

interested parties should serve the petitioner's consultant, as follows: Dennis Silver, P.E., 3404 West 2640 South, West Valley City, Utah 84119-1625.

FOR FURTHER INFORMATION CONTACT: Nancy Joyner, Mass Media Bureau, (202) 418-2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Notice of Proposed Rule Making*, MM Docket No. 95-50, adopted April 17, 1995, and released May 1, 1995. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Center (Room 239), 1919 M Street, NW, Washington, D.C. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, Inc., (202) 857-3800, 2100 M Street, NW, Suite 140, Washington, D.C. 20037.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, See 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

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47 CFR Part 90

[PR Docket No. 89-553, GN Docket No. 93-252, PP Docket No. 93-253, FCC 95-159]

Implementation of Section 309(j) of the Communications Act—900 MHz SMR

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission adopted a *Second Further Notice of Proposed Rule Making* seeking comment on proposed licensing and auction rules to complete the licensing of the 900 MHz Specialized Mobile Radio (SMR)

service. This Order implements the Commission's decision in the *Third Report & Order* in GN Docket No. 93-252, 59 FR 59,945 (Nov. 21, 1994) (*CMRS Third Report & Order*), to license the 900 MHz band on a Major Trading Area (MTA) basis, and to use competitive bidding to select from among mutually exclusive applicants. This *Second Further Notice* requests comment on proposed new licensing rules and auction procedures for the service, including special provisions for small businesses, minority-owned and women-owned entities, and rural telephone companies.

DATES: Comments must be filed on or before May 24, 1995, and reply comments must be filed on or before June 1, 1995.

ADDRESSES: Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Amy Zoslov, (202) 418-0620, Wireless Telecommunications Bureau, Commercial Wireless Division.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Second Further Notice of Proposed Rule Making*, in PR Docket No. 89-553, FCC 95-159, adopted April 14, 1995, and released April 17, 1995. The complete text of this *Second Further Notice of Proposed Rule Making* is available for inspection and copying during normal business hours in the FCC Dockets Branch, Room 239, 1919 M Street, N.W., Washington, D.C., and also may be purchased from the Commission's copy contractor, International Transcription Service, at (202) 857-3800, 2100 M Street, N.W., Suite 140, Washington, D.C. 20037.

Synopsis of the Second Further Notice of Proposed Rule Making

I. Introduction

1. When the Commission established the 900 MHz SMR service in 1986, it elected to use a two-phase licensing process. In Phase I, licenses were assigned in 46 "Designated Filing Areas" (DFAs) comprised of the top 50 markets. Phase II licensing, for facilities outside the DFAs, was frozen after 1986, when the Commission opened its filing window for the DFAs. In 1989, the Commission adopted a *Notice of Proposed Rule Making* in PR Docket 89-553, 55 FR 00744, proposing to begin Phase II licensing of SMR facilities nationwide. In 1993, the Commission adopted a *First Report & Order & Further Notice of Proposed Rule Making* in PR Docket 89-553, 58 FR 12176 (March 3, 1993) (*Phase II First R&O &*

Further Notice), modifying its Phase II proposal and seeking comment on whether to license the 900 MHz SMR band to a combination of nationwide, regional and local systems. 8 FCC Rcd 1469 (1993). Shortly thereafter, Congress amended the Communications Act to reclassify most SMR licensees as Commercial Mobile Radio Service (CMRS) providers and establish the authority to use competitive bidding to select from among mutually exclusive applicants for certain services. The Commission deferred further consideration of Phase II and incorporated the 900 MHz SMR docket into its CMRS proceeding.

2. In the *CMRS Third Report & Order*, FR 59,945 (Nov. 21, 1994), the Commission further revised its Phase II proposals and established the broad outlines for the completion of licensing in the 900 MHz SMR band. The Commission left the specific auction rules for the Phase II proceeding.

3. The Commission seeks comment on the following proposals: adoption of a single simultaneous multiple round auction; establishment of upfront payment requirements; adoption of the Milgrom-Wilson activity rule; adoption of application procedures; adoption of procedures governing timing and duration of auction rounds, stopping rules and bid increments; adoption of bid withdrawal and default rules; adoption of procedures governing down payment and full payment for winning bidders; adoption of anti-collusion rules for bidders; and adoption of transfer disclosure and performance requirements for winning bidders.

4. With respect to rules for designated entities (*i.e.* small businesses, women-owned and minority-owned entities, and rural telephone companies), the Commission seeks comment on the following proposals: insulating certain spectrum blocks from large bidders; providing small businesses bidding credits, reduced down payment requirements, and installment payment options; whether reduced upfront payments are necessary; adoption of partitioning rule for rural telephone companies; adoption of eligibility standards for small business and rural telephone companies; and for small businesses, adoption of restrictions on transfer or assignment of their licenses.

II. Discussion

A. Competitive Bidding

5. In the *CMRS Third Report & Order*, 59 FR 59,945 (Nov. 21, 1994), the Commission determined that it would use competitive bidding to select from among mutually exclusive applicants in

the 900 MHz SMR service. Accordingly, under the Commission's auction authority, if mutually exclusive applications for an MTA 10-channel block are accepted for filing, the Commission will award that license through competitive bidding. The Commission requests comment on specific bidding procedures, as set forth below.

6. *Competitive Bidding Design.* In the *Second Report & Order*, PP Docket No. 93-253, 59 FR 22980 (May 4, 1994) (Auctions Second Report and Order), the Commission stated that (1) licenses with strong value interdependencies should be auctioned simultaneously; and (2) multiple round auctions generally will yield more efficient allocations of licenses and higher revenues by providing bidders with information regarding other bidders' valuations of licenses, especially where there is substantial uncertainty as to value. Thus, where the licenses to be auctioned are interdependent and their value is expected to be high, simultaneous multiple round auctions would best achieve the Commission's goals for competitive bidding. Based on these factors, the Commission tentatively concluded that simultaneous multiple round auctions are appropriate for the 900 MHz SMR service. The expected value of 900 MHz SMR licenses is high, the licenses are interdependent, and licensees will likely aggregate across spectrum blocks and geographic regions. Because, however, the presence of incumbents on certain channels could affect the relative desirability and value of otherwise identical MTA licenses, the Commission proposes to delegate authority to the Wireless Telecommunications Bureau to revisit the issue of whether another auction design would be more appropriate. The Commission seeks comments on this tentative conclusion and proposal.

7. *License Grouping.* The Commission determined in the *Auctions Second Report & Order*, 59 FR 22980 (May 4, 1994), that in a multiple round auction, highly interdependent licenses should be grouped together and put up for bid at the same time because such grouping provides bidders with the most information about the prices of complementary and substitutable licenses during the course of an auction. The Commission also determined that the greater the degree of interdependence among the licenses, the greater the benefit of auctioning a group of licenses together in a simultaneous multiple round auction. The Commission tentatively concludes that all 51 MTAs in the 900 MHz band

should be auctioned simultaneously. While this may entail more administrative costs than breaking the licenses into groups, the added cost will be outweighed by the informational and bidding flexibility advantages afforded by a single auction. Moreover, the 1020 MTA licenses to be auctioned are less than half the number of broadband PCS licenses to be auctioned in Blocks A through F, and all licenses will be for the same amount of spectrum and use a single service area definition. The Commission also proposes to reserve the discretion to inform applicants by Public Notice if the Commission determines to hold more than one auction, on the basis that a single auction proves administratively unworkable.

B. Bidding Issues

8. *Bid Increments.* The bid increment is the amount or percentage by which a bid must be raised above the previous round's high bid in order to be accepted as valid in the current bidding round. The Commission proposes to start the 900 MHz auction with relatively large increments, and adjust the increments as bidding activity indicates. In Stage I of the auction, the minimum bid increment would be five percent of the high bid in the previous round or \$.02 per MHz-pop, whichever is greater. In Stage II, the Commission would reduce the minimum bid increment to the greater of five percent of \$.01 per MHz-pop, and in Stage III, the greater of five percent of \$.01 per MHz-pop. The Commission also proposes to retain the discretion to vary the minimum bid increments for individual license or groups of licenses at any time before or during the course of the auction, based on the number of bidders, bidding activity, and the aggregate high bid amounts. Finally, the Commission proposes to retain the discretion to keep an auction open if there is a round in which no bids are submitted.

9. *Stopping Rules.* In the *CMRS Third Report & Order*, 59 Fed. Reg. 59,945 (Nov. 21, 1994), the Commission noted that in multiple round auctions, a stopping rule must be established for determining when the auction is over. The Commission proposes to adopt a simultaneous stopping rule for 900 MHz SMR. Under this approach, bidding remains open on all licenses until there is no new acceptable bid for any license. This approach also provides full flexibility to bid for any license as more information becomes available during the course of the auction. MTA licenses are expected to have relatively high values because of the substantial amount of clear spectrum that remains

available, the high valuation of SMR spectrum in secondary market transactions, the substitutability between licenses within the same MTA and the ability to pursue back-up strategies. Likewise, the use of MTAs, rather than BTAs or more numerous service areas, should reduce complexity of a simultaneous stopping rule. Because the Commission proposes to impose an activity rule, this approach will not lead to excessively long auctions while affording bidders flexibility to pursue back-up strategies.

10. The Commission also proposes to retain the discretion to announce at any time during the auction that the auction will end after a specified number of additional rounds. Bids would only be accepted on licenses where the high bid has increased in the last three rounds. This would deter bidders from continuing to bid on a few low value licenses solely to delay the closing of the auction. It would also enable the Commission to end the auction when it determines that the benefits of terminating the auction and issuing licenses exceed likely benefits of continuing to allow bidding. The Commission proposes that this mechanism be used only in case of extremely dilatory bidding and that final bidding procedures would be announced by public notice. The Commission also proposes to retain the discretion to conduct market by market closings, if circumstances so warrant, to be announced during the auction. Finally, the Commission proposes to retain discretion to keep an auction open in a round in which no new acceptable bids are submitted if the Commission receives a "proactive" waiver of the activity rules, and to retain discretion to keep an auction open even if no proactive waivers are filed.

11. *Duration of Bidding Rounds.* The Commission reserves the discretion to vary the duration of bidding rounds or the interval at which bids are accepted (e.g. run more than one round per day) in order to move the auction toward closure more quickly. The Commission will announce any changes to the duration of and intervals between bidding rounds either by public notice prior to the auction or by announcement during the auction.

12. *Activity Rules.* The Milgrom-Wilson activity rule encourages bidders to participate in early rounds by limiting their maximum participation to some multiple of their minimum participation level. The Commission tentatively concludes that the Milgrom-Wilson activity rule should be used in conjunction with the simultaneous stopping rule to award 900 MHz SMR

licenses. Under this approach, the minimum activity level increases during the course of the auction. Absent waivers, a bidder's eligibility in the current round is determined by the bidder's activity level and eligibility in the previous round; in the first round, however, eligibility is determined by the bidder's upfront payment and is equal to the upfront payment divided by \$.02 per MHz-pop. Bidders are required to declare their maximum eligibility in terms of MHz-pops, and made an upfront payment equal to \$.02 per MHz-pop. In each round, bidders are limited to bidding on licenses encompassing no more than the number of MHz-pops covered by their upfront payment, and licenses on which a bidder is the high bidder from the previous round count toward this bidding limit. Bidders have flexibility to shift their bids among any license for which they have applied so long as, within each round, the total MHz-pops encompassed by those licenses does not exceed the total number of MHz-pops on which they are eligible to bid. This approach would best achieve the Commission's goals of affording bidders flexibility to pursue backup strategies, while at the same time ensuring that simultaneous auctions are concluded within a reasonable period of time. The Commission seeks comment on these issues.

13. During Stage I, the Commission tentatively concludes that a bidder must be active on licenses encompassing one-half of the MHz-pops for which it is eligible. In Stage II and Stage III, the Commission tentatively concludes that the bidder must be active on 75 and 95 percent, respectively, of the MHz-pops for which it is eligible. The penalty for falling below the minimum activity level at any stage would be a reduction in maximum eligibility to bid in future rounds. The transition from one stage of the auction to the next would be determined by the aggregate level of bidding activity, subject to the Commission's discretion. Once an auction proceeds from one stage to the next, it could not revert to any previous stage. Moreover, the Commission proposes to reserve the discretion to increase or decrease these activity levels as well as to vary the timing of stages and activity levels for each stage through public notices issued after applications are filed and before the auction begins, as circumstances warrant. The Commission seeks comment on these proposals.

14. In the *Fourth Memorandum Opinion & Order*, PP Docket No. 93-253, 59 FR 53364 (October 24, 1994), the Commission clarified that it retained the

discretion to modify the method and timing of submitting waivers and to allow for both "proactive" and "automatic" waivers. Proactive waivers are submitted by the bidder, while automatic waivers would be submitted automatically for a bidder whenever its eligibility would be reduced because of insufficient bidding activity and a waiver is available unless the bidder specifically chooses not to have the automatic waiver apply. The Commission proposes to use these waiver procedures with respect to the 900 SMR auctions.

15. Specifically, the Commission proposes to implement a waiver procedure permitting each bidder to request and automatically receive a certain number of waivers of the activity rule during the auction. The Commission would announce by Public Notice how many waivers bidders will receive. A waiver would permit a bidder to maintain its eligibility at the same level as in the round for which the waiver is submitted; it could not, however, be used to correct an error in the amount bid. Under this proposal, a bidder may request a waiver either in the round in which its bidding falls below the minimum required level or prior to submitting a bid in the next round. If an activity rule waiver is proactively requested in a round in which no other bidding activity occurs, the auction would remain open. The Commission seeks comment on these proposals. Finally, the Commission retains discretion to use an alternative activity rule for 900 MHz SMR if it determines that the Milgrom-Wilson rule is too complicated or costly to administer. Any such change would be announced by public notice before commencement of the auction.

16. *Rules Prohibiting Collusion.* Section 1.2105(c) of the Commission's Rules, 47 CFR 1.2105(c) prohibits collusive conduct in the context of competitive bidding. This rule prohibits bidders from communicating with one another after short-form applications have been filed regarding the substance of their bids or bidding strategies, and also prohibits bidders from entering into consortium arrangements or joint bidding agreements after the deadline for short-form applications has passed. 47 C.F.R. 1.2105(c)(1)-(2). The Commission proposes to apply Section 1.2105(c) to 900 MHz SMR auctions. Bidders who have not filed form 175 applications for any of the same MTA licenses would be permitted enter into such discussions, consortia, or arrangements, or add equity partners, during the course of an auction. Also, communications among bidders

concerning matters unrelated to the auctions would be permitted. The Commission seeks comment on this proposal.

17. Under the collusion rules, bidders would also identify on their Form 175 applications parties with whom they have entered into any agreements relating to the competitive bidding process, and certify that they will not enter into any such agreements with any parties other than those identified. 47 CFR 1.2105(a)(2). Furthermore, winning bidders in the 900 MHz SMR auctions would attach as an exhibit to the Form 600 long-form application a detailed explanation of the terms and conditions and parties involved in any such agreement entered into prior to the close of bidding. All such arrangements would have been entered into prior to filing of short-form applications to comply with the Commission's rules. 47 CFR 1.2107. Allegations of specific instances of collusion in violation of these rules would be investigated by the Commission or referred to the Department of Justice. The Commission also proposes that bidders found to have violated the Commission's rules or the antitrust laws may be subject to forfeiture of their down payment or their full bid amount, revocation of their licenses, and prohibition from participation in future auctions. The Commission seeks comment on these proposals.

C. Procedural, Payment and Penalty Issues

18. *Pre-Auction Application Procedures.* The Commission proposes to follow generally the processing and procedural rules established in 47 CFR Part 1, Subpart Q with certain modifications designed to address the particular characteristics of the 900 MHz SMR service. Unlike incumbent 900 MHz SMR licensees that are essentially confined to the smaller DFA region, MTA licensees will gain use of a large geographic area and the freedom to locate base stations anywhere within that larger geographic region. Thus, the Commission proposes to treat MTA applicants as initial applicants for public notice, application processing, and auction purposes, regardless of whether they are already incumbent operators.

19. The 1993 Budget Act expressly provides the Commission authority to require that bidders' applications contain all information and documentation sufficient to demonstrate that the application is not in violation of Commission rules, and to dismiss applications not meeting those requirements prior to the competitive

bidding, 47 U.S.C. 309(j)(5). *See also* H. R. Rep. No. 111, 103d Cong., 1st Sess. 28 (1993). In furtherance of this policy, the Commission decided to require only a short-form application prior to competitive bidding, and determined that only winning bidders should be required to submit a long-form license application after the auction. 47 CFR 1.2104, 1.207. Because this procedure fulfills the statutory requirements and adequately protects the public interest here, the Commission proposes to extend application of these rules to the competitive bidding process for 900 MHz SMR.

20. Under this proposal, the Wireless Telecommunications Bureau would release an initial Public Notice announcing the auction. The Public Notice would specify the following: licenses to be auctioned; time and place of the auction method of competitive bidding to be used; applicable bid submission procedures; stopping rules; activity rules; the deadline by which short-form applications must be filed; and the amounts and deadlines for submitting the upfront payment. Applications submitted before the release of the Public Notice would be returned as premature. Likewise, applications submitted after the deadline specified by Public Notice would be dismissed, with prejudice, as untimely.

21. All bidders would be required to submit short-form applications on FCC Form 175 (and FCC Form 175-S, if applicable), by the date specified in the initial Public Notice. *See* CFR 1.2105(a)(2). Applications could be filed manually or electronically. Each applicant would specify on its applications certain information, including its status as a designated entity (if applicable), its classification (*i.e.*, individual, corporation, partnership, trust, or other), the markets and frequency blocks for which it is applying, and the names of persons authorized to place or withdraw a bid on its behalf. If there is no mutual exclusivity for a particular license, and no petitions to deny are filed, the application would be grantable after 30 days. The Commission seeks comment on the proposals discussed above.

22. *Amendments and Modifications.* To encourage maximum bidder participation, the Commission proposes to provide 900 MHz SMR applicants with an opportunity to correct minor defects in their short form applications prior to the auction. The Commission also proposes to waive the *ex parte* rules as they apply to submission of amended short-form applications to maximize applicants' opportunities to seek

Commission staff advice on making such amendments. Also, applicants would be permitted to modify their applications to reflect formation of consortia or changes in ownership at any time before or during an auction, provided that (1) such changes do not result in a change in control of the applicant, and (2) parties forming consortia or entering into ownership agreements have not applied for licenses in any of the same geographic licenses. Applicants would not, however, be permitted to make major modifications to their applications, including changes in markets, changes in control of the applicant, or additions of the other bidders into the bidding consortia, until after the auction. Applications that are not signed would be dismissed as unacceptable. The Commission seeks comment on these proposals.

23. Applications with defects, minor or otherwise, would be listed in a public notice. After reviewing corrected applications, the Commission would release a second public notice announcing applicants whose applications have been accepted or filing. This second public notice would announce the date by which applicants must submit an upfront payment to the Commission, generally no later than 14 days before the scheduled auction. The Commission would release a third public notice announcing the names of all applicants that have been determined as qualified to bid. An applicant who fails to submit a sufficient upfront payment to qualified it to bid on any license being auctioned would not be identified on this Public Notice as a qualified bidder. The Commission seeks comment on these proposals.

24. *Upfront Payments.* The Commission tentatively concludes that applicants that have been determined as qualified to bid should be required to submit a payment of \$0.02 per MHz-pop, based on the number of 10-channel blocks in each MTA identified by an applicant on its Form 175. This requirement would help ensure that only serious and qualified bidders participate and that any bid withdrawal or default penalties are paid. *See Auctions Second Report & Order at* ¶ 171. This formula would also afford bidders the flexibility to change their strategy during an auction and bid on a larger number of smaller licenses or a smaller number of larger licenses, so long as the total MHz-pops combination does not exceed that amount covered by the upfront payment. Population information for each license would be announced in the initial Public Notice released prior to the auction. The

Commission seeks comment on these proposals.

25. *Down payment and Full Payment.* The Commission tentatively concludes that winning bidders in 900 MHz SMR auctions should be required to supplement their upfront payments with a down payment sufficient to bring their total deposits up to 20 percent of their winning bid(s). Under this proposal, if the upfront payment already tendered by a winning bidder, after deducting any bid withdrawal and default penalties due, amounts to 20 percent or more of its winning bids, no additional deposit would be required. If the upfront payment amount on deposit is greater than 20 percent of the winning bid amount after deducting any bid withdrawal and default penalties due, the additional monies would be refunded. If a bidder has withdrawn a bid or defaulted but the amount of the penalty cannot yet be determined, the bidder would 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 penalty, any excess deposit would be refunded. Upfront payments would be applied to such deposits and to bid withdrawal and default penalties due before being applied toward the bidder's down payment on licenses the bidder has won and seeks to acquire. The Commission seeks comment on these proposals.

26. The Commission proposes to require winning bidders to submit the required down payment by cashier's check or wire transfer to its lock-box bank by a date to be specified by Public Notice, generally within five business days following the close of bidding. The balance of their winning bids would be made within five business days following public notice that the Commission is about to award the license, and grant of the license would be conditioned on this payment. An auction winner that is eligible to make payments through an installment plan, however, would be required to submit a deposit up to five percent of its winning bid, and would submit an additional five percent of its winning bid after the license granted. This would ensure that auction winners have the necessary financial capabilities to complete payment for the license and pay for the costs of constructing a system, without hindering growth or diminishing access to the auctions. The Commission seeks comment on this proposal.

27. *Bid Withdrawal, Default, and Disqualification.* The Commission proposes that bidders who withdraw a high bid, are found unqualified to hold licenses, or default on payment of a

balance due, would be assessed a substantial penalty. Any bidder that withdraws a high bid during an auction before the Commission declares bidding closed would 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. If a license is re-offered by auction, the "winning bid" would refer 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" would refer to the high bid amount, made subsequent to the withdrawal, in that auction. If the subsequent high bidder also withdraws its bid, that bidder would be required to pay a penalty equal to the difference between its withdrawn bid and the amount of the subsequent willing bid the next time the license is offered by the Commission. If a license which is the subject of withdrawal or default is not re-auctioned, but is instead offered to the highest losing bidders in the initial auction, the "winning bid" would refer to the bid of the highest bidder who accepts the offer. Losing bidders would not be required to accept the offer, and therefore may decline without penalty. The Commission seeks comment on these proposals.

28. The Commission also proposes that after bidding closes, a defaulting winner would be assessed an additional penalty of three percent of the subsequent winning bid or three percent of the amount of the defaulting bid, whichever is less. See 47 CFR 1.2104(g), 1.2109. If a default or disqualification involves an applicant's gross misconduct, misrepresentation, or bad faith, the Commission would be able to declare the applicant ineligible to bid in future auctions or take other action. These penalties would adequately discourage default and ensure that bidders have adequate financing and meet all eligibility and qualification requirements.

29. Finally, the Commission proposes that 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 would re-auction the license. If the default occurs within five days after bidding has closed, the Commission would retain the discretion to offer the license to the second highest bidder at its final bid level, and thereafter to other bidders (in descending order of their bid amounts). If only a small number of relatively low-value licenses were to be re-auctioned

and only a short time has passed since the initial auction, the Commission would have authority to choose to offer the license to the highest losing bidders if the cost of running another auction exceed the benefits. The Commission seeks comment on these proposals.

30. *Long-Form Applications.* If the winning bidder makes the down payment in a timely manner, the Commission proposes the following procedures: 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. Designated entities must also submit evidence to support their claim to any special provision, such as bidding credits or installment payment options. Once the long-form is accepted for filing, 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. See generally 47 CFR 90.163–90.166. The Commission seeks comment on this proposal.

31. *Petitions to Deny and Limitations on Settlements.* A party filing a petition to deny will be required to demonstrate standing and meet all other applicable filing requirements. 47 CFR 90.163. The Commission also adopted "greenmail" restrictions to prevent filing of speculative applications and pleadings (or threats of the same) designed to extract money from 900 MHz SMR applicants. 47 CFR 90.162. Thus, the consideration than an applicant or petitioner is permitted to receive for agreeing to withdraw an application or petition to deny is limited to the legitimate and prudent expenses of the withdrawing party. Finally, 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.

32. *Transfer Disclosure Requirements.* In the 1993 Budget Act amendments to the Communications Act, Congress directed the Commission to "require such transfer disclosures and anti-trafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits. 47 U.S.C. 309(j)(4)(E)). To ensure that these statutory requirements are met, the Commission concluded in the *Auctions Second Report & Order*, 59 FR 22980 (May 4, 1994), that transfer disclosure requirements will enable the Commission to accumulate the necessary data to evaluate auction

designs and judge whether licenses have been issued for bids that fall short of the true market value of the license. The Commission tentatively concludes to apply these same requirements to all 900 MHz SMR licenses obtained through the competitive bidding process. See 47 CFR 1.2111(a). Generally, licensees transferring their licenses within three years after the initial license grant would 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 the license. The Commission would 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, so it may determine if any unforeseen problems relating to unjust enrichment have arisen outside the small business context. The Commission seeks comment on this proposal.

33. *Performance Requirements.* The Communications Act requires the Commission to "include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services. 47 U.S.C. 309(j)(4)(B). The Commission tentatively concludes that additional performance requirements, beyond those already provided in the service rules, and that coverage requirements adopted in this Order will sufficiently prevent warehousing of spectrum. The Commission seeks comment on this proposal.

D. Treatment of Designated Entities

34. *Overview and Objectives.* Congress provided 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." 47 U.S.C. 309(j)(3). Congress also provided that to promote these 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." 47 U.S.C. 309(j)(3)(B). 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. *Id.* § 309(j)(4)(D). To achieve this goal, the statute indicates that the Commission should "consider the use of tax certificates, bidding preferences, and other procedures." *Id.*

35. Congress was particularly concerned that difficulties in accessing capital would prevent designated entities from meaningful participation in auctions and spectrum-based services. See H.R. Rep. No. 111, 103d Cong., 1st Sess. 254-55 (1993). In other services, the Commission has employed a wide range of special provisions and eligibility criteria designed to meet this statutory objective. See, e.g., *Third Report & Order*, PP Docket No. 93-253, 59 FR 26741 (May 24, 1994). The Commission states its intention to meet this objective in the 900 MHz SMR service, and tentatively concludes that it should provide for bidding credits, installment payments and reduced down payments to promote opportunities for small businesses, including small businesses owned by women and minorities—on all channel blocks in each MTA. These provisions would reduce barriers to accessing capital faced by all small businesses. In addition, to facilitate the introduction of service to rural areas, the Commission proposes to allow rural telephone companies to obtain geographically partitioned 900 MHz SMR licenses in areas where they provide telephone service.

36. *Bidding Credits*. Bidding credits allow eligible designated entities to receive a payment discount (or credit) for their winning bid in an auction. In the *Auctions Second Report & Order*, 59 FR 22980 (May 4, 1994), the Commission determined that competitive bidding rules applicable to individual services would specify the designated entities eligible for bidding credits and the amounts of the available bidding credits for that particular service. The Commission has since adopted bidding credits for narrowband PCS, broadband PCS, and Interactive Video and Data Service. See *Third Memorandum Opinion & Order & Further Notice of Proposed Rule Making*, PP Docket No. 93-253, 59 FR 44058 (August 26, 1994); *Fifth Report & Order*, PP Docket No. 93-253, 59 FR

37566 (July 22, 1994); *Fourth Report & Order*, PP Docket No. 93-253, 59 FR 24947 (May 13, 1994). For 900 MHz SMR service, the Commission proposes to offer a 10 percent bidding credit to small businesses bidding on any of the ten-channel blocks within each MTA. These bidding credit designations would help achieve the objectives of the Budget Act and provide small businesses with a meaningful opportunity to participate in the 900 MHz SMR auction, while taking into account the concerns of incumbents within the DFAs. Because of the large number of licenses available in this service, the Commission states that a higher bidding credit would be unnecessary.

37. The Commission seeks comment on this proposal. Specifically, is a 10 percent credit sufficient to enhance bidding opportunities? Also, how should the presence of incumbents on all channel blocks affect the availability of bidding credits on all blocks? In previous auctions where bidding credits for women and minorities have been available, varying degrees of participation in spectrum-based services has resulted, and the Commission's auction experience to date has not included a small business bidding credit available on all blocks. Also, the Commission proposes to limit eligibility for bidding credits to small businesses. The Commission seeks comment on whether eligibility should be expanded to include businesses owned by minorities and/or women, even if they do not fall within the Commission's small business size standards for 900 MHz SMRs.

38. In the event that the Commission modifies the bidding credit eligibility proposal for minority- and women-owned entities, the Commission also seeks comment on a second bidding credit alternative, which would entitle small businesses and minority- and women-owned entities to receive bidding credits on the five least encumbered blocks in each MTA. In the event the Commission adopts a proposal to limit bidding credits to small businesses, should it also limit availability of the credit to the channel blocks with the fewest incumbents, or would this limitation dilute the effectiveness of a small business credit as a means of attracting broad designated entity participation in the 900 MHz SMR service? What bidding credit amounts should apply to women and minority-owned businesses and small businesses? Should women-owned and minority-owned businesses that are also small businesses receive an aggregate bidding credit? The

Commission seeks comment on the ramifications of each proposal for incumbents in each block. Finally, the Commission seeks comment on any possible alternative bidding credit schemes.

39. *Reduced Down Payments/ Installment Payments*. The Commission proposes to adopt an installment payment option for small businesses that are winning bidders in the 900 MHz SMR auction. Under this proposal, small businesses that are winning bidders in the 900 MHz SMR auction would be entitled to pay their bid in installments over the term of the license, with interest charges to be fixed at the time of licensing at a rate equal to the rate for ten-year U.S. Treasury obligations plus 2.5 percent. Under this proposed rule, qualified licensees would make interest-only payments during the first two years of the remaining license term. Timely payment of all installments would be a condition of the license grant and failure to make such timely payment would be grounds for revocation of the license. Additionally, the Commission tentatively concludes that small businesses that are eligible for installment payments also would be allowed to pay a reduced down payment (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 license is ready for grant. This proposal would mitigate the effect of limited access to capital by small businesses, especially those owned by minorities and/or women.

40. The Commission seeks comment on these payment procedures. If the Commission expands its installment payment eligibility proposal for women- and minority-owned entities, should those entities also receive reduced down payment and installment payment provisions and, if so, on what terms? In the event the Commission adopts provisions for minority- and women-owned applicants, should enhanced installment payments be made available?

41. *Eligibility for Bidding Credits, Installment Payments and Reduced Down Payments*. The Commission proposes 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 the small business size standards. The Commission proposes to define small businesses as those entities with less than \$3 million in average gross revenues for each of the preceding

three years. The Commission states that it is unnecessary to propose different eligibility criteria for minority- and women-owned entities that do not meet the small business size standards in order to achieve the goals of Section 309(j) in the 900 MHz SMR service. Broadening the scope of opportunities for very small businesses in all channel blocks still has the potential to result in substantial participation by women and minorities in the provision of 900 MHz SMR service. Moreover, the Commission expects that because capital entry requirements are lower than PCS, minority- and women-owned businesses will have greater opportunities to participate.

42. To enhance the Commission's understanding, however, of the capital requirements the 900 MHz service is likely to entail, the Commission seeks comment on the projected costs associated with acquisition, construction and operation of 900 MHz MTA licenses. In addition, to gain insight into which the degree of small business participation has resulted in opportunities for women and minority-owned businesses, the Commission seeks comment on the composition of existing 900 MHz SMR operators as well as providers in other similar services such as 800 MHz SMR. For example, what proportion of existing 900 MHz SMR businesses are owned by women or minorities? To what extent have participants in 900 MHz SMR networks been small businesses owned by women and minorities? What is 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? Finally, regardless of whether the Commission adopts its proposal for small businesses, the Commission proposes to request bidder information on the short-form filings as to minority and/or women-owned status in order to monitor the applicant pool and monitor participation by women and minorities. The Commission seeks comment on this monitoring proposal.

43. *Small Business Definition.* The Commission defines eligibility requirements for small businesses on a service-specific basis, taking into account capital requirements and other characteristics of each particular service. *Second Memorandum Opinion & Order*, PP Docket No. 93-253, 59 FR 44272 (August 26, 1994). Because 900 MHz SMR is expected to be less capital-intensive than PCS, a much lower gross revenue threshold is warranted. Therefore, the Commission proposes 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. This standard appropriately accounts for build-out costs, abundant license supply, and low acquisition costs. The Commission seeks comment on this proposal. For example, is it an appropriate threshold? Should it be higher or lower, based on the types of companies that are likely to benefit from the special provisions proposed here? The Commission also tentatively concludes that it will consider the revenues of affiliates and certain investors and it proposes to apply the 25 percent attribution threshold and affiliation rules similar to those used in the PCS auction rules. See 47 CFR 24.320(b)(2)(iv), 24.720(j)(1). The Commission seeks comment on these issues.

44. Finally, if the Commission adopts separate provisions for minority-owned and women-owned entities, it also seeks comment on whether it should adopt the definition of minority-owned and women owned businesses contained in Section 1.2110(b)(2) of the Commission's rules, 47 CFR 1.2110(b)(2), *i.e.*, businesses in which minorities and/or women who control the applicant have at least 50.1 percent equity ownership and, in the case of a corporate applicant, a 50.1% voting interest. Every general partner in a partnership either must be a minority and/or a woman who individually or together own at least 50.1 percent of the partnership equity.

45. *Transfer Restrictions and Unjust Enrichment Provisions.* In the *Fifth Report & Order*, PP Docket No. 93-253, 59 FR 37566 (July 22 1994), the Commission adopted restrictions on the transfer or assignment of licenses to ensure that designated entities do not take advantage of special provisions by immediately assigning or transferring control of their licenses. The Commission proposes to adopt these restrictions on transfer and assignment of 900 MHz SMR licenses won by designated entities. Under this proposal, a designated entity would be prohibited from voluntarily assigning or transferring control of its license to any other entity during the three years after license grant. In the fourth and fifth years of the license term, the designated entity would only be able to assign or transfer control of its license to another qualified designated entity, and no unjust enrichment could be gained through the transfer. Thus, if the entity to which the designated entity transfers or assigns the license were not eligible for the same provisions, the difference would have to be paid back to the U.S. Treasury as a condition of approval of

the transfer or assignment. The Commission seeks comment on these proposals.

46. For the remainder of the license term, the Commission proposes to continue to impose unjust enrichment rules on designated entities. These unjust enrichment provisions would 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 the Commission's provisions to obtain a license at a lower cost than they otherwise would have to pay, and later to sell it at the market price. Under this proposal, licensees seeking to transfer their licenses for profit must, within a specified time, remit to the government a penalty equal to a portion of the total value of the benefit conferred by the government. Therefore, if a designated entity making installment payments sells its license to an entity that does not qualify as a designated entity, the Commission would require payment of the remaining principal and any interest accrued through the date of assignment as a condition of the license assignment or transfer. If a transfer is made to another eligible designated entity, no penalty would be assessed against the original designated entity license holder. If bidding credits were awarded to a licensee, the Commission would require a designated entity approval for a transfer of control or an assignment of license to a non-designated entity, or who proposes to take any other action relating to ownership or control that will result in loss of status as an eligible designated entity, to reimburse the government for the amount for the amount of the bidding credit before transfer of the license will be permitted. The Commission proposes to apply these payment requirements for the entire license term. The Commission seeks comment on this proposal.

47. *Rural Telephone Company Partitioning.* Congress directed the Commission to ensure that rural telephone companies have the opportunity to participate in the provision of spectrum-based services. Rural areas tend to be less profitable to serve than more densely populated urban areas. Therefore, service to these areas may not be a priority or feasible for many licensees. Rural telephone companies, however, are well positioned to serve these areas because of their existing infrastructure. Therefore, the Commission proposes a geographic partitioning scheme to encourage participation by rural telephone companies.

48. Under this proposal, rural telephone companies would be

permitted to acquire partitioned 900 MHz SMR licenses either by: (1) forming bidding consortia consistent entirely of rural telephone companies to participate in auctions, and then partition the licenses won among consortia participants; or (2) acquiring partitioned 900 MHz SMR licenses from other licenses through private negotiation and agreement either before or after the auction. The Commission would require that partitioned areas conform to established geopolitical boundaries and include all portions of the wireline service area of the rural telephone company applicant that lies within the service area. This partitioning scheme would prevent rural telephone companies from having to bid on the entire MTA license to obtain licenses covering their wireline service areas. In addition, rural telephone companies would have the flexibility to serve areas in which they already provide service, while the remainder of the service area could be served by other providers. The Commission also proposes to use the definition for rural telephone companies implemented in the *Fifth Report & Order*, PP Docket No. 93-253, 59 FR 37566 (July 22, 1994), for broadband PCS. Rural telephone companies would be defined as local exchange carriers having 100,000 or fewer access lines, including all affiliates. The Commission seeks comment on this proposal.

E. Other Provisions

49. *Reduced Upfront Payments.* The Commission proposes not to adopt a reduced upfront payment option in the 900 MHz SMR service for designated entities. The other provisions adopted here render a reduced upfront payment option unnecessary and, in the absence of an entrepreneurs' block, may be too costly to administer in the 900 MHz SMR service. The Commission seeks comment on this proposal. Also, if the Commission adopts provisions for minority and women-owned entities, should the Commission apply a reduced upfront payment provision to those entities only?

50. *Set-aside Spectrum.* In the *Fifth Report & Order*, PP Docket No. 93-253, 59 FR 37566 (July 22, 1994), the Commission established entrepreneurs' blocks on which only qualified entrepreneurs, including designated entities, could bid. *See also* 47 CFR 24.709. The Commission tentatively concludes not to adopt an entrepreneurs' block for the 900 MHz SMR auction. 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,

the effectiveness of bidding credits and other provisions will be diluted, due to the smaller capital outlay anticipated for this service. Third, it may be impractical to choose particular blocks to set aside for bidding solely by entrepreneurs due to incumbent 900 MHz SMR operators in 19 of the 46 DFAs. The Commission seeks comment on this proposal. Are the capital requirements of this service anticipated to be so substantial that the Commission should insulate certain blocks from very large bidders in order to provide meaningful opportunities for designated entities?

III. Procedural Matters

Initial Regulatory Flexibility Analysis. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the policies and rules proposed in this Further Notice of Proposed Rule Making. Written public comments are requested on the IRFA.

Reason for Action: This rule making proceeding was initiated to secure comment on proposals for establishing a flexible regulatory scheme for the 900 MHz Specialized Mobile Radio (SMR) service that would promote efficient licensing and enhance the service's competitive potential in the commercial mobile radio marketplace. The proposals advanced in the Second Further Notice of Proposed Rule Making are also designed to implement Congress's goal of regulatory symmetry in the regulation of competing commercial mobile radio services as described in Sections 3(n) and 332 of the Communications Act, 47 U.S.C. 153(n), 332, as amended by Title VI of the Omnibus Budget Reconciliation Act of 1993 (Budget Act). The Commission also seeks to adopt rules regarding competitive bidding in the 900 MHz SMR service based on Section 309(j) of the Communications Act, 47 U.S.C. 309(j), which delegates authority to the Commission to use auctions to select among mutually exclusive initial applications in certain services, including 900 MHz SMR.

Objectives: The Commission proposes to adopt rules for the 900 MHz SMR service that are intended to promote the growth of incumbent 900 MHz SMR systems, and emerging MTA SMR licensees, and to enhance the ability of all SMR providers to compete in the larger commercial mobile services market. The Further Notice of Proposed Rule Making seeks to establish competitive bidding procedures and a new licensing mechanism for the 900 MHz SMR service that will expedite

service to the public and promote competition in the CMRS marketplace.

Legal Basis: The proposed action is authorized under the Budget Act, Pub. L. No. 103-66, Title VI, 6002, and Sections 2(a), 3(n), 4(i), 302, 303(g), 303(r), 309(i), 309(j), 332(a), 332(c), and 332(d) of the Communications Act of 1934, 47 U.S.C. 152(a), 153(n), 154(i), 302, 303(g), 303(r), 309(i), 309(j), 332(a), 332(c) and 332(d), as amended.

Reporting, Recordkeeping, and Other Compliance Requirements: Under the proposal contained in the Further Notice of Proposed Rule Making, SMR licensees who obtain MTA-based licenses may be required to report information regarding location of their facilities and coverage of their service areas. SMR applicants seeking treatment as "designated entities" may also be subject to reporting and recordkeeping requirements to demonstrate compliance with the Commission's competitive bidding rules.

Federal Rules Which Overlap, Duplicate or Conflict With These Rules: None.

Description, Potential Impact, and Number of Small Entities Involved: The Further Notice of Proposed Rule Making potentially affects numerous small entities already operating 900 MHz SMR systems in Designated Filing Areas that will co-exist with 900 MHz SMR MTA licensees. The competitive bidding proposals contained in the Further Notice of Proposed Rule Making also could affect small entities seeking initial licenses in the 900 MHz SMR service. The Further Notice of Proposed Rule Making proposes special provisions in the Commission's auction rules to benefit "designated entity" applicants, including small businesses. After evaluating comments filed in response to the Further Notice of Proposed Rule Making, the Commission will examine further the impact of all rule changes on small entities and set forth its findings in the Final Regulatory Flexibility Analysis.

Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives: This Further Notice of Proposed Rule Making solicits comment on a variety of alternatives. Any additional significant alternatives presented in the comments will also be considered.

IRFA Comments: The Commission requests written public comment on the foregoing Initial Regulatory Flexibility Analysis. Comments must have a separate and distinct heading designating them as responses to the IRFA and must be filed by the deadlines provided above.

List of Subjects in 47 CFR Part 90

Radio.

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

Amendatory Text

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

1. The authority citation for Part 90 continues to read as follows:

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

2. A new Subpart U consisting of §§ 90.801 through 90.814 is proposed to be added to Part 90 to read as follows:

PART 90—PRIVATE LAND MOBILE RADIO SERVICES**Subpart U—Competitive Bidding Procedures for 900 MHz Specialized Mobile Radio**

Sec.

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

§ 90.801 900 MHz SMR subject to competitive bidding.

Mutually exclusive initial applications to provide 900 MHz SMR service are subject to competitive bidding procedures. The general competitive bidding procedures found in 47 CFR Part 1, Subpart Q will apply unless otherwise provided in this part.

§ 90.802 Competitive bidding design for 900 MHz SMR licensing.

The Commission will employ a simultaneous multiple round auction design when choosing from among mutually exclusive initial applications to provide 900 MHz SMR service, unless otherwise specified by the Wireless Telecommunications Bureau before the auction.

§ 90.803 Competitive bidding mechanisms.

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

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

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

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

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

§ 90.804 Aggregation of 900 MHz SMR licenses.

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

§ 90.805 Withdrawal, default and disqualification payments.

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

(b) *Bid withdrawal prior to close of auction.* A bidder who withdraws a high bid during the course of an auction will be subject to a payment equal to the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission. No withdrawal payment would be assessed if the subsequent winning bid exceeds the withdrawn bid. This payment amount will be deducted from any upfront payments or down payments that the withdrawing bidder has deposited with the Commission.

(c) *Default or disqualification after close of auction.* If a high bidder defaults or is disqualified after the close of such an auction, the defaulting bidder

will be subject to the payment in paragraph (a) of this section plus an additional penalty equal to three (3) percent of the subsequent winning bid. If the subsequent winning bid exceeds the defaulting bidder's bid amount, the 3 percent payment will be calculated based on the defaulting bidder's bid amount. These amounts will be deducted from any upfront payments or down payments that the defaulting or disqualified bidder has deposited with the Commission.

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

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

§ 90.807 Submission of upfront payments and down payments.

(a) Bidders in the 900 MHz SMR auction will be required to submit an upfront payment of \$0.02 per pop per MHz, in accordance with § 1.2106 of this Chapter.

(b) Winning bidders in a 900 MHz SMR auction must submit a down payment to the Commission in an amount sufficient to bring their total deposits up to 20 percent of their winnings bids, and in accordance with § 1.2107(b) of this chapter, except for small businesses that are winning bidders, which are governed by § 90.811.

§ 90.808 Long-form applications.

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

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

(a) Except with respect to entities eligible for installment payments (see § 90.812) each winning bidder will be required to pay the balance of its winning bid in a lump sum payment within five (5) business days following Public Notice that the license is ready for grant. The Commission will grant the license within ten (10) business days after receipt of full and timely payment of the winning bid amount.

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

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

§ 90.810 Bidding credits for small businesses.

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

(b) *Unjust Enrichment.* (1) If a licensee that utilizes a bidding credit under this section seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for bidding credits or seeks to make any other change in ownership that would result in the licensee no longer qualifying for bidding credits under this section, the licensee must seek Commission approval of such assignment, transfer or other ownership change.

(2) If a licensee that utilizes a bidding credit under this section seeks to assign or transfer control of its license to an entity meeting the eligibility standards

for lower bidding credits or seeks to make any other change in ownership that would result in the licensee qualifying for a lower bidding credit under this section, the licensee must seek Commission approval and reimburse the government for the difference between the amount of the bidding credit obtained by the licensee and the bidding credit for which the assignee, transferee or licensee is eligible under this section as a condition of the approval of such assignment, transfer or other ownership change.

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

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

§ 90.812 Installment payments for licenses won by small businesses.

(a) Each licensee that qualifies as a small business may pay the remaining 90 percent of the net auction price for the license in installment payments pursuant to § 1.210(e) of this chapter.

(b) Interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted, plus 2.5 percent; payments shall include interest only for the first two years and payments of interest and principal amortized over the remaining eight years of the license term.

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

(2) If a licensee that utilizes installment financing under this section seeks to make any change in ownership structure that would result in the licensee losing eligibility for installment payments, the licensee shall first seek

Commission approval and must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of such change as a condition of approval.

§ 90.813 Procedures for partitioned licenses.

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

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

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

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

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

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

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

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

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

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

wireline service area and the partitioned area.

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

§ 90.814 Definitions.

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

(b) *Small Business: Consortium of Small Businesses.* (1) A small business is an entity that, together with its affiliates and persons or entities that hold attributable interests in such entity and their affiliates, have average gross revenues for the three preceding years of less than \$3 million.

(2) A small business consortium is conglomerate organization formed as a joint venture between or among mutually-independent business firms, each of which individually satisfies the definition of a small business in paragraphs (b)(1) and (b)(2) of this section.

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

(d) *Gross Revenues.* Gross revenues shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (e.g., cost of goods sold), as evidenced by audited financial statements for the relevant number of calendar years preceding January 1, 1994, or, if audited financial statements were not prepared on a calendar-year basis, of the most recently completed fiscal years preceding the filing of the applicant's short-form application (Form 175). For applications filed after December 31, 1994, gross revenues shall be evidenced by audited financial statements for the preceding relevant number of calendar or fiscal years. If an entity was not in existence for all or part of the relevant period, gross revenues shall be evidenced by the audited financial statements of the entity's predecessor-in-interest or, if there is no identifiable predecessor-in-interest, unaudited financial statements certified by the applicant as accurate.

(e) *Business Owned by Members of Minority Groups and/or Women.* A business owned by members of minority groups and/or women is one in which minorities and/or women who are U.S. citizens control the applicant, have at least 50.1 percent equity ownership and, in the case of a corporate applicant, a 50.1 percent voting interest. For applicants that are partnerships, every general partner either must be a

minority and/or woman (or minorities and/or women) who are U.S. citizens and who individually or together own at least 50.1 percent of the partnership equity, or an entity that is 100 percent owned and controlled by minorities and/or women who are U.S. citizens. The interest of minorities and women are to be calculated on a fully-diluted basis; agreements such as stock options and convertible debentures shall be considered to have a present effect on the power to control an entity and shall be treated as if the rights thereunder already have been fully exercised. However, upon a demonstration that options or conversion rights held by non-controlling principals will not deprive the minority and female principals of a substantial financial stake in the venture or impair their rights to control the designated entity, a designated entity may seek a waiver of the requirement that the equity of the minority and female principals must be calculated on a fully-diluted basis.

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

(g) *Nonattributable Equity.* Nonattributable equity shall mean:

(1) For corporations, voting stock or non-voting stock that includes no more than 25 percent of the total voting equity, including the right to vote such stock through a voting trust or other arrangement;

(2) For partnerships, joint ventures and other non-corporate entities, limited partnership interests and similar interests that do not afford the power to exercise control of the entity.

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

(i) Directly or indirectly controls or has the power to control the applicant, or

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

(iii) Is directly or indirectly controlled by a third party or parties that also controls or has the power to control the applicant, or

(iv) Has an "identity of interest" with the applicant.

(2) *Nature of control in determining affiliation.*

(i) Every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative and it is

immaterial whether it is exercised so long as the power to control exists.

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

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

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

Example for paragraph (h)(2)(iii). In a corporation where the officers and directors own various size blocks of stock totaling 40 percent of the corporation's voting stock, but no officer or director has a block sufficient to give him or her control or the power to control and the remaining 60 percent is widely distributed with no individual stockholder having a stock interest greater than 10 percent, management has the power to control. If persons with such management control of the other entity are persons with attributable interests in the applicant, the other entity will be deemed an affiliate of the applicant.

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

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

Example 2 for paragraph (h)(3) introductory text. One shareholder in

Corporation Y, shareholder A, has an attributable interest in a SMR application. Another shareholder in Corporation Y, shareholder B, has a nonattributable interest in the same SMR application. While neither shareholder has enough shares to individually control Corporation Y, together they have the power to control Corporation Y. Through the common investment of shareholders A and B in the SMR application, Corporation Y would still be deemed an affiliate of the applicant.

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

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

(A) The family members are estranged,

(B) The family ties are remote, or

(C) The family members are not closely involved with each in business matters.

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

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

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

(iii) If two or more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, such minority holdings are equal or approximately equal in size, and the aggregate of these minority

holdings is large as compared with any other stock holding, the presumption arises that each one of these persons individually controls or has the power to control the concern; however, such presumption may be rebutted by a showing that such control or power to control, in fact, does not exist.

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

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

Example 2 for paragraph (h)(5). If a large company, BigCo, holds 70% (70 of 100 outstanding shares) of the voting stock of company A, who holds an attributable interest in an SMR application, and gives a third party, SmallCo, an option to purchase 50 of the 70 shares owned by BigCo, BigCo will be deemed to be an affiliate of company A, and thus the applicant, until SmallCo actually exercises its options to purchase such shares. In order to prevent BigCo from circumventing the intent of the rule which requires such options to be considered on a fully diluted basis, the option is not considered to have present effect in this case.

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

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

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

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

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

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

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

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

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