

109. Both Geotek and RAM urge the Commission to require upfront payments for each frequency block for which an applicant designates an interest on its FCC Form 175, and that bidding eligibility should be limited to those designated blocks.¹⁹⁴ RAM disagrees with the Commission's proposal to allow bidding on any combination of licenses for which the total MHz-pop does not exceed the amount covered by the upfront payment, because a single upfront payment should not make a bidder eligible for multiple licenses.¹⁹⁵ RAM comments that to do otherwise would not follow the congressional directive to avoid mutual exclusivity.¹⁹⁶

110. Discussion. We reject both Geotek's and RAM's arguments that we should limit a bidder's eligibility to the specific blocks designated on the applicant's Form 175, or that we should adopt a per-license upfront payment. The simultaneous multiple round auction design combined with the standard bid withdrawal payments is designed to allow bidders to have flexibility to substitute bidding on various licenses during the course of the auction. The flexibility to respond to information during the course of the auction is one of the major beneficial features of the auction. If we were to adopt the Geotek/RAM limitation, this flexibility would be lost. For example, bidders can change their strategy during an auction and bid on a larger number of smaller licenses (*i.e.*, MTAs with fewer pops), or a smaller number of larger licenses, so long as the total MHz-pops combination does not exceed the amount covered by the upfront payment. Bidders would be forced to bid on more licenses than they ultimately wish to obtain under the Geotek/RAM proposal. They would be forced to risk an amount that would have little correspondence with the value of the licenses ultimately won. We believe that preserving the bidder's flexibility outweighs the small amount of speculation that might be deterred with a stricter rule, particularly in light of the deterrent effect of the bid withdrawal payment (as discussed at ¶¶ 120-122, *infra*).

111. We will adopt the standard \$0.02 per Mhz-pop formula to calculate the upfront payment. We disagree with Nextel that the \$0.02 per MHz-pop formula is too insignificant to deter speculation in the 900 MHz SMR service. The upfront payment for PCS was calculated to be approximately five percent of the final price to approximate one bid increment. In both the narrowband and broadband PCS auctions, in which we used the \$0.02 per MHz-pop upfront payment, all bid withdrawal payments were paid in full and all winning bidders have paid all amounts due. Thus, our experience demonstrates that the upfront payment will be sufficient to deter speculation in this auction as well.¹⁹⁷

¹⁹⁴ Geotek Comments at 5; RAM Comments at 7-8.

¹⁹⁵ RAM Comments at 7-8.

¹⁹⁶ RAM Comments at 7-8.

¹⁹⁷ In an *Ex Parte* Letter filed August 17, 1995, Geotek claimed that, based on its 900 MHz SMR acquisitions, the \$0.02 per MHz-pop formula overestimates the value of an MTA license. On the other hand, RAM, in an *Ex Parte* Letter filed August 23, 1995, based on its 900 MHz SMR acquisitions, agreed with the proposed \$0.02 per MHz-pop formula. Since there is disagreement as to the licenses' valuation, we will retain

112. In the initial Public Notice issued prior to the auction, we will announce population information corresponding to each license and the upfront payment amount for each MTA license. In general, population coverage for each channel block in each MTA will be based on a formula that takes into account the presence of incumbent licensees.

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

4. Down Payment and Full Payment

114. Background. In the *Competitive Bidding Second Report & Order*, we established a 20 percent down payment requirement for winning bidders to discourage default between the auction and licensing, and to ensure payment of the default assessment if such default occurs.¹⁹⁸ We concluded that a 20 percent down payment was appropriate to ensure that auction winners have the necessary financial capabilities to complete payment for the license and to pay for the costs of constructing a system, while not being so onerous as to hinder growth or diminish access.¹⁹⁹ We also determined that this amount was appropriate for the broadband PCS auctions.²⁰⁰ Using the same reasoning in the *Second R&O and Second Further Notice*, we tentatively concluded that, with the exception of designated entities eligible for installment payments, winning bidders in 900 MHz SMR auctions would have to supplement their upfront payments with a down payment sufficient to bring their total deposits up to 20 percent of their winning bid(s). AMTA generally supports this proposal.²⁰¹

115. Discussion. With the exception of designated entities eligible for installment payments (as discussed at ¶¶ 169-170, *infra*), winning bidders must supplement their upfront payments with a down payment sufficient to bring their total deposits up to 20 percent of their winning bid(s). If the upfront payment already tendered by a winning bidder, after deducting any bid withdrawal and default payments due, amounts to 20 percent or more of its winning bids, no additional deposit will be required. If the upfront payment amount on deposit is greater than 20 percent of the winning bid amount after deducting any bid

the standard \$0.02 formula.

¹⁹⁸ *Competitive Bidding Second Report & Order* at ¶ 190.

¹⁹⁹ *Id.*

²⁰⁰ *See Competitive Bidding Fifth Report & Order* at ¶ 73.

²⁰¹ AMTA Comments at 5.

withdrawal and default payments due, the additional monies will be refunded. If a bidder has withdrawn a bid or defaulted but the amount of the payment cannot yet be determined, the bidder will be required to make a deposit of 20 percent of the amount bid on such licenses. When it becomes possible to calculate and assess the payment, any excess deposit will be refunded. Upfront payments will be applied to such deposits, and to bid withdrawal and default assessments due, before being applied toward the bidder's down payment on licenses the bidder has won and seeks to acquire.

116. Winning bidders must submit the required down payment by cashier's check or wire transfer to our lock-box bank by a date and time to be specified by Public Notice, generally within five business days following the close of bidding. All auction winners generally will be required to make full payment of the balance of their winning bids within five (5) business days following Public Notice that the Commission is prepared to award the license. The Commission generally will grant uncontested licenses within ten (10) business days after receiving full payment.

117. We also will subject an auction winner that is eligible to make payments through an installment plan (*i.e.*, designated entities, as discussed at ¶¶ 152-156, *infra*) to different payment requirements. Such an entity will be required to bring its deposit with the Commission up to five percent of its winning bid after the bidding closes, and will have to pay an additional five percent of its winning bid to the Commission within five (5) business days following Public Notice that the Commission is prepared to award the license. The Commission then will grant the license generally within ten (10) business days after receiving the five percent payment.

5. Bid Withdrawal, Default, and Disqualification

118. Background. We determined in the *Competitive Bidding Second Report & Order* that there must be a substantial payment assessed to bidders if they withdraw a high bid, are found not to be qualified to hold licenses, or default on payment of a balance due. Although we concluded that payment of *all* amounts that a bidder has on deposit may be too severe in many cases, we devised alternative disincentives for withdrawal, default, or disqualification.²⁰² In the *Second R&O and Second Further Notice*, we tentatively concluded that these procedures, found in Sections 1.2104(g) and 1.2109 of the Commission's Rules, would be appropriate for the 900 MHz SMR auction as well.²⁰³ Accordingly, we proposed that any bidder that withdraws a high bid during an auction before the Commission declares bidding closed will be required to reimburse the Commission in the amount of the difference between its high bid and the amount of the winning bid the next time the license is offered by the Commission, if this subsequent winning bid is lower than the withdrawn bid.

²⁰² See *Competitive Bidding Second Report & Order* at ¶ 197.

²⁰³ *Second R&O and Second Further Notice* at ¶ 111.

119. Comments. The only commenter on this issue, Nextel, favors stricter payments on bid withdrawal.²⁰⁴ Nextel maintains that the Commission should impose forfeiture of the upfront payment for withdrawal of a high bid, due to the high potential for abuse in the 900 MHz SMR auctions.²⁰⁵ Nextel, however, fails to explain why the 900 MHz SMR auction would be especially prone to abuse.

120. Discussion. We disagree with Nextel's recommendation, because we believe that forfeiture of the entire upfront payment is too draconian for the bidder who withdraws only one bid. Since commenters have not stated why the 900 MHz SMR service differs in this respect from the narrowband and broadband PCS services, there is no justification for departing from the already tested narrowband and broadband PCS withdrawal, default, and disqualification assessments. Therefore, we believe our proposal to apply Section 1.2104(g)(1) to the 900 MHz SMR auction is more equitable and is consistent with our practice in prior auctions. Section 1.2104(g)(1) provides that any bidder that withdraws a high bid during an auction before the Commission declares bidding closed will be required to reimburse the Commission in the amount of the difference between its high bid and the amount of the winning bid the next time the license is offered by the Commission, if this subsequent winning bid is lower than the withdrawn bid.

121. If a license is re-offered by auction, the "winning bid" refers to the high bid in the auction in which the license is re-offered. If a license is re-offered in the same auction, the winning bid refers to the high bid amount, made subsequent to the withdrawal, in that auction. If the subsequent high bidder also withdraws its bid, that bidder will be required to pay an assessment equal to the difference between its withdrawn bid and the amount of the subsequent winning bid the next time the license is offered by the Commission.²⁰⁶ If a license which is the subject of withdrawal or default is not re-auctioned, but instead is offered to the highest losing bidders in the initial auction, the "winning bid" refers to the bid of the highest bidder who accepts the offer. Losing bidders will not be required to accept the offer, *i.e.*, they may decline without penalty. We wish to encourage losing bidders in simultaneous multiple round auctions to bid on other licenses, and therefore we will not hold them to their losing bids on a license for which a bidder has withdrawn a bid or on which a bidder has defaulted.

122. After bidding closes, we will apply Section 1.2104(g)(2) to assess a defaulting auction winner an additional payment of three percent of the subsequent winning bid or three percent of the amount of the defaulting bid, whichever is less.²⁰⁷ The additional three percent

²⁰⁴ Nextel Comments at 4-5.

²⁰⁵ *Id.* at 4-5.

²⁰⁶ *See* 47 C.F.R. § 1.2104(g)(1).

²⁰⁷ *See* 47 C.F.R. §§ 1.2104(g) and 1.2109.

payment is designed to encourage bidders who wish to withdraw their bids to do so before bidding ceases. We will hold deposits made by defaulting or disqualified auction winners until full payment is made.

123. These payment requirements will discourage default and ensure that bidders meet all eligibility and qualification requirements. If a default or disqualification involves gross misconduct, misrepresentation or bad faith by an applicant, the Commission may declare the applicant and its principals ineligible to bid in future auctions, and may take any other action that it deems necessary, including institution of proceedings to revoke any existing licenses held by the applicant.²⁰⁸

124. If the MTA winner defaults, is otherwise disqualified after having made the required down payment, or the license is terminated or revoked, then the Commission will re-auction the license.²⁰⁹ If the default occurs within five business days after the bidding has closed, the Commission retains the discretion to offer the license to the second highest bidder at its final bid level, or if that bidder declines the offer, to offer the license to other bidders (in descending order of their bid amounts) at the final bid levels. If only a short time has passed since the initial auction, the Commission may choose to offer the license to the highest losing bidders if the cost of running another auction exceeds the benefits.

6. Long-Form Applications

125. Discussion. We proposed in the *Second R&O and Second Further Notice* to apply the general procedures for filing long-form applications²¹⁰ to the 900 MHz SMR auctions.²¹¹ We received no comments on this proposal. Therefore, we will follow these procedures if the winning bidder makes the down payment in a timely manner: A long-form application filed on FCC Form 600 must be filed by a date specified by Public Notice, generally within ten business days after the close of bidding. After the Commission receives the winning bidder's down payment and long-form application, we will review the long-form application to determine if it is acceptable for filing. In addition to the information required in the Form 600, designated entities will be required to submit evidence to support their claim to any special provision available for designated entities described in this Order. This information may be included in an exhibit to FCC Form 600. This information will enable the Commission, and other interested parties, to ensure the validity of the applicant's certification of eligibility for bidding credits, installment payment options, and other special

²⁰⁸ See *Competitive Bidding Second Report & Order* at ¶ 198, citing Character Qualifications Policy Statement, 102 FCC 2d 1179 (1986).

²⁰⁹ See *id.* at ¶ 204; 47 C.F.R. § 1.2109(c).

²¹⁰ See 47 C.F.R. § 1.2107.

²¹¹ *Second R&O and Second Further Notice* at ¶ 116.

provisions. Upon acceptance for filing of the long-form application, the Commission will issue a Public Notice announcing this fact, triggering the filing window for petitions to deny. If the Commission denies all petitions to deny, and is otherwise satisfied that the applicant is qualified, the license(s) will be granted to the auction winner.²¹²

7. Petitions to Deny and Limitations on Settlements

126. Discussion. We determined in the *CMRS Third Report & Order* that the petition to deny procedures in Section 90.163 of the Commission's Rules will apply to the processing of applications for the 900 MHz SMR service.²¹³ Although we did not request comment on this issue, AMTA expressed its support for the Commission's adoption of a limitation on settlements.²¹⁴ AMTA expresses its concern that, due to the small size of the spectrum blocks that will be auctioned in 900 MHz and the presence of incumbents, the auctions offer an opportunity to "greenmail" current licensees.²¹⁵ A party filing a petition to deny against a 900 MHz SMR application will be required to demonstrate standing and meet all other applicable filing requirements. The "greenmail" restrictions in Section 90.162 were established to prevent the filing of speculative applications and pleadings (or threats of the same) designed to extract money from 900 MHz SMR applicants. Thus, we will limit the consideration that an applicant or petitioner is permitted to receive for agreeing to withdraw an application or a petition to deny to the legitimate and prudent expenses of the withdrawing applicant or petitioner.

127. With respect to petitions to deny, the Commission need not conduct a hearing before denying an application if it determines that an applicant is not qualified and no substantial issue of fact exists concerning that determination.²¹⁶ In the event the Commission identifies substantial and material issues of fact, Section 309(i)(2) of the Communications Act permits the submission of all or part of evidence in written form in any hearing and allows employees other than administrative law judges to preside over the taking of written evidence.

8. Transfer Disclosure Requirement

128. Background. In Section 309(j), Congress directed the Commission to "require such transfer disclosures and anti-trafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses

²¹² See generally 47 C.F.R. §§ 90.163-90.166.

²¹³ *CMRS Third Report and Order* at ¶¶ 21, 337, 347.

²¹⁴ AMTA Comments at 5.

²¹⁵ AMTA Comments at 5-6.

²¹⁶ *Competitive Bidding Second Report & Order* at ¶ 202.

and permits."²¹⁷ In the *Competitive Bidding Second Report & Order*, the Commission adopted safeguards designed to ensure that the requirements of Section 309(j)(4)(E) are satisfied.²¹⁸ We decided that it was important to monitor transfers of licenses awarded by competitive bidding to accumulate the necessary data to evaluate our auction designs and to judge whether "licenses [have been] issued for bids that fall short of the true market value of the license."²¹⁹ Therefore, we imposed a transfer disclosure requirement on licenses obtained through the competitive bidding process, whether by a designated entity or not.²²⁰ We tentatively concluded in the *Second R&O and Second Further Notice* that the transfer disclosure requirements of Section 1.2111(a) should apply to all 900 MHz SMR licenses obtained through the competitive bidding process.²²¹

129. Discussion. We received no comments on this proposal. Therefore, we will apply Section 1.2111(a) to all 900 MHz SMR licenses obtained through the competitive bidding process. Generally, licensees transferring their licenses within three years after the initial license grant will be required to file, together with their transfer applications, the associated contracts for sale, option agreements, management agreements, and all other documents disclosing the total consideration received in return for the transfer of its license. As we indicated in the *Second R&O and Second Further Notice*, we will give particular scrutiny to auction winners who have not yet begun commercial service and who seek approval for a transfer of control or assignment of their licenses within three years after the initial license grant, so that we may determine if any unforeseen problems relating to unjust enrichment have arisen outside the designated entity context.²²²

9. Performance Requirements

130. Discussion. The Communications Act requires the Commission to "include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services."²²³ In the *Competitive Bidding Second Report*

²¹⁷ 47 U.S.C. § 309(j)(4)(E).

²¹⁸ *Competitive Bidding Second Report & Order* at ¶¶ 210-226, 258-265.

²¹⁹ See House Report at 257; *Competitive Bidding Second Report & Order* at ¶ 214.

²²⁰ See 47 C.F.R. § 1.2111(a).

²²¹ *Second R&O and Second Further Notice* at ¶ 120.

²²² *Id.* See also *Competitive Bidding Second Report & Order* at ¶ 214. These particular transfer disclosure requirements are in addition to the unjust enrichment provisions discussed in this Order at ¶¶ 173-174, *infra*.

²²³ 47 U.S.C. § 309(j)(4)(B).

& Order, we decided it was unnecessary and undesirable to impose additional performance requirements, beyond those already provided in the service rules, for all auctionable services.²²⁴ In the *Second R&O and Second Further Notice*, we tentatively concluded that the coverage requirements that we adopted there would be sufficient to address the spectrum warehousing concern.²²⁵ We received no comment on this issue. Therefore, we will not adopt any performance requirements for the 900 MHz SMR service beyond that required by Section 90.665. Because the failure to meet those coverage requirements will result in automatic cancellation of license, we believe that is sufficient incentive to promote prompt service and prevent spectrum warehousing.²²⁶

D. Treatment of Designated Entities

1. Overview, Objectives, and the Impact of *Adarand Constructors v. Peña*

131. Background. The Communications Act provides that, in developing competitive bidding procedures, the Commission shall consider various statutory objectives and consider several alternative methods for achieving them. Specifically, the statute provides that in establishing eligibility criteria and bidding methodologies the Commission shall "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."²²⁷ Small businesses, rural telephone companies and businesses owned by minorities and/or women are collectively referred to as "designated entities."²²⁸ Section 309(j)(4)(A) provides that to promote the statute's objectives the Commission shall "consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods . . . and combinations of such schedules and methods."²²⁹ The statute also requires the Commission to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services."²³⁰

²²⁴ *Competitive Bidding Second Report and Order* at ¶ 219. See also 47 C.F.R. §§ 24.103; 24.206.

²²⁵ *Second R&O and Second Further Notice* at ¶ 121; 47 C.F.R. § 90.665.

²²⁶ See discussion at ¶¶ 31-33, *supra*.

²²⁷ 47 U.S.C. § 309(j)(3)(B).

²²⁸ *Competitive Bidding Second Report and Order* at ¶ 227.

²²⁹ 47 U.S.C. § 309(j)(4)(A).

²³⁰ 47 U.S.C. § 309(j)(4)(D).

132. In instructing the Commission to ensure the opportunity for designated entities to participate in auctions and spectrum-based services, Congress was well aware of the problems that designated entities would have in competing against large, well-capitalized companies in auctions and the difficulties they encounter in accessing capital. For example, the legislative history accompanying our grant of auction authority states generally that the Commission's regulations "must promote economic opportunity and competition," and "[t]he Commission will realize these goals by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses and businesses owned by members of minority groups and women."²³¹ The House Report states that the House Budget Committee was concerned that, "unless the Commission is sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications industries."²³² More specifically, the House Budget Committee was concerned that adoption of competitive bidding should not have the effect of "excluding" small businesses from the Commission's licensing procedures, and anticipated that the Commission would adopt regulations to ensure that small businesses would "continue to have opportunities to become licensees."²³³

133. Consistent with Congress's concern that auctions not operate to exclude small businesses, the provisions relating to installment payments clearly were intended to assist small businesses. The House Report states that these related provisions were drafted to "ensure that all small businesses will be covered by the Commission's regulations, including those owned by members of minority groups and women."²³⁴ It also states that the provisions in Section 309(j)(4)(A) relating to installment payments were intended to promote economic opportunity by ensuring that competitive bidding does not inadvertently favor incumbents with "deep pockets" "over new companies or start-ups."²³⁵

134. In addition, with regard to access to capital, Congress had made specific findings in the Small Business Credit and Business Opportunity Enhancement Act of 1992, that "small business concerns, which represent higher degrees of risk in financial markets than do large businesses, are experiencing increased difficulties in obtaining credit."²³⁶ As a result of these difficulties, Congress resolved to consider carefully legislation and regulations "to ensure that small business concerns are not negatively impacted" and to give priority to passage of

²³¹ House Report at 254.

²³² *Id.*

²³³ *Id.* at 255.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ Small Business Credit and Business Opportunity Enhancement Act of 1992, § 331(a) (3), Pub. Law 102-366, Sept. 4, 1992.

"legislation and regulations that enhance the viability of small business concerns."²³⁷

135. In our initial implementation of Section 309(j) of the Communications Act, we established in the *Competitive Bidding Second Report & Order* eligibility criteria and general rules that would govern the special measures for designated entities.²³⁸ We also identified several measures, including installment payments, spectrum set-asides, and bidding credits, from which we could choose in establishing rules for auctionable spectrum-based services. We stated that we would decide whether and how to use these special provisions, or others, when we developed specific competitive bidding rules for particular services. In addition, we set forth rules designed to prevent unjust enrichment by designated entities who transfer ownership in licenses obtained through the use of these special measures or who otherwise lose their designated entity status.

136. We have employed a wide range of special provisions and eligibility criteria designed to meet the statutory objectives of providing opportunities to designated entities in other spectrum-based services.²³⁹ The measures adopted thus far for each service were established after closely examining the specific characteristics of the service and determining whether any particular barriers to accessing capital stood in the way of designated entity opportunities. After examining the record in the competitive bidding proceeding in PP Docket 93-253, we established provisions that sought to enable designated entities to overcome the barriers to accessing capital in each particular service. Moreover, the measures we adopted also were designed to increase the likelihood that designated entities who win licenses in the auctions become strong competitors in the provision of wireless services.

137. Impact of *Adarand Constructors, Inc. v. Peña*. In the broadband PCS docket, we determined that, on separate entrepreneurs' blocks, the bidding credits would vary according to the type of qualifying designated entity that applied (*i.e.*, a small business would receive a 10 percent bidding credit, a business owned by minorities or women would receive

²³⁷ § 331(b)(2),(3).

²³⁸ See also *Competitive Bidding Second Memorandum Opinion and Order* at ¶¶ 64 through 165.

²³⁹ For instance, we determined that minority-owned and women-owned businesses in the nationwide narrowband PCS auction would receive a 25 percent bidding credit on certain channels. *Competitive Bidding Third Report and Order* at ¶ 72. In the regional narrowband PCS auction women-owned and minority-owned businesses would receive a 40 percent bidding credit on certain channels and small businesses would be eligible for installment payments on all channels. *Id.* at ¶ 87; Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Third Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, 10 FCC Rcd 175 (1994) (*Competitive Bidding Third Memorandum Opinion & Order & Further Notice*) at ¶ 58. For the Interactive Video and Data Service (IVDS), we adopted a 25 percent bidding credit for one license in each market for women-owned and minority-owned businesses and installment payments for small businesses. Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Fourth Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2330 (1994) (*Competitive Bidding Fourth Report & Order*) at ¶¶ 39, 53.

a 15 percent bidding credit, and a small business owned by women or minorities would receive an aggregated bidding credit of 25 percent),²⁴⁰ and all entrepreneurs' block licensees would be eligible for varying degrees of installment payments.²⁴¹ The Commission adopted special provisions for businesses owned by members of minority groups or women and analyzed their constitutionality using the "intermediate scrutiny" standard of review articulated in *Metro Broadcasting v. FCC*,²⁴² because, as in *Metro*, the proposed provisions involved Congressionally-mandated benign race- and gender-conscious measures.²⁴³

138. After the release of the broadband PCS rules, the Supreme Court decided *Adarand Constructors v. Peña*,²⁴⁴ which overruled *Metro Broadcasting* "to the extent that *Metro Broadcasting* is inconsistent with" the holding in *Adarand* that "all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny."²⁴⁵ As a result of the *Adarand* decision, the constitutionality of any federal program that makes distinctions on the basis of race must serve a compelling governmental interest and must be narrowly tailored to serve that interest.²⁴⁶ Upon further notice,²⁴⁷ the Commission modified the designated entities provisions in the "C" Block auction so as to render them race- and gender-neutral, because of the potential and substantial delay that would be incurred in supplementing the record to meet a "strict scrutiny" standard, and to avoid the substantial likelihood that the auction would be stayed based on the holding in *Adarand*.²⁴⁸

139. In the 900 MHz SMR service, as in other auctionable services, we remain committed to meeting the statutory objectives of promoting economic opportunity and

²⁴⁰ *Competitive Bidding Fifth Report & Order* at ¶ 133. See also *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, PP Docket No. 93-253, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403 (1994) (*Competitive Bidding Fifth Memorandum Opinion & Order*) at ¶ 99.

²⁴¹ *Competitive Bidding Fifth Memorandum Opinion & Order* at ¶ 103.

²⁴² 497 U.S. 547, 564-65 (1990). (*Metro*).

²⁴³ *Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Notice of Proposed Rule Making*, PP Docket No. 93-253, 8 FCC Rcd 7635 (1993) at ¶ 73.

²⁴⁴ 115 S.Ct. 2097 (1995) (*Adarand*).

²⁴⁵ *Adarand*, 115 S.Ct. at 2113.

²⁴⁶ *Id.*

²⁴⁷ *Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Further Notice of Proposed Rule Making*, PP Docket No. 93-253, GN Docket No. 90-314, GN Docket No. 93-252, FCC 95-263, released June 23, 1995.

²⁴⁸ *Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Sixth Report and Order*, PP Docket No. 93-253, FCC 95-301, released July 18, 1995 (*C Block Auction Order*).

competition, of avoiding excessive concentration of licenses, and of ensuring access to new and innovative technologies by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. Accordingly, in balancing the objectives set forth in the statute, we tentatively concluded that bidding credits, reduced down payments and installment payments should be made available to all small businesses -- including those owned by minorities and women and small rural telephone companies -- on all 900 MHz SMR channel blocks in each MTA.²⁴⁹ In addition, to facilitate the introduction of service to rural areas, we proposed to allow rural telephone companies to obtain geographically partitioned 900 MHz SMR licenses in areas where they provide telephone service, similar to the program adopted in broadband PCS.²⁵⁰

140. The *Second R&O and Second Further Notice* in this docket was released two months before the Supreme Court's decision in *Adarand*. Consequently, we issued a Public Notice requesting further comment on the effect of the *Adarand* decision on the proposals made in the *Second R&O and Second Further Notice* in order to supplement our record in the 900 MHz SMR proceeding.²⁵¹ We received three comments in response to the Public Notice. All three commenters, AMTA, Geotek, and RAM, agree with the Commission's proposal not to adopt separate provisions for minority-owned and women-owned entities that are not small businesses. AMTA submits that the financial barriers which have provided a basis for race- and gender-specific programs in other more capital-intensive services are not present in the 900 MHz SMR service and that the service lacks a history of licensing discrimination.²⁵² Geotek asserts that there is no history of discrimination in 900 MHz SMR, and that Section 309(j) does not justify separate classifications for minority-owned and women-owned businesses in the 900 MHz SMR service.²⁵³ RAM contends that the Commission's gender-neutral and race-neutral proposals serve as adequate incentive to diversified participation in the 900 MHz SMR service.²⁵⁴ All three commenters express their belief that the goals of Section 309(j) will be served by the Commission's original proposal to extend benefits only to small businesses, the definition of which will, they believe, include significant numbers of minority-owned and women-owned entities within its purview.²⁵⁵ Based on the record in this

²⁴⁹ *Second R&O and Second Further Notice* at ¶ 128.

²⁵⁰ *Id.*; See also *Competitive Bidding Fifth Report and Order* at ¶¶ 148-153.

²⁵¹ Request for Comments in 900 MHz SMR Proceeding, *Public Notice*, DA 95-1479, released June 30, 1995.

²⁵² Further Comments of AMTA, filed July 14, 1995, at 3.

²⁵³ Further Comments of Geotek, filed July 14, 1995, at 3.

²⁵⁴ Further Comments of RAM, filed July 14, 1995, at 1-2.

²⁵⁵ AMTA Further Comments at 5-6; Geotek Further Comments at 4; RAM Further Comments at 1-2.

proceeding which establishes 900 MHz SMR service's comparatively lower capital costs than PCS, we intend to adopt bidding credits, installment payments, and reduced down payments for small businesses that meet the Commission's small business definitions, as discussed in ¶¶ 152-156, and will not adopt separate provisions for minority-owned and women-owned entities. As there will be small businesses with variable abilities to access capital, we will tier the bidding credits to account for these differences. We believe these provisions will meet Congress's goal of promoting wide dissemination of wireless licenses. Detailed discussion regarding each aspect of this decision follow.

2. Eligibility for Bidding Credits, Installment Payments and Reduced Down Payments

141. Background. In the *Second R&O and Second Further Notice*, we proposed to limit eligibility for bidding credits, installment payments and reduced down payments to small businesses, including those owned by members of minority groups and women and those rural telephone companies that meet our small business size standards.²⁵⁶ We proposed to define small businesses as those entities with less than \$3 million in average gross revenues for the preceding three years, based in part on data provided by AMTA.²⁵⁷ We stated our belief that providing credits on all blocks and lowering the gross revenue threshold for small businesses would create more opportunities for minorities and women.²⁵⁸ To enhance our understanding of the capital requirements the 900 MHz SMR service, however, we sought comment on the projected costs associated with acquisition, construction and operation of 900 MHz MTA licenses; the composition of existing 900 MHz SMR providers in terms of women and minority ownership; to what extent participants in 900 MHz SMR networks have been small businesses owned by minorities and women; and the likelihood that management agreements are likely to serve as a vehicle for participation in the 900 MHz SMR service by minority and women-owned businesses.²⁵⁹

142. In the *Competitive Bidding Second Memorandum Opinion & Order*, we stated that we would define eligibility requirements for small businesses on a service-specific basis, taking into account the capital requirements and other characteristics of each particular service in establishing the appropriate threshold.²⁶⁰ With respect to eligibility in the 900 MHz auction for provisions available to small businesses, we stated that, because the 900 MHz SMR service is expected to be less capital-intensive than broadband PCS and regional narrowband

²⁵⁶ *Second R&O and Second Further Notice* at ¶ 135.

²⁵⁷ *Id.* at ¶ 138 and n.202, citing AMTA *Ex Parte* Letter, filed March 23, 1995, at 3.

²⁵⁸ *Id.* at ¶ 135.

²⁵⁹ *Id.* at ¶ 136.

²⁶⁰ *Competitive Bidding Second Memorandum Opinion & Order* at ¶ 145.

PCS, in which we adopted a \$40 million threshold,²⁶¹ and it encompasses a smaller amount of spectrum than PCS and less area than regional narrowband PCS, a much lower gross revenue threshold would be warranted. Therefore, we proposed to define a small business as an entity that, together with affiliates and attributable investors, has average gross revenues for the three preceding years of less than \$3 million.

143. With respect to the proposed small business definition, we sought comment on whether the \$3 million definition was an appropriate threshold; and whether it should be higher or lower, based on the types of companies that are likely to benefit from the special provisions offered.²⁶² We also tentatively concluded that we would consider the revenues of affiliates and certain investors, and we proposed to apply the 25 percent attribution threshold and affiliation rules similar to those used in the PCS auction rules.²⁶³ We sought comment on whether the 900 MHz SMR service warranted a different attribution threshold.²⁶⁴

144. We also sought comment on whether, in the event we were to adopt separate provisions for minority-owned and women-owned entities, we should use the definition of minority-owned businesses and women-owned businesses contained in Section 1.2110(b)(2) of the Commission's rules, *i.e.*, businesses in which minorities and/or women control the applicant, have at least 50.1 percent equity ownership and, in the case of a corporate applicant, a 50.1 percent voting interest. Under this rule, every general partner in a partnership either must be a minority and/or woman who individually or together own at least 50.1 percent of the partnership equity.²⁶⁵

145. Comments. AMTA, Nextel, RAM, Celsmer and Motorola favor the Commission's proposal to limit eligibility for bidding credits to small businesses,²⁶⁶ while AMTA, RAM, Celsmer and Motorola also favor reduced down payments and installment payments to small businesses.²⁶⁷ The combination of bidding credits, reduced down payments and installment payments, as well as the relatively small capital outlay required for entry into

²⁶¹ *Competitive Bidding Fifth Report & Order* at ¶ 175; Implementation of Section 309(j) of the Communications Act - Competitive Bidding Narrowband PCS, PP Docket No. 93-253, *Competitive Bidding Third Memorandum Opinion & Order & Further Notice* at ¶ 46.

²⁶² *Second R&O and Second Further Notice* at ¶ 139.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *See id.* § 1.2110(b)(2).

²⁶⁶ AMTA Comments at 8; Motorola Comments at 9; Nextel Comments at 5; RAM Comments at 6; Celsmer Comments at 5; Celsmer Reply Comments at 3-4.

²⁶⁷ AMTA Comments at 8; Motorola Comments at 9; RAM Comments at 6; Celsmer Comments at 5; Celsmer Reply Comments at 3-4.

the 900 MHz SMR service, were found by commenters to increase the likelihood that women and minority-owned businesses would be able to participate.²⁶⁸ Motorola supports its conclusion with data purporting to show that the capital outlay needed to start up and build out a 900 MHz SMR system will be significantly less than that for either narrowband or broadband PCS.²⁶⁹ Specifically, Motorola estimates that a system adequate to provide service throughout an entire MTA should cost less than \$2 million, as compared with build-out costs for nationwide narrowband and broadband PCS, anticipated to exceed hundreds of millions of dollars.²⁷⁰ AMTA agrees that economic barriers to minority entry into 900 MHz SMR service are extremely small in comparison to other telecommunications services, and that the industry has more diversified licensees than many other telecommunications services, making specific remedies unnecessary.²⁷¹ Celsmer comments that 900 MHz SMR is not as cost-prohibitive as cellular or PCS, eliminating the need for additional enhancements for minority-owned and women-owned businesses.²⁷² Motorola and RAM suggest that the use of enhanced benefits for women-owned and minority-owned entities may well result in a constitutional challenge, which would delay the auction, and that the Commission's proposals in the *Second Further Notice* clearly are constitutional.²⁷³ Nextel comments that the Commission's proposal not to set aside a specific block for designated entity bidding serves the public interest in light of the presence of incumbents.²⁷⁴ In their response to our *Adarand* Public Notice, AMTA, RAM and Geotek expressed support for the Commission's decision to limit eligibility to small businesses.²⁷⁵

146. On the other hand, in comments filed before the Supreme Court's *Adarand* decision, the National Association of Black Owned Broadcasters ("NABOB") and the Minority Business Enterprise Legal and Defense Education Fund, Inc. ("MBELDEF") disagree with the Commission's proposal to limit eligibility to small businesses. NABOB contends that the Commission would not be complying with Section 309(j) of the Act unless it specifically includes rules that promote economic opportunities for minorities.²⁷⁶ NABOB urges the

²⁶⁸ Celsmer Comments at 5; Celsmer Reply Comments at 3-4; RAM Comments at 6; Motorola comments at 6-8; Geotek Comments at 3.

²⁶⁹ Motorola Comments at 6.

²⁷⁰ *Id.*

²⁷¹ AMTA Reply Comments at 2-3.

²⁷² Celsmer Comments at 5; Celsmer Reply Comments at 3-4.

²⁷³ Motorola Reply Comments at 2; 5-6; RAM Comments at 6.

²⁷⁴ Nextel Comments at 5.

²⁷⁵ AMTA Further Comments at 3; Geotek Further Comments at 2; RAM Further Comments at 1.

²⁷⁶ NABOB Comments at 1.

Commission to rely on a 1995 National Telecommunications and Information Administration ("NTIA") study that shows a decline in African-American owned telecommunications companies over the last three years, to justify promotion of minority business opportunities.²⁷⁷ NABOB contends that the Commission is not complying with Section 309(j) because, while 99 percent of all minority businesses may fall under our proposed definition, 99 percent of all small businesses are not minority-owned.²⁷⁸ NABOB proposes a 25 percent bidding credit for all minority-owned businesses having up to \$125 million in gross revenue and limiting eligibility to 20 percent of the channels to minority-owned companies.²⁷⁹ MBELDEF contends that the Commission's proposals do not provide enough benefit to minorities, and that the Commission will not be able to monitor the benefits of its programs for minorities.²⁸⁰ MBELDEF expresses concern that without race-specific benefits, the benefits of any race-neutral provisions will be diluted.²⁸¹

147. Although we did not request comment on the issue of incumbent licensees who meet the designated entity definition, Pro Tec, a women-owned entity, suggests that the Commission waive the auction requirement for incumbent licensees who also are designated entities.²⁸² To that end, Pro Tec suggests that the Commission employ the following criteria to determine when wide area licenses should be awarded to designated entity incumbents: (1) the company is a small or women-owned or minority-owned business as defined in the *Further Notice*; (2) the entity has a fully constructed and operational 900 MHz system operating on at least 10 channels; and (3) the existing system, employing a 55-mile contour, currently provides coverage to 25 percent or more of the population within the MTA.²⁸³ As an alternative, Pro Tec suggests that the Commission use these three criteria to judge eligibility for higher bidding credits, e.g., 40 percent.²⁸⁴ As another alternative, Pro Tec suggests that the Commission limit bidding on channels that are encumbered by designated entities to other designated entities.²⁸⁵ Pro Tec comments that the public interest will be disserved by forcing incumbent designated entity licensees to pay in auctions for spectrum

²⁷⁷ NABOB Comments at 3-4.

²⁷⁸ NABOB Comments at 7.

²⁷⁹ NABOB Comments at 8.

²⁸⁰ MBELDEF Comments at 3.

²⁸¹ MBELDEF Comments at 4.

²⁸² Pro Tec Comments at 4.

²⁸³ *Id.* at 4.

²⁸⁴ *Id.* at 5.

²⁸⁵ *Id.* at 5.

with money that is better spent on construction of a wide area system.²⁸⁶

148. Small Business Definition. The majority of commenters agree with the Commission's proposed definition of small businesses as those with gross revenues over the past three years of \$3 million or less. RAM, AMTA, Motorola and Celsmer comment that this limit will encompass the majority of women-owned and minority-owned businesses.²⁸⁷ Geotek comments that due to the relatively low start-up and build-out costs of the 900 MHz service, small businesses less likely will need special provisions such as bidding credits, installment payments and reduced down payments in the auction.²⁸⁸ Geotek and CICS also comment that affording bidding credits, installment payments, and reduced down payments to entities that exceed the \$3 million threshold may unfairly favor those entities over incumbents.²⁸⁹ CICS, however, suggests that the Commission encourage small business participation by using Basic Trading Areas ("BTAs"), which are smaller service areas, rather than MTAs.²⁹⁰ Motorola estimates that 25 per cent or more of all existing SMR licensees have gross revenues of less than \$3 million, and that the Commission's proposal will limit bidding credits to entities that could successfully compete in the 900 MHz SMR market.²⁹¹ AMTA agrees with Motorola's assessment.²⁹²

149. Small Common Carrier Coalition ("SCCC"), National Telephone Cooperative Association ("NTCA"), SBA and Monterey disagree with the Commission's proposed definition, and urge the Commission to adopt a higher threshold.²⁹³ SCCC contends that the proposed definition is too narrow to include rural telephone companies, which have a significant amount of capital necessary to operate a rural telephone company.²⁹⁴ SCCC suggests that the Commission use the same definition as that used for broadband PCS, *i.e.*, less than \$40 million in gross revenues for the three preceding years, or a prorated gross revenue cap based on the \$40 million cap.²⁹⁵ As an example, SCCC states that under a

²⁸⁶ *Id.* at 4-5.

²⁸⁷ AMTA Comments at 8-9; RAM Comments at 6; Motorola Comments at 7-8; Celsmer Comments at 5-6.

²⁸⁸ Geotek Comments at 3-4.

²⁸⁹ *Id.* at 3-4; CICS Reply Comments at 4.

²⁹⁰ CICS Reply Comments at 4.

²⁹¹ Motorola Comments at 7; Motorola Reply Comments at 6.

²⁹² AMTA Reply Comments at 6-7.

²⁹³ SCCC Comments at 3; NTCA Comments at 4?; SBA Comments at 7; Monterey Reply Comments at 2.

²⁹⁴ SCCC Comments at 3-5.

²⁹⁵ SCCC Comments at 6-7.

prorated cap, the cap for 10 MHz of SMR spectrum would be \$13.5 million.²⁹⁶ As another alternative, SCCC suggests that the Commission base the small business definition on net revenues, which more accurately may reflect a company's resources.²⁹⁷ RAM and Geotek disagree with SCCC's suggestion that the Commission change the proposed small business definition to include rural telephone companies, stating that rural telephone companies already can take advantage of their existing infrastructure and do not need any additional advantage over incumbents and new entrants serving rural areas.²⁹⁸

150. SBA, NTCA, and Celsmer recommend that the Commission adopt a \$15 million threshold, based on high construction costs in the 900 MHz SMR service.²⁹⁹ SBA points out that, due to high construction costs, an entity with only \$3 million in gross revenues could exhaust half its gross revenue in the construction of two blocks, which could range between \$500,000 and \$750,000.³⁰⁰ As a result, SBA concludes, any business under the \$3 million threshold would be precluded from developing a wide area network.³⁰¹ SBA also comments that the Commission should take into account migration of large commercial entities from the 800 MHz SMR service, as it did when it expanded the size of businesses qualifying as small businesses in the narrowband PCS auctions due to potential migration from other services.³⁰² NTCA contends that there is no record indicating that a business with gross revenues of \$3 million or less will be able to raise the capital for construction, and that such a result would render bidding credits, reduced down payment, and installment payments meaningless.³⁰³ NTCA also points out that the Commission's proposed \$3 million threshold does not meet any SBA-approved small business definition.³⁰⁴ RAM replies that the Commission should not delay the auction pending SBA approval on the definition of small businesses.³⁰⁵

151. AMTA, Geotek, and Motorola disagree with the suggestion of SBA, NTCA, and SCCC that the Commission adopt a \$15 million threshold. AMTA and Geotek disagree on

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ RAM Reply Comments at 3-4; Geotek Reply Comments at 4.

²⁹⁹ SBA Comments at 8-9; NTCA Comments at 4; Celsmer Reply Comments at 1-2.

³⁰⁰ SBA Comments at 7-8.

³⁰¹ *Id.* at 8.

³⁰² SBA Comments at 9.

³⁰³ *Id.*

³⁰⁴ NTCA Comments at 4.

³⁰⁵ RAM Reply Comments at 6-7.

the basis that the comparisons with broadband PCS, cellular, or even 800 MHz SMR are not relevant to the 900 MHz spectrum.³⁰⁶ AMTA points out that there are drastic differences between the number of licenses available and the size of the licenses in broadband PCS and in 900 MHz.³⁰⁷ AMTA also states that the nature of 900 MHz SMR makes it more likely that the build-out of the system will be less expensive than cellular, PCS or 800 MHz SMR wide-area systems.³⁰⁸ Geotek contends that SBA's statement regarding migration from the 800 MHz SMR spectrum is purely speculative, and that the licenses are not fungible due to technical differences between the services.³⁰⁹ AMTA states that SBA's contention that an entity with \$15 million in gross revenues has the wherewithal to construct and operate a 900 MHz SMR system is the precise reason why such an entity does not need bidding credits.³¹⁰ AMTA also urges the Commission not to switch to a net revenue test, because a large well-financed entity may use accounting methods that demonstrate very low net revenues.³¹¹ Motorola maintains that expanding the threshold would dilute the Commission's original purpose of conveying benefits to truly small entities.³¹²

152. Discussion. In balancing the objectives set forth in the auction statute, and mindful of the new parameters set out in *Adarand*, we will extend eligibility for bidding credits, reduced down payments and installment payments to all small businesses -- including those owned by minorities, women and small rural telephone companies. Although we are not providing separate provisions for minority-owned and women-owned businesses, we will continue to request bidder information on the short-form filings as to minority and/or women-owned status (as defined in § 90.814(f)), in addition to small business status and, in analyzing the applicant pool and the auction results, we will monitor whether we have accomplished substantial participation by minorities and women through the broad provisions available to small businesses. This also will assist us in preparing our report to Congress on the success of designated entities in auctions.³¹³ If bidding credits only for small businesses prove unsuccessful in accomplishing participation by a significant number of women and minority-owned entities, we retain discretion to tailor our approach for future auctions within the parameters of the *Adarand* strict scrutiny test.

³⁰⁶ AMTA Reply Comments at 5-7; Geotek Reply Comments at 3.

³⁰⁷ AMTA Reply Comments at 7.

³⁰⁸ AMTA Reply Comments at 7-8.

³⁰⁹ Geotek Reply Comments at 3.

³¹⁰ AMTA Reply Comments at 8 n.4. See SBA Comments at 8.

³¹¹ AMTA Reply Comments at 8.

³¹² Motorola Reply Comments at 6-7.

³¹³ See 47 U.S.C. § 309(j)(12)(D).

153. Furthermore, we believe, and are supported by most commenters, that both the \$3 million and \$15 million small business definitions are appropriate for the 900 MHz SMR service. We will adopt a "tiered" system for awarding bidding credits, as discussed in further detail at ¶¶ 164-165, *infra*. We believe that a \$40 million definition is unwarranted, because build-out costs are likely to be much lower than those for broadband PCS and regional narrowband PCS. Additionally, the license supply (1,020) is more abundant and we believe that the costs of acquiring a 900 MHz SMR license are lower than for broadband or narrowband regional PCS licenses. We believe that many of the incumbents already licensed in the 900 MHz SMR service will fall within either one of these definitions of small business,³¹⁴ which are a variation of the definition used for broadband PCS.³¹⁵ Although SBA questions whether a \$3 million entity can raise the capital required to build out a wide area network, we have placed reliance on the estimates both of the industry³¹⁶ and industry representatives³¹⁷ in determining that the \$3 million figure will be high enough to include truly small businesses. Businesses with gross revenues of not more than \$3 million may have systems only in a single MTA and may not be interested in building large regional networks. However, in reliance on SBA's suggestion, we also believe that the \$15 million figure is low enough so as not to include businesses that, by industry standards, would not need the assistance of bidding credits, installment payments, and reduced down payments to compete successfully in the auction. Furthermore, given the costs of building out a system spanning several MTA's, a \$15 million or less small business definition is appropriate.³¹⁸

154. We reject SCCC's argument that we should use a small business threshold that is designed to include most rural telephone companies. By virtue of their existing infrastructure, rural telephone companies already have an edge over other new entrants. Therefore, we are not convinced that their ineligibility for bidding credits, installment payments, and reduced down payments will hinder their entry into 900 MHz SMR services. Moreover, we are adopting partitioning rules, as discussed at ¶¶ 177-179, *infra*. We also reject SCCC's request to use a "net revenues" test for the same reasons we have rejected that test for other auctionable services. Although we stated in the *Competitive Bidding Second Report and Order* that we would use a "net worth" test in most circumstances,³¹⁹ we decided subsequently to apply a "gross revenues" test to auctionable services as a more accurate

³¹⁴ See, e.g., AMTA *Ex Parte* Letter, filed Mar. 23, 1995, at 3.

³¹⁵ *Competitive Bidding Fifth Report & Order* at ¶ 175.

³¹⁶ AMTA Comments at 7-8; RAM Comments at 6; Motorola Comments at 7-8; Celsmer Comments at 5-6.

³¹⁷ AMTA *Ex Parte* Letter, filed Mar. 23, 1995, at 2-3.

³¹⁸ We need not consider the migration from unsuccessful bidders in the 800 MHz SMR auction to the 900 MHz SMR spectrum, because the 900 MHz SMR auction will precede that of 800 MHz SMR.

³¹⁹ *Competitive Bidding Second Report & Order* at ¶ 271.

indicator of a company's size.³²⁰ A gross revenues test is a clear measure for determining the size of a business and is an established method of determining size eligibility for various types of federal programs that aid small businesses.³²¹

155. Although we received no comment on our proposed attribution level of 25 percent,³²² we have decided that the attribution level for purposes of meeting the financial cap should be consistent with our treatment of SMR attribution in other contexts. In the *CMRS Third Report and Order*, we adopted a cap on the amount of PCS, cellular and SMR spectrum any single entity could own within a geographic area.³²³ Pursuant to Section 20.6(d) of the Commission's Rules, we established attribution levels for the SMR service as a 20 percent ownership interest in the applicant.³²⁴ Therefore, we will not attribute the gross revenues of investors that hold less than a 20 percent interest in the applicant, but we will include the gross revenues of the applicant's affiliates and investors with ownership interests of 20 percent or more in the applicant in determining whether an applicant qualifies as a small business.³²⁵ As has been the case in prior auctions where special provisions for small businesses have been made, it also is our expectation that a qualifying small business or principals of a qualifying small business will retain *de facto* and *de jure* control of the applicant. In determining attribution when 900 MHz SMR licensees are held indirectly through intervening corporate entities, we will use the multiplier adopted in the *CMRS Third Report and Order* for the spectrum aggregation cap.³²⁶

156. As we noted in the *Second R&O and Second Further Notice*, U.S. Census Data shows that approximately 99 percent of all women-owned businesses and 99 percent of all

³²⁰ See, e.g., *Competitive Bidding Fifth Report and Order* at ¶ 157; Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service in the Instructional Television Fixed Service, MM Docket No. 94-131, *Report and Order*, FCC 95-230, released June 30, 1995 at ¶ 191.

³²¹ All federal agencies base eligibility of small businesses to bid on a government contract set aside on the (single) size standard set forth in the solicitation. See, e.g., 13 C.F.R. § 121.902. See also *Competitive Bidding Fifth Report and Order* at ¶ 23 and n. 55.

³²² *Second R&O and Second Further Notice*, at ¶ 67.

³²³ *CMRS Third Report and Order* at ¶ 16.

³²⁴ See *CMRS Third Report and Order* at ¶ 276; 47 C.F.R. § 20.6

³²⁵ 47 C.F.R. § 90.814(g). Compare 47 C.F.R. §§ 24.320(b)(2)(iv); 24.720(j)(1).

³²⁶ *CMRS Third Report and Order* at ¶ 277. See 47 C.F.R. §20.6(d)(6).

minority-owned businesses generated net receipts of \$1 million or less.³²⁷ Thus, we expect that we will capture the majority of minority and women-owned businesses within these categories. In doing so, we believe that we will satisfy the requirement of § 309(j) to provide opportunities for business owned by minority groups and women to participate in the provision of spectrum based services. Moreover, in light of the statute's instruction to "design and test multiple alternative methodologies,"³²⁸ we believe that the 900 MHz SMR service may be a suitable service in which to assess the effectiveness of more uniform measures, because capital entry requirements are expected to be lower than PCS and the spectrum is occupied by incumbents who will not be required to relocate. In designing our auction rules for broadband PCS, we observed that the different capital requirements of each spectrum-based service would influence our decision as to the types of provisions necessary for designated entities.³²⁹ In that context, we decided that lack of access to capital for women and minorities becomes especially problematic for very costly spectrum-based services, such as broadband or regional narrowband PCS³³⁰ and nationwide narrowband PCS. As a result, we found that women and minorities could not overcome historical difficulties in accessing capital without additional provisions.³³¹ We also decided that such targeted provisions may not be necessary in other less costly spectrum-based services.³³² Our expectation is that while 900 MHz MTA service may be a capital-intensive undertaking, it should require considerably less capital than broadband or regional narrowband PCS, thereby providing greater opportunities for participation by smaller businesses, including those owned by women and minorities. For these reasons, we disagree with NABOB's argument that our rules would be inconsistent with the mandate of § 309(j) of the Communications Act.

3. Bidding Credits

157. Background. Bidding credits allow eligible designated entities to receive a payment discount for their winning bid in an auction. In the *Competitive Bidding Second Report & Order*, we determined that competitive bidding rules applicable to individual

³²⁷ *Second R&O and Second Further Notice* at ¶ 135, citing *Women-Owned Businesses*, WB 87-1, 1987 Economic Census, p. 144, Table 8; *Survey of Minority-Owned Business Enterprises*, MB 87-4, 1987 Economic Census, pp 81-82, Table 8. For purposes of this data, these are entities that earned at least \$500 and filed an IRS Form 1040, Schedule C, and in which at least 51% of the assets are owned by minorities or women. The definition of minorities is the same as that defined in § 90.814(f).

³²⁸ 47 U.S.C. § 309(j)(3).

³²⁹ *Competitive Bidding Fifth Report & Order* at ¶ 96.

³³⁰ In the *Competitive Bidding Fifth Report & Order*, for example, we decided it was necessary to do more for minorities and women in an extremely capital-intensive service such as broadband PCS. *Id.* at ¶¶ 96 and 113.

³³¹ *Id.* at ¶¶ 96, 101.

³³² *Id.* at ¶ 96.

services would specify the designated entities eligible for bidding credits and the amounts of the available bidding credits for that particular service.³³³ In the *Competitive Bidding Third Report & Order*,³³⁴ we determined that eligible designated entities in the nationwide narrowband PCS auction would receive a 25 percent bidding credit. In the regional narrowband PCS auction, designated entities would receive a 40 percent bidding credit.³³⁵ For broadband PCS, we originally adopted a "tiered approach" of awarding 10 percent to small businesses, 15 percent to minority-owned and women-owned entities, and 25 percent to small businesses that also are owned by women or minorities.³³⁶ After *Adarand*, we modified the broadband PCS rule to provide a single bidding credit of 25 percent for small businesses.³³⁷

158. For the 900 MHz SMR service, we proposed to offer a 10 percent bidding credit to small businesses bidding on any of the ten-channel blocks within each MTA.³³⁸ Although we proposed to limit eligibility for bidding credits to small businesses, we also sought comment on whether this eligibility should be expanded to include businesses owned by minorities and/or women, even if they do not fall within our small business size standards for 900 MHz SMRs.³³⁹ We also sought comment on a second bidding credit alternative, which would entitle small businesses, and minority and women-owned businesses to receive bidding credits on the five least encumbered blocks in each MTA.³⁴⁰ We asked whether, assuming bidding credits were limited to small businesses, we also should limit availability of the credit to the channel blocks with the fewest incumbents; what bidding credit amounts should apply to women and minority-owned businesses and small businesses; whether women-owned and minority-owned businesses that also are small businesses should receive an aggregated bidding credit; and the ramifications of each proposal for the incumbents in each block.³⁴¹ We also asked whether some other amount was appropriate for a bidding credit.³⁴²

159. Comments. Most commenters agree with the Commission's proposal to limit

³³³ *Competitive Bidding Second Report & Order* at ¶ 241.

³³⁴ *Competitive Bidding Third Report & Order* at ¶ 72.

³³⁵ *Competitive Bidding Third Memorandum Opinion & Order & Further Notice* at ¶ 58.

³³⁶ *Competitive Bidding Fifth Report and Order* at ¶¶ 132-133.

³³⁷ *C Block Auction Order* at ¶ 9; 47 C.F.R. § 24.712.

³³⁸ *Second R&O and Second Further Notice* at ¶ 130.

³³⁹ *Id.* at ¶ 132.

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *Id.*

bidding credits to small businesses, but disagree on the amount of the credit and whether they should apply to encumbered blocks. Both Geotek and AMTA agree that 10 percent is a reasonable amount.³⁴³ Nextel and the Council of Independent Communications Suppliers ("CICS") contend that the Commission's proposal will meet legislative intent to ensure participation by designated entities.³⁴⁴ Celsmer, though supportive of bidding credits for small businesses, comments that 10 percent is too low because, although the start-up costs may not be great, small bidders will bid directly against large communications corporations for the same licenses.³⁴⁵ Celsmer concludes that a higher bidding credit is warranted in light of the Commission's decision not to set aside an entrepreneur's block, in which smaller businesses would only bid against each other.³⁴⁶ RAM, however, comments that because they believe 900 MHz SMR systems are worth a fraction of the value of PCS frequencies, the proposed bidding credit is too high.³⁴⁷

160. Geotek, RAM, and AMTA comment that bidding credit(s) should be limited to unencumbered blocks, because doing otherwise would unfairly prejudice incumbents,³⁴⁸ would lead to speculative bidding and anti-competitive behavior such as "greenmailing,"³⁴⁹ and is not statutorily mandated.³⁵⁰ As an alternative, Geotek proposes that designated entities bidding on unencumbered spectrum receive no higher credit than incumbents.³⁵¹ RAM also comments that incumbent licensees should be given priority over new entrants to expand their networks³⁵² and prefers that a lower bidding credit apply to all blocks, as opposed to a higher bidding credit on the least encumbered blocks.³⁵³ AMTA suggests that the Commission limit bidding credits to the three least encumbered blocks in each MTA.³⁵⁴ Celsmer agrees with RAM that the Commission should not afford new applicants bidding credits on encumbered

³⁴³ Geotek Comments at 4-5; AMTA Comments at 6; AMTA Reply Comments at 5.

³⁴⁴ Nextel Comments at 5; CICS Reply Comments at 3.

³⁴⁵ Celsmer Comments at 2-3.

³⁴⁶ *Id.* at 3; Celsmer Reply Comments at 2-3.

³⁴⁷ RAM Reply Comments at 1.

³⁴⁸ Geotek Comments at 4-5; Geotek Reply Comments at 4.

³⁴⁹ RAM Comments at 2-3; AMTA Comments at 7; Geotek Comments at 4-5.

³⁵⁰ RAM Comments at 5; Geotek Comments at 4.

³⁵¹ Geotek Reply at 5-6.

³⁵² RAM Comments at 3-4.

³⁵³ RAM Comments at 4.

³⁵⁴ AMTA Comments at 6-7; AMTA Reply Comments at 5.

blocks,³⁵⁵ but disagrees with AMTA's suggestion that the Commission should not afford any bidding credits on encumbered blocks,³⁵⁶ as that would prejudice incumbent small businesses bidding on their own blocks.³⁵⁷

161. Pro Tec suggests that any existing incumbent designated entity that meets its three criteria³⁵⁸ should be given at least a 40 percent bidding credit.³⁵⁹ Pro Tec asserts that such bidding credits would encourage greater participation in the auction process by small businesses, women and minorities.³⁶⁰

162. SBA contends that the Commission should wait until the conclusion of the 800 MHz SMR auction before setting the rules for 900 MHz SMR.³⁶¹ If, at that time, the Commission determines that there will be significant migration of unsuccessful 800 MHz bidders into 900 MHz, the Commission either should adopt a greater bidding credit or establish an entrepreneurs' block in 900 MHz.³⁶²

163. In response to our Public Notice requesting comment on the impact of the *Adarand* decision on the Commission's 900 MHz SMR proposals,³⁶³ Geotek supplemented its comments by suggesting that "no compelling governmental interest" exists for expanding bidding credit eligibility beyond the small business definition proposed by the Commission.³⁶⁴

164. Discussion. We will adopt a proposal to offer small businesses a bidding credit

³⁵⁵ See RAM Comments at 5.

³⁵⁶ See AMTA Comments at 7.

³⁵⁷ Celsmer Reply Comments at 3.

³⁵⁸ Pro Tec's criteria are: (1) the company is a small or women-owned or minority-owned businesses as defined in the *Further Notice*; (2) the entity has a fully constructed and operational 900 MHz system operating on at least 10 channels; and (3) the existing system, employing a 55-mile contour, currently provides coverage to 25% or more of the population within the MTA.

³⁵⁹ Pro Tec Comments at 5.

³⁶⁰ Pro Tec Comments at 5.

³⁶¹ SBA Comments at 10.

³⁶² SBA Comments at 11.

³⁶³ Request for Comments in 900 MHz SMR Proceeding, *Public Notice*, DA 95-1479, released June 30, 1995.

³⁶⁴ Geotek Further Comments at 2.

on all blocks on a "tiered" basis similar to the one originally offered for broadband PCS.³⁶⁵ Accordingly, very small businesses with gross revenues that are not more than \$3 million for the preceding three years are entitled to a 15 percent bidding credit on all blocks; small businesses with gross revenues that are not more than \$15 million for the preceding three years are entitled to a 10 percent bidding credit on all blocks. Bidding credits for small businesses are not cumulative. Thus a \$3 million small business will be eligible for only a 15 percent bidding credit, not a 25 percent credit. This formula strikes a reasonable compromise between the new applicants who favor a higher bidding credit on all blocks, and the incumbent commenters who favor a lower bidding credit only on unencumbered blocks. We also believe that limiting the bidding credit to small businesses poses the slightest risk of legal challenge (and accompanying delay) in light of the *Adarand* decision.³⁶⁶ Considering the dormancy of the 900 MHz SMR spectrum, we believe that avoiding any further delay in the Phase II licensing process is of paramount importance. Tiered bidding credits are narrowly tailored to the varying abilities of businesses to access capital. Smaller businesses have more difficulty accessing capital and thus need a higher bidding credit. Tiering also takes into account that different small businesses will pursue different strategies, such as single MTAs, large regions or nationwide coverage.

165. Along with other provisions in this *Order*, these bidding credits will help to achieve the objectives of Congress by providing small businesses, including women-owned and minority-owned small businesses, with a meaningful opportunity to obtain licenses in the 900 MHz SMR auction, while accommodating the concerns of incumbents within the DFAs.³⁶⁷ While some discount is needed to put small businesses on equal footing with other larger applicants, given the large number of licenses available in this service (*i.e.*, 1,020), we believe it is unnecessary to provide a higher bidding credit, such as that provided for certain designated entities in regional narrowband PCS.³⁶⁸ In narrowband PCS and broadband PCS, we limited the channel blocks on which bidding credits were available to designated

³⁶⁵ See, e.g., *Competitive Bidding Fifth Report and Order* at ¶ 130.

³⁶⁶ See *C Block Auction Order* at ¶ 1.

³⁶⁷ In auctions conducted to date, bidding credits have been available for women and minority-owned applicants, with installment payments available for both women and minority-owned businesses and small businesses. In auctions where bidding credits for women and minorities have been available, participation and success in spectrum-based auctions have varied. For example, in nationwide narrowband PCS, a 25 percent bidding credit did not produce successful bidders among women and minority-owned applicants. In regional narrowband PCS, four of the nine winning bidders applied for a 40 percent bidding credit and installment payments to obtain licenses. Our auction experience to date has not included our current proposal to provide a small business bidding credit available on all blocks, although we recently modified our broadband PCS rules for the C Block to include a 25 percent bidding credit for small businesses only.

³⁶⁸ *Competitive Bidding Third Memorandum Opinion & Order & Further Notice* at ¶ 58.

entities.³⁶⁹ In IVDS, we permitted the use of bidding credits on both available channels, yet imposed a limit of one bidding credit per service area.³⁷⁰ Due to the characteristics of the 900 MHz SMR service, we will offer bidding credits for eligible designated entities on all channel blocks in each MTA, rather than limiting this measure to certain blocks. Due to the presence of incumbents throughout all blocks, it is difficult to choose certain blocks for bidding credits. Furthermore, it would be impossible to determine the least encumbered blocks, because they vary from market to market. Additionally, we believe that we will provide greater opportunities for small businesses by offering bidding credits across all blocks, and will not limit applicants from pursuing regional or nationwide strategies. Unless we offer bidding credits across all blocks, we would be depriving small businesses of the opportunity to pursue regional and nationwide strategies.

4. Reduced Down Payments/Installment Payments

166. Background. We noted in the *Competitive Bidding Second Report & Order* that allowing installment payments reduces the amount of private financing needed by prospective small business licensees and therefore mitigates the effect of limited access to capital by small businesses, especially those owned by minorities and/or women.³⁷¹ Thus, we proposed in the *Second R&O and Second Further Notice* to adopt an installment payment option for small businesses that are winning bidders in the 900 MHz SMR auction.³⁷² Additionally, we tentatively concluded that small businesses that are eligible for installment payments may pay a reduced down payment.³⁷³

167. Comments. AMTA, Celsmer, SBA and CICS support the Commission's proposal to offer reduced down payments and installment payments to small businesses.³⁷⁴ Celsmer comments that such options would ease the financial burden on small businesses that may have to rely on private sectors loans to meet the burdens of acquisition, construction, and maintenance.³⁷⁵ AMTA, however, suggests that the Commission limit these options to

³⁶⁹ *Competitive Bidding Third Report and Order* at ¶ 72 (narrowband PCS); *Competitive Bidding Fifth Report & Order* at ¶ 131 (broadband PCS).

³⁷⁰ *Competitive Bidding Fourth Report & Order* at ¶ 39.

³⁷¹ *Competitive Bidding Second Report & Order* at ¶¶ 231-232.

³⁷² *Second R&O and Second Further Notice* at ¶ 133.

³⁷³ *Id.* at ¶ 134.

³⁷⁴ AMTA Comments at 8; Celsmer Comments at 2-3; SBA Comments at 10; CICS Reply Comments at 7.

³⁷⁵ Celsmer Comments at 4-5.

unencumbered blocks, or to the three least encumbered blocks in each MTA.³⁷⁶

168. Discussion. We will adopt both the installment payment and reduced down payment options for small businesses that are winning bidders in the 900 MHz SMR auction. However, to encourage maximum small business participation, and for the reasons discussed at ¶¶ 164-165, *supra*, we reject AMTA's suggestion to limit these options to bidders for unencumbered blocks or the three least encumbered blocks. In light of the *Adarand* decision, and to avoid further delay in auctioning the 900 MHz SMR spectrum, our decision to limit installment payments and reduced down payments to small businesses not only is the best legal course, but most likely will confer those benefits on the majority of minority-owned and women-owned entities.

169. Small businesses, including those owned by minorities and women, face capital access difficulties not encountered by other firms. Thus, they require special measures to ensure their opportunity to participate in the 900 MHz SMR service, and we will provide an "enhanced" installment payment plan similar to the one set out in the *Competitive Bidding Fifth Report and Order*.³⁷⁷ Licensees who qualify for installment payments will be entitled to pay their winning bid amount in quarterly installments over the term of the license, with interest charges to be fixed at the time of licensing at a rate equal to the rate for ten-year U.S. Treasury obligations plus 2.5 percent. Pursuant to this enhanced installment payment plan, small businesses that fall under the \$15 million definition will be required to pay interest only for the first two years of the license term at the same interest rate as set forth in the rule. Interest will accrue at the Treasury note rate plus 2.5 percent. Small businesses that fall under the \$3 million definition will be able to make interest-only payments for five years. Interest will accrue at the Treasury note rate without the additional 2.5 percent. Timely payment of all quarterly installments will be a condition of the license grant, and failure to make such timely payment will be grounds for revocation of the license.

170. Licensees who qualify for reduced down payments will be required to pay five percent of the winning bid five days after the auction closes, with the remaining five percent down payment due five days after Public Notice that the Commission is prepared to award the license. The Commission will grant the license generally within ten (10) business days after receiving such down payment.

5. Transfer Restrictions and Unjust Enrichment Provisions

171. Discussion. In the *Competitive Bidding Fifth Report & Order*, we adopted restrictions on the transfer or assignment of entrepreneurs' block licenses to ensure that designated entities do not take advantage of special provisions by immediately assigning or

³⁷⁶ AMTA Comments at 8.

³⁷⁷ See, e.g., *Competitive Bidding Fifth Report and Order* at ¶ 139.

transferring control of their licenses.³⁷⁸ In the *Competitive Bidding Third Report and Order*, we adopted restrictions for narrowband PCS on the transfer of licenses to non-designated entities.³⁷⁹ Women and minority-owned and small business licensees who transferred licenses to non-qualifying designated entities were required to repay any benefits conferred prior to the transfer. As in the 900 MHz SMR service, narrowband PCS did not contain a separate entrepreneurs' block. In the *Second R&O and Second Further Notice*, we proposed to adopt these restrictions on transfer and assignment of licenses won by designated entities.³⁸⁰ We received no comments on this proposal.

172. The Commission's unjust enrichment provisions are integral to the success of the special provisions provided to designated entities in the various auctionable services. In the *Competitive Bidding Second Report & Order*, we outlined unjust enrichment provisions applicable specifically to designated entities. We established these provisions to deter speculation and participation in the licensing process by those who do not intend to offer service to the public, or who intend to use our provisions to obtain a license at a lower cost than they otherwise would have to pay, and later to sell it for a profit.³⁸¹

173. Licensees seeking to transfer their licenses to entities which do not qualify as small businesses, as a condition to approval of the transfer, must remit to the government a payment equal to a portion of the total value of the benefit conferred by the government. Thus, a small business that received bidding credits seeking transfer or assignment of a license to an entity that is not a small business or does not qualify as a smaller business under the definitions in § 90.814(b)(1), will be required to reimburse the government for the amount of the bidding credit, plus interest at the rate imposed for installment financing at the time the license was awarded, before transfer will be permitted. The amount of this payment will be reduced over time as follows: a transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit; in year three of the license term the payment will be 75 percent; in year four the payment will be 50 percent and in year five the payment will be 25 percent, after which there will be no payment. If a small business under the \$3 million definition seeks to transfer or assign a license to a small business under the \$15 million definition, for the purposes of determining the amount of payment, the value of the bidding credit is 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 assessments will have to be paid to the U.S. Treasury as a condition of approval of the assignment or transfer.³⁸²

³⁷⁸ *Competitive Bidding Fifth Report & Order* at ¶ 128.

³⁷⁹ *Competitive Bidding Third Report and Order* at ¶¶ 80,89.

³⁸⁰ *Second R&O and Second Further Notice* at ¶ 141-143.

³⁸¹ *Competitive Bidding Second Report and Order* at ¶ 259; 47 C.F.R. § 1.2111.

³⁸² See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Erratum to Third Memorandum Opinion and Order*, PP Docket No. 93-253, DA 94-1037, released September 21, 1994.

174. To ensure that large businesses do not become the unintended beneficiaries of measures meant for smaller firms, we propose to apply the unjust enrichment provisions adopted for narrowband PCS to installment payments for the 900 MHz SMR service.³⁸³ Specifically, if a licensee that was awarded installment payments seeks to assign or transfer control of its license during its term to an entity that does not meet either of the definitions set forth in Section 90.814(b)(1), 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 transfer. Moreover, if a small business that meets the \$3 million definition seeks to assign or transfer control of a license to a small business that meets 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. Thus, a higher interest rate and earlier payment of principal may begin to be applied. For example, a transfer of a license in the fourth year after license grant from a small business that meets the \$3 million definition to a small business that meets the \$15 million definition will require the transferee to begin principal payments and the balance will begin accruing interest at a rate 2.5 percent above the rate that had been in effect. However, a licensee may not switch its payment plan to a more favorable plan. Finally, if an investor subsequently purchases an "attributable" interest in the businesses and, as a result, the gross revenues or total assets of the business exceed the applicable financial caps, this unjust enrichment provision also will apply. We will apply these payment requirements for the entire license term to ensure that small businesses will look first to other small businesses when deciding to transfer their licenses.

6. Partitioning

175. Background. Congress directed the Commission to ensure that, together with other designated entities, rural telephone companies ("rural telcos") have the opportunity to participate in the provision of spectrum-based services. Rural areas, because of their more dispersed populations, tend to be less profitable to serve than more densely populated urban areas. Therefore, service to these areas may not be a priority or economically feasible for many licensees. Rural telcos, however, are well positioned because of their existing infrastructure to serve these areas. Therefore, we proposed a geographic partitioning scheme similar to that adopted in broadband PCS,³⁸⁴ which will encourage participation by rural telephone companies, thereby increasing the likelihood of rapid introduction of service to rural areas.³⁸⁵

176. Comments. Only two commenters addressed the Commission's proposal to allow partitioning by rural telephone companies. NTCA favors such partitioning as a means

³⁸³ See *Competitive Bidding Third Memorandum Opinion & Order & Further Notice* at ¶ 98.

³⁸⁴ *Competitive Bidding Fifth Report and Order* at ¶ 150.

³⁸⁵ *Second R&O and Second Further Notice* at ¶ 144-145.

to bring wireless services to rural areas and satisfy the statutory mandate.³⁸⁶ NTCA requests, however, that the Commission remove the presumption that a partitioned service area is reasonably related to the company's wireline service area if it contains no more than twice the population overlap.³⁸⁷ NTCA favors a policy that would approve the partitioning agreement as long as the partitioned area contained the rural telco's wireline service area, thereby giving consortia the flexibility they need to create efficient service areas while meeting the needs of sparsely populated areas.³⁸⁸ NTCA also notes that elimination of the presumption will eliminate the disposition of time-consuming waiver requests that can result in delayed service.³⁸⁹

177. Discussion. We will adopt the partitioning scheme as proposed in the *Second R&O and Second Further Notice*, and deny NTCA's request to change the "reasonably related" presumption for post-auction partitioning. This partitioning scheme will prevent rural telephone companies from having to bid on the entire MTA license to obtain licenses covering their wireline service areas. In addition, partitioning will provide rural telcos with the flexibility to serve areas in which they already provide service, while the remainder of the service area could be served by other providers.³⁹⁰

178. Rural telcos are permitted to acquire partitioned 900 MHz SMR licenses in either of two ways: (1) they may form bidding consortia to participate in auctions, and then partition the licenses won among consortia participants; and (2) they may acquire partitioned 900 MHz SMR licenses from other licensees through private negotiation and agreement either before or after the auction.³⁹¹ Each member of a consortium will be required to file a long-form application, following the auction, for its respective mutually agreed-upon geographic area. Partitioned areas must conform to established geopolitical boundaries (such as county lines). With respect to rural telcos, each area must include all portions of the wireline service area of the rural telco applicant that lies within MTA service area.³⁹² We also will use the definition for rural telcos implemented in the *Competitive Bidding Fifth Report & Order* for broadband PCS. Rural telcos are defined as local exchange carriers having 100,000 or fewer

³⁸⁶ NTCA Comments at 3.

³⁸⁷ NTCA Comments at 3-4.

³⁸⁸ NTCA Comments at 3-4.

³⁸⁹ NTCA Comments at 4.

³⁹⁰ *Id.*

³⁹¹ *Id.* at ¶ 151.

³⁹² *Id.*

access lines, including all affiliates.³⁹³

179. In addition, we deny NTCA's request to change the "reasonably related" presumption for rural telco post-auction partitioning. The rural telco post-auction partitioning scheme was developed in response to Section 309(j)(3) of the Communications Act's explicit mandate to promote economic opportunities for rural telcos. If "reasonably related" service was not required, there would be no justification for allowing only rural telcos to obtain partitioned licenses, because the rural telco would essentially be no different than any other applicant. However, the Commission intends to explore the issue as to whether to adopt a more general partitioning scheme in a future proceeding. Thus, if a rural telco receives a partitioned license post-auction from another MTA licensee, the partitioned area must be reasonably related to the rural telco's wireline service area that lies within the MTA service area. In our proposed rule in the *Second R&O and Second Further Notice*, we indicated that we would presume as "reasonably related" a partitioned area that contains no more than twice the population of that portion of a rural telco's wireline service area that lies within the MTA service area.³⁹⁴ NTCA's argument to change this presumption is unpersuasive. This presumption, adopted for post-auction partitioning for rural telcos in the broadband PCS service,³⁹⁵ has been unchallenged, and NTCA has not proffered a rationale that would justify distinguishing the post-auction partitioning procedures in PCS from that of the 900 MHz SMR service. Without such a limitation, a rural telco (or consortia thereof) easily could circumvent the auction process by obtaining practically the entire MTA license.

7. Reduced Upfront Payments

180. Discussion. We proposed not to adopt a reduced upfront payment option in the 900 MHz SMR service for designated entities.³⁹⁶ We received no comments on this proposal. Accordingly, we believe that a reduced upfront payment option is unnecessary in the 900 MHz SMR service, in light of the other provisions adopted here (*i.e.*, bidding credits, installments payments and reduced down payments). Moreover, this will encourage sincere bidding by all parties.

8. Set-aside Spectrum

181. Background. In the *Competitive Bidding Fifth Report & Order* we established entrepreneurs' blocks on which only qualified entrepreneurs, including designated entities;

³⁹³ *Id.* at ¶ 193; 47 C.F.R. § 1.2110(b)(3).

³⁹⁴ *See Second R&O and Second Further Notice*, Appendix B, proposed § 90.813(d)(3).

³⁹⁵ *Competitive Bidding Fifth Report and Order* at ¶ 151; 47 U.S.C. § 24.714(d).

³⁹⁶ *Second R&O and Second Further Notice* at ¶ 146.

could bid.³⁹⁷ We tentatively concluded not to adopt an entrepreneurs' block for the 900 MHz SMR auction, but requested comment on whether the capital requirements of this service were anticipated to be so substantial that we should insulate certain blocks from very large bidders in order to provide meaningful opportunities for designated entities.

182. Comments. In general, most commenters support the Commission's proposal not to create a separate entrepreneur's block for designated entities.³⁹⁸ Motorola cites 900 MHz's cost difference, spectrum availability, and small allocations as factors which will enhance the effectiveness of bidding credits, reduced down payments and installment payments and render the establishment of an entrepreneur's block unnecessary.³⁹⁹

183. SCCC supports creation of an entrepreneurs' block, stating that the absence of an entrepreneur's block will mean poor bidding odds for rural telephone companies.⁴⁰⁰ Monterey Telecommunications Technology ("Monterey") agrees with SCCC's conclusion.⁴⁰¹ According to SCCC, without an entrepreneur's block, rural telephone companies ("rural telcos") will have to bid against companies with deep pockets for scarce 900 MHz spectrum, effectively shutting the rural telcos out of the auction.⁴⁰² The SBA suggests that the Commission establish an entrepreneur's block (or increase the bidding credits for small businesses, discussed at ¶ 162, *infra*) if the Commission adopts the SBA's suggestion to postpone the adoption of the 900 MHz SMR rules until it has completed the rule making in the 800 MHz SMR docket.⁴⁰³

184. Discussion. We will not adopt an entrepreneur's block in the 900 MHz SMR service for several reasons. First, the large numbers of licenses available and relatively small spectrum allocations in the 900 MHz SMR service should allow for extensive small business participation. Second, unlike broadband PCS, the effectiveness of bidding credits, reduced down payments and installment payments will not be diluted, due to the smaller capital outlay anticipated for this service. With respect to SCCC's concern, we do not believe that we need to provide more enhancements for rural telcos which, in addition to having the existing infrastructure, may qualify as a small business or may take advantage of our partitioning

³⁹⁷ *Id.* at ¶¶ 113-123. These rules were further refined in the *Competitive Bidding Fifth Memorandum Opinion & Order*. See 47 C.F.R. § 24.709.

³⁹⁸ AMTA Comments at 6-8; RAM Comments at 3-7; Geotek Comments at 2-4; Motorola Comments at 6-7.

³⁹⁹ *Id.* at 8-9.

⁴⁰⁰ SCCC Comments at 8-9.

⁴⁰¹ Monterey Reply Comments at 2-3.

⁴⁰² SCCC Comments at 8-9.

⁴⁰³ SBA Comments at 10-11.

rules. We also reject the SBA's final suggestion as moot, as the Commission has determined not to postpone the adoption of 900 MHz SMR rules until the completion of the 800 MHz SMR rule making.

9. Other Matters

185. Although we did not request comment on this issue, the National Paging and Personal Communications Association ("NPPCA") suggests that the Commission establish a Telecommunications Development Fund ("TDF") to assist small businesses in accessing capital for build-out purposes.⁴⁰⁴ To that end, NPPCA suggests three alternative funding schemes for the TDF: (1) Upfront payments should be placed in an interest-bearing account, with the interest money used to fund the TDF; (2) Use part of the proceeds from the spectrum auctions to fund the TDF (as RTC did to support purchase of property by minorities); or (3) Use development banks on a domestic and international level, or other private sector funding.⁴⁰⁵ NPPCA also suggests the TDF could administer loans, and that funding small business ventures through a TDF would foster diversity in the telecommunications industry.⁴⁰⁶

186. Discussion. While we fully support the goal of "ensur[ing] that small businesses . . . are given the opportunity to participate in the provision of spectrum-based services" and recognize that access to capital is key to such opportunities, the small business financing proposal raised by NPPCA is beyond the scope of this proceeding. As such, it will not be addressed here.

VI. CONCLUSION

187. We believe that the auction rules adopted in this Order will promote the public policy goals set forth by Congress. The rules should facilitate the rapid implementation of the 900 MHz SMR service, thus advancing the public interest by fostering economic growth of competitive new services via efficient spectrum use. The rules will allow the public to recover a portion of the value of the public spectrum, and will promote access to 900 MHz SMR services by consumers, producers, and new entrants, by ensuring that designated entities will have genuine opportunities to participate in the auctions and in the provision of service.

VII. PROCEDURAL MATTERS AND ORDERING CLAUSES

188. The Final Regulatory Flexibility Analysis, as required by Section 604 of the Regulatory Flexibility Act is set forth in Appendix B.

⁴⁰⁴ NPPCA Comments at 1-2.

⁴⁰⁵ NPPCA Comments at 8-13.

⁴⁰⁶ *Id.* at 13.

189. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i) 303(r), 309(j), and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 309(j), and 332, this *Second Order on Reconsideration and Seventh Report and Order* is adopted and Part 90 of the Commission's Rules IS AMENDED as set forth in the attached Appendix A.

190. IT IS FURTHER ORDERED that the rule amendments set forth in Appendix A WILL BECOME EFFECTIVE 30 days after publication in the Federal Register.

191. IT IS FURTHER ORDERED, that the Petitions for Reconsideration filed by Advanced Mobilecomm, Inc., American Mobile Telecommunications Association, Celsmer, DW Communications, Inc., Geotek Communications, Inc., Nextel, Personal Communications Industry Association, RAM Mobile Data Limited Partnership, and Southern California Edison Company are GRANTED to the extent discussed herein, and DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

