.

the number of bidders, bidding activity, and the aggregate high bid amounts. We also proposed to retain the discretion to keep an auction open if there is a round in which no bids or "proactive" waivers (*i.e.*, waivers submitted by the bidder, as explained at ¶¶ 85-87) are submitted.<sup>140</sup>

71. Comments. Both AMTA and Nextel support the Commission's proposals to impose bid increments.<sup>141</sup> Pro Tec Communications, Inc. ("Pro Tec"), however, suggests that the Commission's proposed bid increment system may work a hardship on incumbent licensees who also are designated entities that plan to participate in the auction, because the proposed \$0.02 per MHz-pop may cause untenable jumps in bidding prices.<sup>142</sup> Pro Tec explains that the value of sparsely populated areas and a widely distributed population base, which represents that portion not covered by Pro Tec's current service, is not equal to the per pop value of an urban, densely populated market.<sup>143</sup> Thus, Pro Tec suggests that the Commission reject the per pop system and simply adopt the proposed five percent criterion.<sup>144</sup>

72. Discussion. We will announce by Public Notice prior to the auction the general guidelines for bid increments.<sup>145</sup> 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. Where a tie bid occurs, we will determine the high bidder by the order in which the Commission receives the bids.<sup>146</sup> We have considered Pro Tec's argument that there will be differences in the per pop values of licenses across MTAs and even for different blocks within the same MTA, depending on the status of incumbents on the different blocks. To allow for the flexibility to deal with these differences, the Commission retains the discretion to vary both absolute and percentage bid increments for specific licenses. We do not believe that the possibility of value differences leads to the conclusion that we should eliminate absolute bid increments, as this might unduly prolong the auction.

### 3. Stopping Rules

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<sup>140</sup> *Id.*

<sup>141</sup> AMTA Comments at 4; Nextel Comments at 3.

<sup>142</sup> Pro Tec Comments at 8.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 9.

<sup>145</sup> In an *Ex Parte* Letter filed on August 17, 1995, Geotek requested that the Commission retain discretion to lower the bid increments. We have adopted Geotek's suggestion to the extent that we have retained the discretion to set, raise or lower the bid increments by announcement before or during the auction.

<sup>146</sup> See *Competitive Bidding Second Report and Order* at ¶¶ 124-126.

73. Background. In multiple round auctions, a stopping rule must be established for determining when the auction is over.<sup>147</sup> In simultaneous multiple round auctions, bidding may close separately on individual licenses, simultaneously on all licenses, or a hybrid approach may be used. Under a license-by-license approach, bidding closes on each license after a certain number of rounds pass in which no new acceptable bids are submitted for that particular license. With a simultaneous stopping rule, bidding generally remains open on all licenses until there is no new acceptable bid for any license. This approach provides bidders full flexibility to bid for any license as more information becomes available during the course of the auction, but it may lead to very long auctions unless an activity rule is imposed. Under a hybrid approach, we may use a simultaneous stopping rule (along with an activity rule designed to expedite closure for licenses subject to the simultaneous stopping rule) for the higher value licenses. For lower value licenses, where the loss from eliminating some back-up strategies is less, we may use the license-by-license approach.

74. For 900 MHz SMR, we proposed to adopt a simultaneous stopping rule.<sup>148</sup> We noted that MTA licenses are expected to have relatively high values because of the substantial amount of clear spectrum that remains available and the high valuation of SMR spectrum in secondary market transactions.<sup>149</sup> AMTA and Nextel support the Commission's proposal.<sup>150</sup>

75. Discussion. We will adopt a simultaneous stopping rule for the 900 MHz SMR auction. The substitutability between licenses within the same MTA, and the ability to pursue back-up strategies support the use of a simultaneous stopping rule. Bidding will remain open on all licenses in an auction until bidding stops on every license. The auction will close after one round passes in which no new valid bids or proactive activity rule waivers (as defined in ¶¶ 85-86, *infra*) are submitted. We retain the discretion to keep an auction open even if no new acceptable bids and no proactive waivers are submitted in a single round.<sup>151</sup> In the event that we exercise this discretion, the effect will be the same as if a bidder has submitted a proactive waiver. We also retain the discretion to announce license-by-license closings.

76. We retain the discretion to declare after 40 rounds that the auction will end after some specified number of additional rounds. We believe this number of rounds will assure that the auction will not close prematurely, while providing bidders with fair assurance that

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<sup>147</sup> *Id.* at ¶ 128.

<sup>148</sup> *Second R&O and Second Further Notice* at ¶ 82.

<sup>149</sup> *Id.*

<sup>150</sup> AMTA Comments at 4; Nextel Comments at 3.

<sup>151</sup> Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC Rcd 7684 (1994) at ¶ 3.

the auction will be conducted as intended.<sup>152</sup> Bids will be accepted only on licenses where the high bid has increased in the last three rounds.<sup>153</sup> 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.

77. The disadvantage of declaring an imminent end to an auction, however, is that the procedure may result in less efficient allocation of licenses than if the auction remained open as long as new bids were received.<sup>154</sup> Therefore, we will declare the imminent end of the auction only in the case of extremely dilatory bidding, as we favor other methods to hasten the end of an auction -- shortening the bidding rounds, raising the minimum bid increments, and proceeding to a later auction stage.<sup>155</sup> This will facilitate the rapid completion of the auction by permitting the Commission to use larger bid increments, thereby speeding the auction pace without risking a premature auction close.<sup>156</sup>

#### 4. Duration of Bidding Rounds

78. Background. We proposed in the *Second R&O and Second Further Notice* to reserve the discretion to vary the duration of the bidding rounds or the interval at which bids are accepted. AMTA and Nextel support the Commission's proposals.<sup>157</sup>

79. Discussion. In simultaneous multiple round auctions, bidders may need a significant amount of time to evaluate back-up strategies and develop their bidding plans. We delegate to the Wireless Telecommunications Bureau the discretion to vary the duration of the bidding rounds or the interval at which bids are accepted (*e.g.*, run more than one round per day) in order to move the auction toward 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.

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<sup>152</sup> See *Competitive Bidding Fifth Report and Order* at ¶ 48.

<sup>153</sup> *Competitive Bidding Fifth Report & Order* at ¶ 49.

<sup>154</sup> Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Fourth Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC Rcd 6858 (1994) (*Competitive Bidding Fourth Memorandum Opinion & Order*) at ¶ 20.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at ¶ 5.

<sup>157</sup> AMTA Comments at 4; Nextel Comments at 3.

## 5. Activity Rules

80. Background. To ensure that simultaneous auctions with simultaneous stopping rules close within a reasonable period of time and to increase the information conveyed by bid prices during the auction, it is necessary to impose an activity rule to prevent bidders from waiting until the end of the auction before participating. In the *Competitive Bidding Second Report & Order*, we adopted the Milgrom-Wilson activity rule as our preferred activity rule where a simultaneous stopping rule is used.<sup>158</sup> The Milgrom-Wilson approach encourages bidders to participate in early rounds by limiting their maximum participation to some multiple of their minimum participation level. Bidders are required to declare their maximum eligibility in terms of MHz-pops, and to make an upfront payment proportional to that eligibility level.<sup>159</sup> (See discussion of upfront payments at ¶¶ 111-113, *infra*) In each round, bidders are limited to bidding on licenses encompassing no more than the number of MHz-pops covered by their upfront payment. Licenses on which a bidder is the high bidder at the end of the withdrawal period in the previous round, as well as licenses on which a new valid bid is placed, count toward this bidding limit. Under this approach, bidders have the flexibility to shift their bids among any license for which they have applied so long as, within each round, the total MHz-pops encompassed by those licenses does not exceed the total number of MHz-pops on which they are eligible to bid.

81. In the *Second R&O and Second Further Notice*, we tentatively concluded that the Milgrom-Wilson activity rule should be used in conjunction with the proposed simultaneous stopping rule to award 900 MHz SMR licenses. We noted that it would best achieve the Commission's goals of affording bidders flexibility to pursue backup strategies, while at the same time ensuring that simultaneous auctions are concluded within a reasonable period of time. AMTA and Nextel support the Commission's proposals.<sup>160</sup>

82. Discussion. We will employ the Milgrom-Wilson activity rule in conjunction with the simultaneous stopping rule. Under the Milgrom-Wilson procedure, the minimum activity level, measured as a fraction of the bidder's eligibility in the current round, increases during the course of the auction. Absent waivers (discussed *infra*), a bidder's eligibility (in terms of MHz-pops) 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 \$.02 per MHz-pop.

83. 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 of the MHz-pops for which it

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<sup>158</sup> *Competitive Bidding Second Report & Order* at ¶¶ 144-145.

<sup>159</sup> The number of "MHz-pops" is calculated by multiplying the population of the license service area by the amount of spectrum authorized by the license.

<sup>160</sup> AMTA Comments at 4; Nextel Comments at 3.

current, is eligible. Failure to maintain the requisite activity level will result in a reduction in the amount of MHz-pops upon which a bidder will be eligible to bid in the next round of bidding (unless an activity rule waiver, as defined in ¶ 85, *infra*, 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 (2). 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 is required to be active on at least 75 percent of the MHz-pops 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 MHz-pops 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 nineteenth (20/19). We 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.

84. As in prior auctions, we will determine the transition from one stage to the next in the 900 MHz SMR auction by the aggregate level of bidding activity, subject to our discretion. The transition rule also may be defined in terms of the "auction activity level" -- the sum of the MHz-pops of those licenses whose high bid increased in the current round, as a percentage of the total MHz-pops 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. However, we retain the discretion 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 MHz-pops) on which there are new bids, the number of new bids, and the percentage increase in revenue.

85. 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, we 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 (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 amount bid. An activity rule waiver applies to an entire round

of bidding and not to a particular MTA service area.

86. Bidders will be afforded an opportunity to override the automatic waiver mechanism when they place a bid, if they intentionally wish to reduce their bidding eligibility and do not want to use a waiver to retain their eligibility at its current level.<sup>161</sup> If a bidder overrides the automatic waiver mechanism, its eligibility permanently will be reduced (according to the formulas specified above), 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 proactively enter an activity rule waiver during the bid submission period. Thus, a "proactive" waiver, as distinguished from an automatic waiver, is one requested by the bidder. If a bidder submits a proactive waiver in a round in which no other bidding activity occurs, the auction will remain open.

87. The Bureau retains the discretion to issue additional waivers during the course of an auction for circumstances beyond a bidder's control. The Bureau 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.<sup>162</sup>

## 6. Rules Prohibiting Collusion

88. Background. In the *Competitive Bidding Second Report & Order*, we adopted a special rule prohibiting collusive conduct in the context of competitive bidding.<sup>163</sup> We observed that such a rule would serve the objectives of the Budget Act by preventing parties, especially the largest firms, from agreeing in advance to bidding strategies that divide the market according to their strategic interests and disadvantage other bidders.<sup>164</sup> In the *Second R&O and Second Further Notice*, we tentatively concluded that Section 1.2105(c) of the Commission's Rules would apply to 900 MHz SMR auctions.<sup>165</sup> We also proposed that winning bidders in 900 MHz SMR auctions be subject to Section 1.2107(d) of the Commission's Rules.

89. Comments. AMTA suggests that the Commission modify the collusion rules to

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<sup>161</sup> See *Competitive Bidding Fourth Memorandum Opinion and Order* at ¶ 15.

<sup>162</sup> See *Competitive Bidding Second Report and Order* at ¶ 145.

<sup>163</sup> See 47 C.F.R. § 1.2105(c); see also *Competitive Bidding Second Memorandum Opinion & Order* at ¶¶ 50-53 and Implementation of Section 309(j) of the Communications Act - Competitive Bidding. Erratum. PP Docket No. 93-253, rel. Oct. 19, 1994 (*Competitive Bidding 2nd MO&O Erratum*).

<sup>164</sup> See *Competitive Bidding Second Report & Order* at ¶ 221.

<sup>165</sup> *Second R&O and Second Further Notice* at ¶ 94.

reflect the differences between Section 1.2107(d) and Section 1.2105(c).<sup>166</sup> Specifically, AMTA requests that the Commission clarify that consortia agreements entered into after the filing of the Form 175 are permitted subject to the limitations set out in Section 1.2105(c)(2), which allows modification of the short-form to reflect the formation of consortia, under certain circumstances.<sup>167</sup> RAM requests that the Commission clarify that providing information about existing systems to potential new entrants in the 900 MHz SMR service does not constitute collusion.<sup>168</sup>

90. Discussion. We will subject 900 MHz SMR licensees to the reporting requirements and rules prohibiting collusion embodied in Sections 1.2107(d) and 1.2105(c) of the Commission's Rules. In response to AMTA's suggestion, we restate the collusion rules here. Section 1.2107(d) provides that, as an exhibit to the long-form application, the applicant must provide 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. The rule provides that such agreements must have been entered into prior to the filing of the FCC Form 175. Section 1.2105(c), however, provides an exception to that prohibition for bidders who have not filed Form 175 applications for licenses in any of the same geographic license areas.<sup>169</sup> Those bidders may enter into such discussions, consortia, or arrangements, or add equity partners, after the filing of short-form applications.<sup>170</sup> We also will permit communications among bidders concerning matters unrelated to the license auctions, except for communications resulting in a transfer of control of the applicant.<sup>171</sup>

91. Section 1.2105(c)(4) also provides an exception for non-controlling parties holding an attributable interest in multiple applicants for the same geographic license area. Such parties may acquire an ownership interest in, form a consortium with, or enter into a joint bidding arrangement with, other applicants for licenses in the same geographic license area, provided that they have not communicated and will not communicate with any party

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<sup>166</sup> AMTA Comments at 4.

<sup>167</sup> AMTA Comments at 4-5.

<sup>168</sup> RAM Comments at 8.

<sup>169</sup> 47 C.F.R. § 1.2105(c); see *Competitive Bidding Second Memorandum Opinion and Order* at ¶ 51 and *Competitive Bidding 2nd MO&O Erratum*.

<sup>170</sup> 47 C.F.R. § 1.2105(c)(3).

<sup>171</sup> *Competitive Bidding Fourth Memorandum Opinion & Order* at ¶ 56. But see *Letter to R. Michael Senkowski from Rosalind K. Allen, Acting Chief, Commercial Radio Division*, rel. Dec. 1, 1994 (establishing that discussions that indirectly provide information that affects bidding strategy also are precluded by anti-collusion rules) and *Competitive Bidding Fourth Memorandum Opinion & Order* at note 125 (stating applicants also are subject to existing antitrust laws).

concerning the bids or bidding strategies of more than one of the applicants in which they hold attributable interests, or with which they have a consortium or joint bidding arrangement, and which have applied for licenses in the same geographic license area(s). The arrangements also must not result in any change in control of an applicant.<sup>172</sup>

92. In addition, as discussed at ¶¶ 104-105, *infra*, bidders will be required by Section 1.2105(a)(2) to identify on their 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. 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.

93. We deny RAM's request to modify the collusion rule to exempt communications between MTA bidders and incumbents. First, as we have stated, the Bidder Information Package will contain information about the incumbent licensees. Any communications between MTA bidders and incumbent licensees should take place prior to the deadline for filing Form 175s. We see no reason to create a special exemption for this situation, particularly because the MTA bidder and the incumbent licensee may be competing for the same MTA license.

94. We note 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 or the Commission's rules in connection with participation in the auction process may be subject to penalties under antitrust laws, forfeiture of their down payment or their full bid amount and revocation of their license(s), and they may be prohibited from participating in future auctions.<sup>173</sup>

## **C. Procedural and Payment Issues**

### **1. Pre-auction Application Procedures**

95. Background. In the *Competitive Bidding Second Report & Order*, the Commission established general competitive bidding rules and procedures, which we noted may be modified on a service-specific basis.<sup>174</sup> In the *Second R&O and Second Further Notice*, we proposed to follow generally the processing and procedural rules established in the

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<sup>172</sup> 47 C.F.R. § 1.2105(c)(4); see *Competitive Bidding Second Memorandum Opinion and Order* at ¶ 52.

<sup>173</sup> *Second Report & Order & Further Notice* at ¶ 96.

<sup>174</sup> *Competitive Bidding Second Report and Order* at ¶ 6; 47 C.F.R. Part 1, Subpart Q.

*Competitive Bidding Second Report & Order*, with certain modifications designed to address the particular characteristics of the 900 MHz SMR service. AMTA generally agrees with our proposals.<sup>175</sup> Therefore, we will adopt such modified rules. These rules are structured to ensure that bidders and licensees are qualified and will be able to construct systems quickly and offer service to the public. By ensuring that bidders and license winners are serious, qualified applicants, these proposed rules will minimize the need to re-auction licenses and prevent delays in the provision of 900 MHz SMR service to the public.

96. As MTA 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 900 MHz licensees that essentially are confined to the smaller DFA region. Accordingly, we will treat all MTA applicants as initial applicants for public notice, application processing, and auction purposes, regardless of whether they are already incumbent operators.

97. 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."<sup>176</sup> 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.<sup>177</sup> 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 Commission rules, and we will dismiss applications not meeting those requirements prior to the competitive bidding.<sup>178</sup>

98. In the *Competitive Bidding Second Report & Order*, we determined that we should require only a short-form application (FCC Form 175) prior to competitive bidding, and that only winning bidders should be required to submit a long-form license application (FCC Form 600) after the auction. As we determined that such a procedure would fulfill the statutory requirements and objectives and adequately protect the public interest, we incorporated these requirements into the rules adopted in the *Competitive Bidding Second Report & Order*.<sup>179</sup> Accordingly, we will extend the application of these rules to the competitive bidding process for 900 MHz SMR.

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<sup>175</sup> AMTA Comments at 5.

<sup>176</sup> 47 U.S.C. § 309(j)(5).

<sup>177</sup> *Id.*

<sup>178</sup> See H.R. Rep. No. 111, 103rd Cong., 1st Sess. 258 (1993) (House Report).

<sup>179</sup> See 47 C.F.R. §§ 1.2104 and 1.2107.

99. Prior to the start of the 900 MHz SMR auction, the Wireless Telecommunications Bureau 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, and the deadline by which short-form applications must be filed and the amounts and deadlines for submitting the upfront payment.<sup>180</sup> We 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 Public Notice will be dismissed, with prejudice, as untimely.

100. Soon after the release of the initial Public Notice, a Bidder Information Package will be made available to prospective bidders. As discussed at ¶ 64, *supra*, the bidders' package will contain information on the incumbents occupying blocks on which bidding will be available.

101. 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 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. The short-form applications will require applicants to provide the information required by Section 1.2105(a)(2) of the Commission's Rules.<sup>181</sup> Specifically, each applicant will be required to specify on its Form 175 applications certain identifying information, including its status as a designated entity (if applicable), its classification (*i.e.*, individual, corporation, partnership, trust, or other), the MTAs and frequency 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.

102. As we indicated in the *Competitive Bidding Second Report & Order*, if we receive only one application that is acceptable for filing for a particular license, and thus there is no mutual exclusivity, we 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 (as discussed at ¶ 127, *infra*).<sup>182</sup> If no petitions to deny are filed, the application will be grantable after 30 days.

## 2. Amendments and Modifications

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<sup>180</sup> See *Competitive Bidding Second Report & Order* at ¶ 164.

<sup>181</sup> 47 C.F.R. § 1.2105(a)(2).

<sup>182</sup> See *Competitive Bidding Second Report & Order* at ¶ 165.

103. Background. To encourage maximum bidder participation, we proposed in the *Second R&O and Second Further Notice* to provide applicants with an opportunity to correct minor defects in their short-form applications prior to the auction.<sup>183</sup> We received no comments on this proposal.

104. Discussion. On the date set for submission of corrected applications, applicants that on their own discover minor errors in their applications (*e.g.*, typographical errors, incorrect license designations, etc.) will be permitted to file corrected applications. We also will waive the *ex parte* rules as they apply to the submission of amended short-form applications for the 900 MHz SMR auctions, to maximize applicants' opportunities to seek Commission staff advice on making such amendments.<sup>184</sup> 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.<sup>185</sup> Applicants may modify their short-form applications to reflect formation of consortia or changes in ownership at any time before or during an auction, provided such changes will not result in a change in control of the applicant, and provided that the parties forming consortia or entering into ownership agreements have not applied for licenses in any of the same geographic license areas.<sup>186</sup> In addition, applications that are not signed will be dismissed as unacceptable, as will applications in which no market designations are made.

105. In addition, a single member of a bidding consortium may withdraw from a consortia only in a particular MTA(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.<sup>187</sup>

106. Upon reviewing the short-form applications, we will issue a Public Notice listing

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<sup>183</sup> *Second R&O and Second Further Notice* at ¶ 105.

<sup>184</sup> The Commission also waived the *ex parte* rules as they applied to the A and B blocks of the broadband PCS auctions. See Commission Announces that Mutually Exclusive "Short Form" Applications (Form 175) to Participate in Competitive Bidding Process ("Auctions") are Treated as Exempt for *Ex Parte* Purposes, *Public Notice*, 9 FCC Rcd 6760 (1994).

<sup>185</sup> Bidders who have not filed Form 175 applications for licenses in any of the same geographic license areas may enter into bidding consortia, joint ventures, partnerships or other agreements. See ¶ 90, *infra*.

<sup>186</sup> See *Competitive Bidding Second Memorandum Opinion & Order* at ¶ 52.

<sup>187</sup> See *Letter to Leonard J. Kennedy, Esq. from Rosalind K. Allen, Acting Chief, Commercial Radio Division*, rel. Dec. 14, 1994.

all defective applications, and applicants with minor defects will be given an opportunity to cure 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 generally will 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 as 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.

### 3. Upfront Payments

107. Background. In the *Competitive Bidding Second Report & Order*, we concluded that a substantial upfront payment prior to the beginning of an auction is necessary to ensure that only serious and qualified bidders participate.<sup>188</sup> By requiring such a payment, we also help to ensure that any bid withdrawal or default assessments are paid. We tentatively concluded to use the standard upfront payment formula of \$0.02 per MHz-pop, based on the number of 10-channel blocks in each MTA identified by an applicant on its Form 175, and to allow bidders to bid on any combination of licenses, as long as the total MHz-pops combination would not exceed the amount covered by the upfront payment.<sup>189</sup>

108. Comments. Four commenters addressed the Commission's proposal to require an upfront payment equal to \$0.02 per MHz-pop. RAM supports the Commission's proposal.<sup>190</sup> Geotek does not support the Commission's proposal, reasoning that such a formula, as opposed to a per-license upfront payment, may encourage bidders to bid in every block, including encumbered blocks in which they have no particular interest.<sup>191</sup> Nextel contends that an upfront payment of \$0.02 per MHz-pop may be insufficient to discourage insincere bidders, because the capital outlay is significantly different from PCS.<sup>192</sup> CICS disagrees with Nextel, stating that the nature of the auction process will deter speculators and that, in any event, the imposition of strict penalties is a better safeguard.<sup>193</sup>

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<sup>188</sup> *Competitive Bidding Second Report & Order* at ¶ 171.

<sup>189</sup> Each 10-channel block accounts for .25 MHz.

<sup>190</sup> RAM Comments at 7-8.

<sup>191</sup> Geotek Comments at 6-7.

<sup>192</sup> Nextel Comments at 3-4.

<sup>193</sup> CICS Reply Comments at 6.